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STATEWIDE INDIGENT DEFENSE SYSTEMS (INCLUDING TRIAL LEVEL)*

1 STATE/NAME OF PROGRAM	2 TYPE OF AGENCY	3 COMMISSION ?	4 PUBLIC DEFENDER or DIRECTOR ?
ALASKA Office of Public Advocacy	Executive Agency (Department of Administration)	No	Yes -Appointed by Governor from nomination of judicial council. -Confirmed by majority of legislature in joint sitting.
ARKANSAS Public Defender Commission	Executive Agency	Yes	Yes -Appointed by Governor.
COLORADO Office of State Public Defender Commission and Office of Alternate Counsel	Judicial Agency	Yes	Yes (Alternate Defense Counsel) -Appointed by Commission.
CONNECTICUT Public Defender Services Commission	Autonomous Body Within Judicial Department	Yes	Yes -Appointed by Commission.
DELAWARE Office of the Public Defender	Executive Agency	No	Yes -Appointed by Governor.
DISTRICT OF COLUMBIA Public Defender Service	Independent Agency	Yes	Yes -Appointed by Trustees.
[illegible]RGIA [illegible]nt Defense Council	Separate Agency Within Judicial Branch	Yes	Yes -Appointed by Council.
HAWAII Office of State Public Defender	Executive Agency (Department of Budget & Finance)	Yes	Yes -Appointed by Council.
IOWA Office of the State Public Defender	Independent Agency Within Executive Branch	No	Yes -Appointed by Governor.
KANSAS State Board of Indigent Defense Services	Executive Agency	Yes	Yes -Appointed by Board.
KENTUCKY Department of Public Advocacy	Independent Agency Within Executive Branch	Yes Also, 17-member citizen advisory board appointed by Public Advocate.	Yes -Appointed by Governor from nominees submitted by Commission.
LOUISIANA Louisiana Indigent Defender Program	Separate Agency Within Executive Branch (created by Supreme Court rule)	Yes	Yes -Appointed by Board.
MARYLAND Office of the Public Defender	Executive Agency	Yes	Yes -Appointed by Board of Trustees.
MASSACHUSETTS Committee for Public Counsel Services	Independent Agency (Judicial Branch for Budget Purposes Only)	Yes	Yes -Appointed by Committee.

* Excerpts from Detailed Chart Prepared by The Spangenberg Group on behalf of the American Bar Association Information Program (copyright July 1998) (reprinted with permission of The Spangenberg Group)

1 STATE/NAME OF PROGRAM	2 TYPE OF AGENCY	3 COMMISSION ?	4 PUBLIC DEFENDER or DIRECTOR ?
MINNESOTA State Board of Public Defense	Separate Agency Within Judicial Branch	Yes	Yes -Appointed by Board.
MISSISSIPPI Public Defender Commission of the State of Mississippi	Executive/Judicial/Legislative	Yes	Yes
MISSOURI Office of State Public Defender	Independent Department in Judicial Branch	Yes	Yes -Appointed by Commission.
NEBRASKA Commission for Public Advocacy	Executive Agency	Yes	Yes -Appointed by Commission.
NEVADA State Public Defender	Judicial Agency	No	Yes -Appointed by Governor.
NEW HAMSHIRE Judicial Council	Judicial Agency	Yes	Yes -Under Contract With Council.
NEW JERSEY Office of the Public Defender	Executive Agency	No	Yes -Appointed by Governor with advice and consent of Senate.
NEW MEXICO State Public Defender	Executive Agency	No	Yes -Appointed by Governor.
NORTH DAKOTA Legal Counsel for Indigents Commission	Judicial Agency	Yes	No
OHIO Ohio Public Defender Commission	Independent Commission Within Executive Branch	Yes	Yes -Appointed by Commission.
OKLAHOMA Oklahoma Indigent Defense System Board	Executive Agency	Yes	Yes -Appointed by Board.
OREGON CRIMINAL APPELLATE - State Public Defender TRIAL & LIMITED APPELLATE Office of the State Court Administrator	Independent Within Judicial Branch Judicial Department	Yes, Committee No	Yes No
RHODE ISLAND Office of the Public Defender	Executive Agency	No	Yes -Appointed by Governor with advice and consent of Senate.
SOUTH CAROLINA Office of Indigent Defense	Independent Agency Within Executive Branch	Yes	Yes -Appointed by Commission.
TENNESSEE District Public Defenders Conference	Judicial Agency	No	Yes
VERMONT Office of the Defender General	Executive Agency	No	Yes -Appointed by Governor with advice and consent of Senate.
VIRGINIA Public Defender Commission	Judicial Agency	Yes	Yes -Appointed by Commission.
WISCONSIN Wisconsin State Public Defender	Independent Agency Within Executive Branch	Yes	Yes -Appointed by Board.
WYOMING State Public Defender	Executive Agency	No	Yes -Appointed by Governor.

STATEWIDE INDIGENT DEFENSE SYSTEMS: July 1998

STATE Type of Program	Commission	Commission Duties & Responsibilities	Public Defender Selection Process, Terms & Qualifications	Public Defender Duties & Responsibilities
ALABAMA	None	Not applicable	None	Not applicable
ALASKA State Public Defender Agency (Executive agency, Department of Administration)	None	Not applicable	Appointed by Governor from nominations of judicial council. Confirmed by majority of legislature in joint sitting. Four-year term; renewal requires legislative confirmation. Member of bar. Governor can remove for good cause.	Appoint, supervise and control assistant public defenders and other employees. Submit annual report to legislature & Supreme Court on number and types of cases, dispositions and expenditures. Full-time; private practice prohibited.
ALASKA Office of Public Advocacy (Executive agency, Department of Administration)	None	Not applicable	Public Advocate appointed by Governor. Serves at will of Governor.	Provides Guardians Ad Litem for abused and neglected children and status offenders. Provides representation in conflict cases from the Alaska Public Defender Agency. Acts as Public Guardian and conservator for citizens with disabilities.
ARIZONA	None	Not applicable	None	Not applicable
ARKANSAS Arkansas Public Defender Commission (Executive agency)	Seven members appointed by Governor: at least four licensed Arkansas attorneys experienced in criminal defense; at least one county judge. Governor designates one member as Chair. No more than two residents of same congressional district. No two members from same county. Serve five-year terms.	Establish policies and standards for Public Defender System. Approve budgets for trial public defender offices. Require annual reports from trial public defender offices. Appoint Executive Director. Evaluate performance of Executive Director, Capital, Conflicts & Appellate Office, trial public defenders and private assigned counsel. Maintain list of private attorneys willing and qualified to accept capital case appointments. Authorize contracts with trial public defenders.	Executive Director appointed by Commission. Must have experience in defense of capital cases. Serves at will of commission.	Supervise capital conflict and appellate office. Maintain records of operation of public defender system. Prepare budget for commission. Implement attorney performance procedures pursuant to commission's standards. Maintain court opinions, statutes, etc. for use by trial public defenders and court- appointed counsel. Maintain appellate brief bank. Convene training program related to public defender system. Prepare annual report.
CALIFORNIA California Habeas Resource Center (Judicial Branch)	Five-member Board of Directors confirmed by the Senate. Each of the state's five Appellate Projects shall appoint one board member; all must be attorneys. No lawyer working as judge, prosecutor or in a law enforcement capacity is eligible. Four year terms.	Appoint Executive Director.	Executive Director appointed by Board of Directors. Must be member of California state bar during the five years preceding appointment and possess substantial experience in the representation of accused or convicted persons in criminal or juvenile proceedings during that time. Serves at the will of the board.	Hire up to 30 attorneys to represent any indigent person convicted and sentenced to death in California in postconviction actions in state and federal courts. Work with the supreme court to recruit attorneys to accept death penalty habeas case appointments and to maintain a roster of attorneys so qualified. Employ investigators and experts to provide services to appointed attorneys in capital postconviction cases. Develop and maintain brief bank for use by appointed counsel. Review case billings and recommend compensation of members of the private bar to the court. Prepare annual report on the status of appointment of counsel for indigent prisoners in capital postconviction cases.

STATEWIDE INDIGENT DEFENSE SYSTEMS: July 1998

STATE Type of Program	Commission	Commission Duties & Responsibilities	Public Defender Selection Process, Terms & Qualifications	Public Defender Duties & Responsibilities
COLORADO Office of State Public Defender Commission (Judicial agency)	Five members appointed by Supreme Court. No more than three from same political party. Three attorneys, two non-attorneys. No judges, prosecutors, public defenders or law enforcement personnel.	Appoint State Public Defender and discharge for cause.	State Public Defender appointed by Commission. Five-year, renewable term. Member of bar five years prior to appointment. Full-time position.	Employ and set compensation for all employees (rates approved by Supreme Court); establish regional offices as necessary; provide commensurate legal services to indigents accused of crimes as are available to non-indigents, independently of any political consideration or private interests.
COLORADO Office of Alternate Defense Counsel (Judicial Agency)	Nine members appointed by Supreme Court. No more than five from same political party. Six member lawyers, each representing one of the six congressional districts, all of whom are Colorado licensed lawyers practicing criminal law. Three members citizens not licensed to practice law in Colorado. No member at any time a judge, prosecutor, public defender or employee of a law enforcement agency. Serve four-year terms.	Select an Alternate Defense Counsel; serve as an advisory board to the alternate defense counsel; advise alternate defense counsel on development and maintenance of competent and cost-effective representation. Shall meet at least annually.	Alternate defense counsel appointed by Commission to renewable five-year term. Must be licensed to practice law in Colorado for at least five years prior to appointment. May not hold private practice. Serves at will of the Commission.	Employ and set compensation for all employees. Provide legal representation to indigent persons and partially indigent persons in circumstances when the state public defender has a conflict of interest by contracting with licensed attorneys and investigators. Legal services provided to indigents shall be commensurate with those available to non-indigents and independent of any political considerations or private interests.
CONNECTICUT Public Defender Services Commission (Autonomous body within judicial department for fiscal and budgetary purposes only.)	Seven members: two judges appointed by Chief Justice; one member appointed by each: Speaker of House, President Pro Tem of Senate, minority leader of House, minority leader of Senate. Chairman appointed by Governor. Three-year term. No more than three, other than chairman, from same party. Two of four non-judicial members non-attorneys. No public defenders.	Adopt rules for Division of Public Defender. Establish a compensation plan comparable to state's attorneys. Establish employment standards. Appoint Chief Public Defender and Deputy Chief Public Defender. Remove Public Defender and Deputy Public Defender for cause following notice and hearing. Submit annual report to Chief Justice, Governor and Legislature by October 15. (See duties of public defender.)	Chief Public Defender appointed by Commission for a four-year term. Member of state bar for five years. Full-time position.	Direct and supervise work of all personnel. Submit annual report, including data and recommendations for changes in law, to Commission by September 15. (Note extensive list in Sec. 51-291.)
DELAWARE Office of the Public Defender (Executive agency)	None	Not applicable	Public Defender appointed by Governor. Six-year term. Qualified attorney licensed in Delaware.	Appoint assistant attorneys, clerks, investigators and other employees as necessary and set salaries. Determine indigency prior to arraignment. Prepare annual report.
DISTRICT of COLUMBIA D.C. Public Defender Service (independent agency)	Eleven member Board of Trustees. Appointed by panel of two U.S. judges, two D.C. judges and Mayor of D.C. Three-year term; not more than two consecutive. No judges. Four of eleven members non-attorney residents of D.C.	Establish general policy but shall not direct conduct of particular cases. Submit fiscal year report to Congress, chief judges of U.S. Courts and D.C. Courts and D.C. Mayor. Arrange annual independent audit. Quarterly reports to court on matters relating to appointment system. Appoint Director and Deputy Director and set their salaries.	Director appointed by Trustees. Serve at pleasure of Trustees. Member of D.C. Bar. No private practice.	Employ and supervise personnel. Set compensation not to exceed salary paid to U. S. Attorneys and staff.

STATEWIDE INDIGENT DEFENSE SYSTEMS: July 1998

STATE Type of Program	Commission	Commission Duties & Responsibilities	Public Defender Selection Process, Terms & Qualifications	Public Defender Duties & Responsibilities
FLORIDA Florida Public Defender Association (FPDA); Florida Public Defender Coordination Office (FPDCO)	None per se, but the FPDA is governed by a Board of Directors comprised of the 20 elected public defenders in Florida, two representatives of the assistant public defender staff and one representative apiece from public defender investigative and administrative staff. The FPCDO works with the FPDA.	The FPDA engages in activities that promote and develop the public defender system in Florida. The FPCDO coordinates FPDA meetings; collects caseload and budget information from public defenders; analyzes public defender workload; prepares annual funding formulae which are based on caseload and attorney unit cost and used by the three branches of government and the circuit public defenders in the budget request process; monitors pertinent legislative developments; conducts training for public defender staff; and circulates pertinent case law to the elected public defenders.	Not applicable	Not applicable
GEORGIA Georgia Indigent Defense Council (separate agency within Judicial branch)	Fifteen member council. Supreme Court selects members: ten lawyers; three lay persons; and two county commissioners. Selected for four year terms.	Recommend standards and guidelines for local programs. Administer state funds to local public defender programs that comply with standards. Support local defenders. Provide local attorneys with technical, clinical help and training. Prepare budget.	Director selected by Council.	Duties and responsibilities not contained in statute.
HAWAII Office of State Public Defender (Executive agency, Department of Budget and Finance)	Five member Defender Council. Appointed by Governor. Serve at Governor's pleasure. One member form each county. Chairman selected by members.	Council shall be governing body of Office of State Public Defender. Shall appoint Public Defender. Approve employment decision of Public Defender.	State Public Defender appointed by Council. Four-year term. Qualified to practice law in Hawaii. Full-time position.	Subject to approval of Council: employ assistant public defenders, investigators and other support personnel. Assistant public defenders may be part-time and engage in private practice other than criminal law.
IDAHO State Appellate Public Defender (The Department of Self-Governing Agencies)	None	Not applicable	State Appellate Defender appointed by the governor with advice and consent from the senate from a list of 2-4 persons recommended by a committee comprised of the president of the Idaho state bar association, chairmen of the senate judiciary and rules committee, and a citizen at large appointed by the governor. The chief justice of the Idaho supreme court, or her designee, is ex officio member of the committee. Public defender must be attorney licensed to practice in Idaho with at least five year experience practicing law. Four-year term; removed only for good cause.	Provide appellate and postconviction representation to indigent defendants convicted of felony offenses in those counties which participate in the capital crimes defense fund; prepare annual report. Employ deputy state appellate defenders and othe employees. Adopt necessary policies or rules.

STATEWIDE INDIGENT DEFENSE SYSTEMS: July 1998

STATE Type of Program	Commission	Commission Duties & Responsibilities	Public Defender Selection Process, Terms & Qualifications	Public Defender Duties & Responsibilities
ILLINOIS Office of State Appellate Defender (agency of the Judicial department)	Board of Commissioners. Nine members. Appointed by various courts and bars. Governor appoints Chair. Serves one six-year term.	Approve budget. Advise Appellate Public Defender on policy. Can recommend dismissal of the Appellate Public Defender.	State Appellate Defender appointed by Illinois Supreme Court. Four-year term. Qualified to practice law in Illinois.	Provide representation in criminal appeals. Establish offices around the state. Train and assist trial level defenders.
INDIANA Public Defender Commission (Policy board for capital and non-capital representation) (Judicial agency)	Public Defender Commission: Eleven members: three appointed by Governor; three appointed by Chief Justice; one appointed by Board of Indiana Criminal Justice Institute; two House members appointed by the Speaker of the House; two Senate members, appointed by Speaker Pro Tempore of the Senate. Four-year term. No law enforcement officers or court employees. Members designate one member Chair.	Set standards for indigent defense services in capital and non-capital cases. Adopt guidelines and fee schedule under which counties may be reimbursed. Make recommendations concerning the delivery of indigent defense services in Indiana. Prepare annual report on operation of public defense fund.	Not applicable, but see below.	Not applicable, but see below.
INDIANA Public Defender of Indiana (State post-conviction public defender) (Judicial agency)	None, but see above.	Not applicable, but see above.	Public Defender appointed by Supreme Court. Four-year term. Resident. Practicing lawyer in Indiana for three years.	Represent all indigent defendants in post-conviction proceedings.
IOWA Office of the State Public Defender (independent agency within Executive branch)	None	Not applicable	State Public Defender appointed by Governor. Four-year term. Licensed to practice law in Iowa.	Oversee all 18 public defender offices. Coordinate non-public defender indigent defense program. Contract with attorneys when public defender unable to take case.
KANSAS State Board of Indigent Defense Services (Executive branch agency)	Nine members: five lawyers, four non-lawyers. Appointed by Governor and confirmed by Senate. Two members from First Congressional District, one of whom is a registered Kansas lawyer, and at least one member from each other Congressional District. At least one (and up to five) registered Kansas lawyer from each county with over 100,000 population. No members may be judicial or law enforcement personnel. Three-year terms.	Appoint Director and public defenders. Maintain statistics on indigent defense representation. Conduct training programs. Establish public defender offices. Enter into contracts with attorneys to provide indigent defense representation and with cities or counties for misdemeanor representation. Provide technical assistance to public defenders and private attorneys.	Board appoints Director who must be licensed in Kansas and demonstrate commitment and ability in criminal law.	Serve as Chief Executive Officer of Board. Supervise operation, policies, procedures of Board. Prepare annual report.

STATEWIDE INDIGENT DEFENSE SYSTEMS: July 1998

STATE Type of Program	Commission	Commission Duties & Responsibilities	Public Defender Selection Process, Terms & Qualifications	Public Defender Duties & Responsibilities
KENTUCKY Department of Public Advocacy (independent state agency within Executive branch)	Nine appointed members plus deans of Kentucky law schools. Two members appointed by Governor. One by speaker, one by president of the senate, two by Supreme Court; two criminal lawyers appointed by Governor from list of five submitted by Bar Association, one appointed by Governor from list submitted by Kentucky Protection and Advocacy Advisory Board. Four-year term. No prosecutors or law enforcement officials. Chair elected by Commission to one-year term. Also a 17-member citizen advisory board appointed by the Public Advocate.	Recommend to Governor three attorneys as nominees for Public Advocate. Assist Public Advocate in selecting staff. Provide general supervision of Public Advocate and review performance. Engage in public education and generate political support. Review and adopt annual budget. Not interfere with handling of cases.	Public Advocate appointed by Governor from nominees submitted by Commission. Member of Kentucky Bar with five years experience. Four-year term.	Appoint Deputy Public Defender. Appoint assistant public defenders and other personnel. Serve as ex officio, non-voting member of Commission. Appoint 17-member Advisory Board for Protection and Advocacy Division.
LOUISIANA Louisiana Indigent Defender Program (separate agency within Executive branch created by Supreme Court Rule)	Seven to fifteen members. Appointed by Chief Justice of Supreme Court with concurrence of majority of justices. Renewable three-year terms. One member from each of the six Supreme Court districts. One additional member from First Supreme Court District. Not more than three non-lawyer members. At least three experienced criminal lawyers.	Members elect Chair. Establish uniform standards and guidelines for statewide program. Subdivide state into regions. Select most appropriate system for delivery in each region. Select regional full-time public defenders. Set policy for the Expert Witness/Testing Fund and the District Assistance Fund. Set eligibility standards and guidelines for district defender boards to receive Expert Witness/Testing and District Assistance Funds.	Chief Executive Officer selected by Board. Attorney with five years prior experience in criminal practice. Board sets term.	Supervise attorneys in Appellate Division and Capital Litigation programs. Manage monies in Expert Witness/Testing Fund and District Assistance Fund. Assist Board in enforcing its standards and guidelines.
MAINE	None	Not applicable	None	Not applicable
MARYLAND Office of the Public Defender (Executive agency)	Three-member Board of Trustees; two must be active attorneys. Appointed by Governor. Three-year term. Chair designated annually by Trustees.	Study and observe operation of Public Defender office. Coordinate activities of district Advisory Boards. Appoint Public Defender. Advise Public Defender on all relevant matters.	Public Defender appointed by Board of Trustees. Term is at the pleasure of Trustees. Attorney admitted in Maryland plus five years in practice.	Appoint Deputy Public Defender with Board approval. Appoint First District Defender in each judicial district. Appoint assistant public defenders with advice of District Defenders. Appoint other employees. Maintain at least one office in each district. General responsibility for operation of all offices. Maintain records. Supervise district defenders' maintenance of local attorney panels.
MASSACHUSETTS Committee for Public Counsel Services (independent agency; Judicial branch for budget purposes only)	Fifteen members. Appointed by Justices of Supreme Judicial Court. Three-year term. Chair elected by the Committee.	Establish standards for public counsel and private counsel divisions. Establish uniform standards of indigency. Establish guidelines for training and for qualification and removal of counsel in public and private divisions. Prepare annual report. Appoint chief counsel and two deputies. Extensive list of other duties and responsibilities enumerated by Statute.	Chief Counsel appointed by Committee. Attorney. Serves at pleasure of Committee.	Overall supervision of various divisions of committee. Perform duties as defined by the Committee. Authorize all payments certified by judges for private counsel.

STATEWIDE INDIGENT DEFENSE SYSTEMS: July 1998

STATE Type of Program	Commission	Commission Duties & Responsibilities	Public Defender Selection Process, Terms & Qualifications	Public Defender Duties & Responsibilities
MICHIGAN State Appellate Defender Office, Appellate Defender Commission (agency of Judicial branch)	Seven members appointed by Governor. Two recommended by Supreme Court; one recommended by Court of Appeals; one recommended by Michigan Judges Association; two recommended by State Bar; one non-attorney. Four-year term. No member a sitting judge, prosecutor or law enforcement officer.	Choose State Appellate Defender. Develop appellate defense program. Develop standards for program. Maintain list of attorneys willing and qualified for appointment in indigent appellate cases. Provide CLE training for attorneys on list.	State Appellate Defender chosen by Commission. Can only be removed for cause.	Provide appellate representation. Maintain a manageable caseload. Prepare and maintain brief bank available to court-appointed attorneys who provide appellate services to indigents.
MINNESOTA State Board of Public Defense (separate agency within Judicial branch)	Seven members. One district court judge appointed by Supreme Court. Four attorneys familiar with criminal law but not employed as prosecutors, appointed by Supreme Court. Two public members appointed by Governor.	Elect chair and appoint State Public Defender. Chair may appoint Chief Administrator. Prepare annual report. Recommend budget for Board, Office of State Public Defender and public defense corps. Establish procedures for distribution of funds for public defense. Set standards for state and district public defenders and court-appointed system.	State Public Defender appointed to four-year term. Full-time position.	Provide appellate and post-conviction proceeding representation in all indigent cases. Assist in trial representation in conflict of interest cases when requested by a district public defender or appointed counsel. Conduct training programs.
MISSISSIPPI Public Defender Commission of the State of Mississippi	Nine members, no active prosecutors may serve. The Governor, Lieutenant Governor, Speaker of the House of Representatives, Chief Justice of the Supreme Court of Mississippi, Conference of Circuit Judges of the State of MS, Conference of County Court Judges of the State of Mississippi, President of the Mississippi Bar, President of the Magnolia Bar and the President of the Public Defenders Association each appoint one member. The Chairman of the Senate Judiciary Committee and House of Representatives Judiciary B Committee, or their designees, serve as legislative liaisons and non-voting members. Members serve three-year terms.	Appoint an Executive Director of the Statewide Public Defender System; establish, implement and enforce policies and standards for a comprehensive and effective public defender system throughout the state of Mississippi. The Commission may delegate to the Executive Director, in whole or in part, these duties.	Executive Director shall be an experienced criminal lawyer, licensed to practice law in Mississippi for four years prior to appointment.	Commission's duties, which it may delegate to the Executive Director, include: appoint a District Defender in each circuit court district; supervise the Conflicts and Appellate Divisions; develop indigency eligibility and caseload standards; establish qualification and performance standards for all attorneys working for the statewide system; re-assign conflict or overload cases from one district office to another; maintain lists of attorneys willing and able to accept appointments to individual cases, including capital cases; provide CLE and training seminars; compile and maintain a law library and brief bank for district defenders and private attorneys participating in the Statewide Public Defender System; assume all budgeting and reporting responsibilities for the System.
MISSOURI Office of State Public Defender (independent department in Judicial Branch)	Public Defender Commission: Seven members: four lawyers; no more than four from same party. Appointed by Governor with advice and consent of Senate. Six-year term. State Public Defender is ex officio member without vote. Chair elected by members.	Select director and deputies. Establish employment procedures. Review office performance and monitor director. Public education to ensure independence of system. Advise on budgetary matters. Contract with private attorneys. Approve fee schedule for assigned counsel.	Director appointed by Commission. Four-year term. Attorney with substantial criminal law experience, also experienced in personnel administration.	Administer and coordinate operation. Direct and supervise work of employees. Submit annual report to budget to Commission. Supervise training. Contract out for legal services with approval of Commission.

STATEWIDE INDIGENT DEFENSE SYSTEMS: July 1998

STATE Type of Program	Commission	Commission Duties & Responsibilities	Public Defender Selection Process, Terms & Qualifications	Public Defender Duties & Responsibilities
MONTANA State Appellate Public Defender (Executive branch agency)	Five members. One trial level judge, nominated by Judges Association. Three attorneys, nominated by State Bar, who must have criminal defense experience. One lay person nominated by Governor. Staggered terms, one or two years.	Appoint Appellate Public Defender. Help gather attorney list for appointments of counsel at trial and state post-conviction. Draft criminal defense standards for counsel.	State Appellate Defender hired by Commission. No term limit.	Provides representation in state post-conviction or appeals if defendant claims ineffective assistance. Help in or assume responsibility in appeals. Assume case if trial or Supreme Court judge appoints.
NEBRASKA (Executive branch agency)	Commission for Public Advocacy. Nine members: six members for each judicial district; chair and two positions at large. Governor appoints from list prepared by State Bar. Non-salaried. Qualified attorneys with criminal defense experience or demonstrated commitment. Budget is from general funds and recovery of one-third of expenses from Nebraska's counties.	Provide legal services and resources to assist counties in providing effective assistance to indigent persons through its capital litigation, appellate and felony resource center divisions. Select a chief counsel.	Chief Counsel selected by Commission. Serves at will of Commission. Five years Nebraska practice. Criminal defense experience including capital case defense.	Overall supervision of appellate, capital and major case divisions and litigation support fund. Prepare budget and annual report. Establish and administer projects and programs for the operation of the commission. Oversee training programs.
NEVADA State Public Defender (Judicial branch agency)	None	Not applicable	Four-year term. Selected by Governor. Nevada Bar member.	Establish statewide system for all counties who choose to be part of state system. Oversee activities of these programs. Prepare annual budget. Annual report to legislature.
NEW HAMPSHIRE Judicial Council (Judicial branch agency)	State-level Judicial Council. Fourteen members. One selected from each court level: Supreme, Superior, Probate; President of the New Hampshire Municipal and District Court Justices Association (ex officio); Attorney General (ex officio); President of New Hampshire Bar Association (ex officio); representative from Superior Court Clerks; seven others appointed by Governor, four of whom must be attorneys.	The Judicial Council's responsibilities related to indigent defense include contracting with local defender corporations and individual attorneys for provision of defense services and general supervision of indigent programs in regard to: allocation of cases between public defender program and assigned counsel; performance of counsel; competence of counsel; fiscal and budgetary matters.	The Executive Director of the New Hampshire Public Defender, a private non-profit corporation under contract with the Judicial Council, is selected by the corporations board of directors.	Executive Director's responsibilities are contained in a contract with the Judicial Council.
NEW HAMPSHIRE New Hampshire Public Defender (Judicial branch)	None	Not applicable	The judicial council, with approval of the governor and council, contracts with an organization or group of lawyers approved by the board of governors of the New Hampshire bar Association to operate a public defender program.	Represent indigent defendants in criminal cases or juveniles charges as delinquents in the district, municipal, superior and supreme courts.
NEW JERSEY Office of the Public Defender (Executive Agency, Part of Division of the Public Advocate)	None	Not applicable	Appointed by Governor with advice and consent of Senate. Five-year term. Attorney, experienced in practice in New Jersey.	Appoint deputy and assistant public defenders as well as support personnel. Establish State Public Defender system for all counties. Engage and compensate assigned counsel.

STATEWIDE INDIGENT DEFENSE SYSTEMS: July 1998

STATE Type of Program	Commission	Commission Duties & Responsibilities	Public Defender Selection Process, Terms & Qualifications	Public Defender Duties & Responsibilities
NEW MEXICO State Public Defender (Executive department)	None	Not applicable	Chief Public Defender appointed by and serves at pleasure of Governor. Attorney active for five years prior to appointment and is experienced in defense or prosecution.	Manage all operations of department. Set fee schedule for assigned counsel. Establish local public defender districts. Appoint district public defenders who serve at his/her pleasure.
NEW YORK Capital Defender Office (independent agency in Judicial branch)	None	Not applicable	Capital Defender selected by three-member Capital Defender Office Board of Directors.	In consultation with Board of Directors, hire attorneys as deputy capital defenders, investigators and other staff. The Capital Defender Office provides both direct representation and consultation services; it also has responsibility for determining, in consultation with the administrative board of the judicial conference, attorney qualification standards.
NORTH CAROLINA Appellate Defender Office (Judicial branch agency)	None	Not applicable	Appellate Defender appointed by Chief Justice.	Provide appellate representation to indigents. Maintain appellate brief bank. Provide CLE training. Consult with attorneys representing defendants in capital cases. Recruit qualified, willing attorneys for state and federal death penalty post-conviction proceedings.
NORTH DAKOTA North Dakota Legal Counsel for Indigents Commission (Judicial agency)	Seven members. Chief Justice appoints: one county government representative recommended by North Dakota Association of Counties; one judge recommended by Chief Presiding Judge; three recommended by State Bar; and two recommended by Attorney General. Three-year terms. Chief Justice appoints Chair. State Court Administrator provides staff.	Review cost and caseload data. Prepare annual report and budget. Provide planning, guidelines and technical assistance to counties and judicial districts re: indigent defense services. Adopt guidelines for indigent defense services. Review disputed fee decisions of trial judges.	None	Not applicable
OHIO Ohio Public Defender Commission (independent commission within the Executive branch)	Nine members. Chair appointed by Governor. Four appointed by Governor; two of whom are from each political party. Four members appointed by Supreme Court. Chair and at least four members are bar members. Four-year terms.	Provide, supervise and coordinate legal representation. Establish rules for Public Defender such as compensation, indigency standards and caseloads. Approve budgets.	State Public Defender appointed by Commission. Attorney with minimum of four years experience. State bar member.	Appoint Assistant State Public Defender. Supervise maintenance of Commission standards. Keep records and financial information. Establish compensation procedures.
OKLAHOMA Oklahoma Indigent Defense System Board (Executive branch agency)	Five members for five-year terms. Appointed by Governor, subject to advice and consent of Senate. At least three lawyers. Governor designates Chair.	Make policies for indigent defense programs. Approve budget. Appoint advisory council of indigent defense attorneys. Establish policies on maximum caseloads. Appoint Executive Director.	Executive Director appointed by and serves at pleasure of Board. Licensed as Oklahoma attorney for four years. Experienced in criminal defense.	Develop state system, with exception of Oklahoma and Tulsa counties. Prepare system budget. Keep list of private attorneys for capital and non-capital case appointments. Advisor to indigent defenders. Act on system's behalf in legislative efforts. Conduct training.

STATEWIDE INDIGENT DEFENSE SYSTEMS: July 1998

STATE Type of Program	Commission	Commission Duties & Responsibilities	Public Defender Selection Process, Terms & Qualifications	Public Defender Duties & Responsibilities
OREGON State Public Defender Office (agency of Judicial branch)	Six member Board appointed by Chief Justice of Supreme Court for four-year terms.	Make policy for statewide appeals. Selects state Public Defender. Chairman chosen by committee. Responsible for establishing policy of program.	Selected by independent committee under Judicial branch. Four-year term. Full-time; private practice prohibited.	Two levels - appellate (on-staff) and trial (contract provider). Report to Legislature biannually.
PENNSYLVANIA	None	Not applicable	None	Not applicable
RHODE ISLAND Office of the Public Defender (agency of Executive branch)	None	Not applicable	Appointed by Governor with advice and consent of Senate. Three-year term. Attorney with five years experience.	Appoint, supervise and direct assistants as necessary. Develop and oversee statewide system by regions.
SOUTH CAROLINA Office of Indigent Defense (independent agency within Executive branch)	Commission on Indigent Defense. Seven members appointed by Governor on recommendation of South Carolina Public Defender Association. One from each congressional district. One from state at-large who serves as Chair. Four-year terms.	Appoint Executive Director of Office of Indigent Defense. Supervise operation of Office of Indigent Defense.	Executive Director appointed by Commission.	Administer Office of Indigent Defense. Distribute state funds to counties. Compile statistics on indigent defense statewide. Report to General Assembly on indigent defense. Maintain list of attorneys qualified to accept appointments in death penalty cases. Administer collection and distribution of public defender application fees and surcharge fines imposed on specified criminal offenses. Supervise staff and carry out requirements of Commission.
SOUTH CAROLINA Office of Appellate Defense (independent state agency within Executive branch)	Commission on Appellate Defense: Dean of the University of South Carolina Law School; President of the South Carolina Public Defenders Association; President of the South Carolina Bar Association; President of the South Carolina Trial Lawyers Association; Chairman of the South Carolina Judicial Council; Chairman of the Senate Judiciary Committee or his designee; and Chairman of the Judiciary Committee of the House of Representatives or his designee. Commission elects Chairman for one-year term.	Appoint Chief Attorney. May, subject to rules of Supreme Court, recommend or establish policies for the operation of the Office of the Appellate Defense. Approve annual budget. Establish indigency criteria.	Chief Attorney appointed by Commission to four-year term. Licensed to practice law in South Carolina.	Submit budget to Commission. Establish training for employees. Represent indigent defendants in appeal of a conviction in trial court or decision of any proceeding in civil commitment or other involuntary placement.
SOUTH DAKOTA	None	Not applicable	None	Not applicable
TENNESSEE District Public Defenders Conference (agency of the Judicial branch)	Not applicable, but see below.	Not applicable, but see below.	Office of Executive Secretary to District Public Defender Conference. Elected by Conference for eight-year term.	Assist district public defenders to coordinate their responsibilities. Serve as liaison among various branches of state government. Prepare budgets for each district for submission to state. Provide public defenders with minimum law libraries.

STATEWIDE INDIGENT DEFENSE SYSTEMS: July 1998

STATE Type of Program	Commission	Commission Duties & Responsibilities	Public Defender Selection Process, Terms & Qualifications	Public Defender Duties & Responsibilities
TENNESSEE Tennessee Indigent Defense Commission of the Supreme Court of Tennessee (Judicial branch)	Tennessee Indigent Defense Commission of the Supreme Court of Tennessee. Eleven members appointed by Supreme Court from recommendations made by petitioner organizations who pushed for creation of Commission through Supreme Court rule. Three-year terms. Chair appointed by Supreme Court.	Appoint officers. Adopt rules for operation of Commission. Develop a comprehensive plan for indigent defense services in state court system. Collect case information; determine reasonable caseload for district defenders; set standards for criminal defense attorneys representing indigent defendants; set compensation schedule for assigned counsel; set annual budget for court-appointed counsel expenditures; and develop voucher review process.	Not applicable, but see above.	Not applicable, but see above.
TENNESSEE Office of the Post-Conviction Defender and Post-Conviction Defender Commission	Nine members: two appointed by the Governor; two appointed by the lieutenant governor; two appointed by the speaker of the House of Representatives; three appointed by the Supreme Court of Tennessee. Serve four-year terms.	Appoint Post-Conviction Defender; prepare annual budget for the Office of Post-Conviction Defender.	Post-Conviction Defender appointed by Post-Conviction Defender Commission. Four-year term. Must be lawyer in good standing with Supreme Court of Tennessee and possess demonstrated experience in capital case litigation.	Provide legal representation to indigent persons convicted and sentenced to death; hire assistant post-conviction defenders, investigators and support staff; maintain clearinghouse of materials and brief bank for public defenders and private counsel who represent indigents charged or convicted of capital crimes; provide CLE training and consulting services to lawyers representing defendants in capital cases; recruit qualified members of the bar to provide representation in state death penalty proceedings.
TEXAS	None	Not applicable	None	Not applicable
UTAH	None	Not applicable	None	Not applicable
VERMONT Office of the Defender General (agency of Executive branch)	None	Not applicable	Defender General appointed by Governor with advice and consent of Senate. Four-year term.	Operates program thru public defenders and deputy public defenders or by contracting out to private attorneys. May establish local offices headed by a public defender. Contract with member of bar to serve as assigned counsel coordinator.
VIRGINIA Public Defender Commission (agency of Judicial branch)	Nine members. Appointed by Speaker of the House in consultation with Senate and House Courts of Justice Committees. Three judges, three practicing attorneys, three lay people. Three-year terms.	Oversee administration of Public Defender Commission. Select Executive Director and individual head public defenders.	Commission selects Executive Director who serves at pleasure of Commission. Member of Virginia State Bar and experienced.	Statute sets up office. Hire staff. Establish and oversee local public defender offices mandated by state legislature.

STATEWIDE INDIGENT DEFENSE SYSTEMS: July 1998

STATE Type of Program	Commission	Commission Duties & Responsibilities	Public Defender Selection Process, Terms & Qualifications	Public Defender Duties & Responsibilities
WASHINGTON Office of Public Defense (independent agency of the Judicial branch)	Advisory Committee has nine members: three persons appointed by the chief justice; two non-attorneys appointed by the governor; two senators and two members of the house of representatives; one person appointed by the court of appeals executive committee; and one member appointed by the Washington State Bar Association.	Submit three names to the Supreme Court for Director of the Office of Public Defense.	Director serves at the pleasure of the supreme court, which selects from list of three names submitted by Advisory Committee. Director must have: practiced law in Washington for at least five years, represented criminal defendants, and proven managerial or supervisory experience.	Administers all criminal defense services; submits to state legislature a biennial budget for costs related to appellate indigent defense; recommends indigency standards; collects information and reports to the legislature on indigency cases; coordinates with the supreme court and judges of each division of the court of appeals to determine how attorney services should be provided. The Office of Public Defense does not provide direct representation.
WEST VIRGINIA	None	Not applicable	None	Not applicable
WISCONSIN Wisconsin State Public Defender (independent agency within Executive branch)	Nine members. Appointed by Governor, approved by Senate. At least five must be attorneys. Three-year terms. Chair is elected by Board.	Appoint state Public Defender and establish salary. Approve budget and submit to Governor. Promulgate standards of indigency. Promulgate rules for assignment of private counsel in regard to standards, payments and pro bono programs. Perform all other duties necessary and incidental. Contract with federal agencies and local public defender organizations for provision of services.	State Public Defender appointed by Board. Member of Wisconsin Bar. Five-year term.	Supervise operation of all state and regional public defender offices. Maintain data and submit biennial budget to Board. Delegate cases to any member of Wisconsin Bar. Negotiate contracts out for representation as directed by Board. Appoint staff.
WYOMING State Public Defender (Executive agency)	None	Not applicable	State Public Defender appointed by Governor. No term specified. Member of Wyoming Bar with experience in defense or prosecution.	Administer public defender program in districts and oversee operation of public defender system statewide. Assistant public defenders appointed by Governor and serve at pleasure of Public Defender. Public Defender may require them to be full-time. Public defender in each district appointed by Governor upon recommendations from district judge and county commissioners.

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Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial:

A State-by-State Overview

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Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview, 1999

Introduction

The Spangenberg Group last prepared a state-by-state table on compensation rates for assigned counsel handling non-capital felony trial cases in September 1997. Prior to that, our most recent table was prepared in 1994. The tables, which are prepared on behalf of the American Bar Association Bar Information Program, provide state-by-state information concerning the hourly rates paid and the authority for the rates. We have received repeated requests for the tables, most often from attorneys and policy-makers, and usually when a state legislature is considering a change in its attorney compensation rates.

There have been a number of changes made in the hourly rates paid to court-appointed counsel since 1997. Rates have been increased in nine states on a statewide basis (Alabama, Colorado, Connecticut, Georgia, Iowa, Kentucky, New Jersey, Vermont and Wyoming) and two states (Alabama and Maine) have authorized increases that will go into effect in 2000. There have also been a number of increases made in rates which are authorized by local, rather than state, governments, as well. The enclosed table contains up-to-date compensation information as of summer 1999.

While the table alone is a valuable tool for comparison purposes, it is impossible to use it to make an accurate ranking comparison of rates paid to court-appointed counsel among states. In part this is because many states are so-called "reasonable compensation" states, where the rates are set by the local judge or county and vary widely from county to county and therefore no single rate can be defined for the state. Also complicating a ranking exercise is the growth in the number of states which are using contract counsel for cases previously handled by counsel appointed on a case-by-case basis and paid hourly rates. Contracts are administered in different ways: some contract attorneys receive flat fees for each case handled, while others receive annual figures, paid in monthly installments, to handle all of the conflict of interest cases in a given year.

Most major metropolitan areas in this country are served by public defender offices. Cases in which the public defender (and, in some cases, the second public defender) has a conflict of

interest are handled by court-appointed counsel or contract counsel. In addition, in some jurisdictions, there is no public defender, so contract counsel or court-appointed counsel handle all indigent defendant cases. The large majority of cases handled by attorneys who would be paid under the rates provided in the accompanying table are cases in which a public defender has a conflict of interest.

Different Approaches to Compensating Non-Public Defender Counsel

The following section discusses eight approaches taken by the states to compensating conflict counsel and other non-public defender counsel assigned to non-capital felony cases. These approaches are characterized as:

- Reasonable compensation
- Statutory hourly rate
- Hourly rate per administrative or court rule
- Flat fee per case
- Flat fee per case under annual contract
- Annual contract
- Non-binding state commission on indigent defense
- Combination approach.

Reasonable Compensation

In 15 states (Arizona, Arkansas, Florida, Idaho, Louisiana, Mississippi, Michigan, Montana, Nebraska, North Carolina, Pennsylvania, South Dakota, Texas, Utah and Washington) the compensation for court-appointed attorneys is left up to the locality, either the county, a local judge or a combination of the two. In some states, such as South Dakota, the rate paid is uniform throughout the state ($55 per hour with no maximum). In other states, such as Arkansas and Texas, the rates paid and the use of a maximum vary considerably from county to county, and from judge to judge within a county. Because the range of practices concerning compensation of court-appointed counsel in so-called "reasonable compensation" is so significant, we highlight below several examples from the various states.

- Arizona

In Arizona, state statute and the Rules of Criminal Procedure govern compensation of appointed counsel, leaving it to the court to award the attorney a sum representing reasonable compensation for services performed. In the two largest counties, Maricopa (Phoenix) and Pima (Tucson), the responsibility of administering court-appointed counsel compensation has been transferred from the courts to small county agencies. The agencies administer contract programs for conflict of interest cases which the primary and secondary public defender agencies are unable to handle. In Maricopa County, there are two types of felony contracts: regular felony contracts and major felony contracts. Regular felony contracts pay $700 per case with the expectation that few of the cases will go to trial. Major felony contracts pay $8,000 per case. Concessions for additional compensation may be made for regular felony contract attorneys or major felony contract attorneys whose cases are extraordinarily complicated or lengthy.

In Pima County, contract attorneys accept appointments to two classifications of non-capital felony cases. Group B felonies include attempted murder, second degree murder, manslaughter, negligent homicide, drive by shooting, sexual offenses involving minors and arson of occupied structure. Group A felonies include everything else. For Group A felonies, attorneys are paid a flat fee of $800, with an additional $50 per hour after 3 days of trial and 40 hours of pretrial work. For Group B felonies, attorneys receive a flat rate of $3,000 as well as an additional $50 per hour after 5 days of trial. An attorney may petition the court to receive payment in excess of the maximum.

- Arkansas

In Arkansas, court-appointed counsel rates are set by local judges. The rates vary not only from circuit to circuit but also vary in one circuit from judge to judge. Rates currently range from $80 - $85 per hour throughout the state.

- Florida

Statutory ceilings on individual case payments are in effect statewide ($2,500 for a non-capital, non-life felony and $3,000 for a life felony), but it is up to the counties to establish their own hourly rates of compensation for attorneys handling cases in which the public defender has a conflict of interest. In Dade County (Miami) court-appointed counsel rates are set out in an administrative order of the chief judge of the circuit. Attorneys are paid $40 per hour for work performed out of

court and $50 per hour for in-court work, but only after they exceed the quantum of hours set out in the Circuit Court of the 11th Judicial Circuit's short form. Each type of case has a different schedule. The schedule for first degree felonies is:

5 hours or less	$250
above 5 hours - 10 hours	$500
above 10 hours - 20 hours	$750
above 20 hours - 30 hours	$1,000
above 30 hours - 40 hours	$1,250
above 40 hours - 50 hours	$1,500

Thus, a court-appointed attorney with a first degree felony that took 70 hours to handle would receive $1,500 plus $40 x 20 or $2,300, or $500 less than an attorney who billed 70 hours at $40/hour would receive. The 11th Judicial Circuit has a fee review committee which reviews all claims in excess of the maximums, and will grant additional payments if it agrees they are warranted.

In the Fall of 1998, Florida voters supported Revision Seven, which will gradually shift the responsibility for funding conflict of interest cases from the counties to the state. The state will assume the responsibility for setting compensation rates for conflict counsel, and by 2006, there will be a uniform rate paid throughout the state.

- Idaho

Although the statute concerning court-appointed counsel compensation states that the rates should be set by local judges, in some areas the county commissioner sets the rates. The majority of court-appointed counsel are paid $40/hour out of court and $50/hour in court in non-capital felony cases.

- Louisiana

In Louisiana, most of the district-based indigent defender boards utilize contract counsel to handle conflict of interest cases, but among the few that still use court-appointed counsel, the average rate paid is $42 per hour, for work performed both in and out of court.

- Michigan

There is wide variation in court-appointed counsel fee schedules among Michigan's judicial circuits. Further, while the majority of circuits pay hourly rates on a case-by-case basis, some circuits pay flat fees for plea and trial cases. In the 3rd Judicial Circuit (Wayne County), for example,

attorneys handling criminal cases in the trial court are reimbursed according to a graduated, event-based schedule. Based on the event (motion, preliminary examination, etc.) and possible sentence, attorneys receive a particular fee. For instance, for a half day of trial in a case where the possible sentence is 24-60 months, defenders receive $90 per hour. For a half day of trial in a case with a potential sentence of natural life, the attorney earns $190 per hour. Other districts, such as the 21st (Isabella County), use contracts as the basis for legal representation of indigent defendants. Isabella County contracts with six attorneys for a total indigent defense cost of $250,000 per year.

- Mississippi

Compensation rates for court-appointed counsel in non-capital cases in Mississippi vary throughout the state, though the state has capped court-appointed compensation at $1,000 per case. However, attorneys may also bill for all overhead expenses, and the presumptive rate for such expenses is $25 per hour.

- Montana

In Montana it is up to local judges to decide what to pay court-appointed counsel, however, in the majority of counties, counsel are paid $60 per hour for work in and out of court. A few counties pay counsel $40 per hour for out-of-court work and $45 per hour for in-court work. There is no firm case maximum in Montana, but some counties use $5,000 as a ceiling.

- Nebraska

The majority of counties in Nebraska pay court-appointed counsel $60 per hour with no per-case maximum. Douglas County (Omaha) is a notable exception, paying attorneys $45 per hour out of court and $65 per hour in court, up to $3,500 for felony cases. Douglas County's employment of a per-case maximum is not sanctioned by state statute or common law (see *In re: Rhem v. County of Richardson*, 410 N.W.2d 92 (Neb. 1987)). The presiding judge can determine if additional funds should be granted.

- North Carolina

The rates paid to court-appointed counsel are completely at the discretion of the judges. Some pay hourly rates, some pay flat rates. There is no per case maximum.

- Pennsylvania

The rates paid to court-appointed counsel vary widely in Pennsylvania, with all decisions left

to local judges. In Philadelphia, effective March 10, 1997, compensation for court-appointed counsel shifted from an hourly basis to a "Modified Guaranteed Fee System," where attorneys are paid on a per-diem basis. The fee is payable as follows:

- Court appointments in felony non-homicide cases which require one trial day that lasts more than three hours will be paid a $750 fee. Of that $750, $600 is for preparation and $150 is for the in-court time that lasts more than three hours.
- Court appointments in felony non-homicide cases that last more than one day through duration will be paid a $650 fee for the first day of trial and an additional per diem of $150 for each half day (three hours or less) and $300 for each full day (three hours or more) of trial.
- Court appointments in homicide cases that require one trial day lasting more than three hours will be compensated $1,700 as preparation fee and $200 for the in-court time that lasts more than three hours.
- Court appointments in homicide cases that last more than one day through the duration of trial will be paid $1,900 for the first day of trial ($1,700 preparation fee and $200 for more than three hours in-court time) and an additional per diem of $200 for each half-day (three hours or less) and $400 for each full day (three hours or more).

In cases of extreme complexity, counsel may petition the Administrative Judge of the Trial Division or his designee to apply for hourly compensation. Associate or backup counsel may be requested by counsel for homicide cases, but they will be compensated at a lesser rate of $850 as a preparation fee with no per diem.

- South Dakota

Some counties in South Dakota use contract counsel for conflict of interest cases, but among those that use court-appointed counsel, the majority pay counsel $55 per hour for work in and out of court with no cap in all types of cases.

- Texas

Texas has 254 counties, each with a different indigent defense system, and no statewide mechanism to track what goes on in each of the 254 counties. There is no way to determine a

statewide average rate of compensation for court-appointed counsel; judges within the same county pay different rates.

According to legislation passed in 1987, all counties are supposed to establish an indigent defense system, and if they choose an assigned counsel system, they must formalize the requirements for appointment of counsel through a "schedule of fees adopted by formal action of the county and district criminal court judges within the county." Texas Criminal Code of Procedure Article 26.05(b). Some counties have a schedule, but others only pay flat rates for court appearances. Dallas County's fee schedule, pursuant to Art. 26.05 C.C.P., and adopted on February 4, 1999, is as follows:

Activity	Minimum-Maximum Rates
Jury Trial	$200-$750
Evidentiary Hearing	$50-$500
Court Appearance	$50-$150
Non-Jury Disposition	$100-$750
Examining Trial	$75

Hourly rate for all activities except Capital Appeals: $40-$250.

Each judge in Dallas County may, "at his or her discretion and in accordance with Art. 26.05 C.C.P. set a fixed rate or daily rate within the minimum and maximum rates" listed above.

Some counties reimburse travel and expenses, others do not. In Bexar County, officials have implemented the San Antonio Plan, in which all lawyers must accept random appointments unless they pay the $500 annual buy out rate.

- Washington

Court-appointed counsel compensation rates vary widely in Washington. At the low end of the scale, in King County (Seattle), conflict counsel are paid $33 per hour for felony cases, with an upper limit of $550 per Class C felony. (Compensation for work on an aggravated homicide is negotiated on a case-by-cases basis.) Spokane County pays counsel $40 per hour up to $4,000 for a felony trial case. Whatcom County pays $60 per hour, with no cap.

Statutory Hourly Rate

Eight states, plus the District of Columbia, reimburse court-appointed counsel according to state statute. These states are Alabama, Hawaii, Illinois, Nevada, New York, South Carolina, West Virginia and Wisconsin. All of the pertinent statutory sections and the rates appear in the accompanying chart. Some of the rates have not been changed for decades. For example, the hourly rates in Illinois ($30 out of court, $40 in court with a $1,250 maximum) were set in 1975 and the hourly rates in New York ($25 out of court and $40 in court with a $1,200 maximum) were set in 1986.

Hourly Rate Per Administrative or Court Rule

In 16 states, uniform, statewide hourly rates are established either by executive administrative rule (Rhode Island), the Public Defender or indigent defense commission (Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, New Jersey) or court rule (Colorado, Maine, New Hampshire, Oregon, Vermont, Virginia, Tennessee, Wyoming). The practices in several of these states warrant brief discussion.

- Iowa

The1999 Iowa General Assembly passed legislation changing the method of determining appointed counsel rates of compensation and fee limitations. In 1996, the state legislature authorized the State Public Defender to set the rates paid to all court-appointed counsel, whether or not they work under contract with the public defender. In addition, according to past practice, the Iowa Supreme Court was required to periodically promulgate guidelines which include a range of rates to be paid court-appointed counsel. These guidelines set the hourly fee range between $40 and $60 per hour with no per-case maximum. However, Senate File 451 created a five-member Indigent Defense Advisory Commission to advise the Governor and General Assembly regarding hourly rates and per case fee limitations. The Iowa State Public Defender will actually set the fee limitations, which may then be reviewed by the Commission. This bill also implemented a statutory hourly fee for cases handled by court-appointed counsel. As of July 1, 1999, attorneys representing indigent defendants in Iowa have received $60 per hour for all work on Class "A" felonies; $55 per hour for all work on Class "B" felonies; and $50 per hour for all other cases. Since 1992 in Iowa, the state

public defender has contracted with private attorneys to provide indigent defense services. These contract attorneys will also receive the new hourly rates.

The bill also transferred the authority to determine fee limitations for various cases from the Iowa Supreme Court to the State Public Defender. The new limits, subject to Administrative Rules Review Committee approval, are: $15,000 for Class "A" felonies; $3,000 for Class "B" felonies; $1,200 for Class "C" felonies; and $1,000 for Class "D" felonies.

- Minnesota

In Minnesota, it is exceedingly rare to appoint counsel on an hourly basis, as the state public defender system contracts with salaried attorneys to handle conflict of interest cases.

- Vermont

In Vermont, 13 V.S.A. §5205(a) and Administrative Order of the Vermont Supreme Court govern compensation rates for court-appointed counsel. In 1992, by Supreme Court administrative order, the $25 per hour rate was raised to $50 per hour, effective FY 1993, with the following maximums: $25,000 for felonies involving life imprisonment or death penalty (Vermont currently does not have the death penalty), $5,000 for a major felony, and $2,000 for a minor felony. However, the legislature passed a legislative override in 1992 stating: "Notwithstanding 13 V.S.A. §5205(a) and Administrative Order of the Vermont Supreme Court as amended, the rate of compensation for the services of ad hoc counsel in public defender cases shall be $40 per hour through June 30, 1997." The sunset date was extended in 1997 through June 30, 1998, and payment of $40 per hour continued for a year after that date. However, as of July 1, 1999, Vermont began to adhere to the $50 per hour rate.

- Virginia

In Virginia, the state supreme court has established rates of $40 per hour for out-of-court work and $60 per hour for in-court work, but state statute restricts per-case payments to no more than $845 to defend charges punishable for more than 20 years and $305 to defend other felony charges. Because of these low per-case caps, the relatively competitive hourly rates have little bearing.

Flat Fee Per Case

In Missouri, a standard flat rate is paid for each case not handled by a public defender. The rates are set by the state public defender, but it is extremely rare to appoint an attorney from outside of the public defender program to a conflict case. The vast majority of conflict of interest cases are handled by transferring the case from the branch office where the conflict was identified to another branch office.

Flat Fee Per Case Under Annual Contract

In two states, Connecticut and New Mexico, the state public defender contracts with attorneys to handle conflict of interest cases and cases where no public defender is available. Attorneys agree to accept a flat rate for each non-capital felony, misdemeanor or juvenile delinquency case handled (capital cases are handled outside of this arrangement). For cases in Connecticut where there is no available contract attorney, outside counsel will be appointed at hourly rates of $40 for out of court work and $60 for work in court; rates which are also paid to contract attorneys when a case goes to trial.

Annual Contract

In Delaware, superior court rule governs compensation of attorneys appointed in non-capital felony cases. Counsel are paid an annual contract amount of roughly $42,620. Outside of the contracts, counsel may receive up to an additional $12,000 for handling Class A felony appointments. Attorneys not on contract receive $50 per hour for all work both in- and out-of-court.

Non-Binding State Commission on Indigent Defense

In three states, Georgia, Indiana and Ohio, a statewide commission for indigent defense sets recommended rates of compensation, but these rates have no binding effect. In all three states, indigent defense is organized and delivered at the county level.

- Georgia

The Georgia Indigent Defense Commission recommends that counties pay rates of $45 per hour out of court and $60 per hour in court in non-capital felony cases, and discourages the setting

of a per-case maximum. If a county chooses to adopt a maximum fee, GIDC recommends the fee be at least $2,500 in non-capital felony cases. As of March 4, 1999, through a Supreme Court order, the 141 of Georgia's 159 counties which meet the standards and guidelines set out by GIDC must adhere to these rates. GIDC receives an annual state appropriation to distribute among counties that meet its standards. The remaining 18 counties utilize flat fees or hourly rates which vary from county to county.

- Indiana

In Indiana, the Indiana Public Defender Commission also receives a state appropriation for disbursement to counties which meet its standards and guidelines pertaining to the delivery of indigent defense services. The Commission requires counties to pay attorneys $60 per hour for work in non-capital felony cases with no case maximum, and the Commission reimburses compliant counties for a portion of their annual expenditures on appointed counsel.

- Ohio

Each county in Ohio is required to have a fee schedule for court-appointed counsel. In addition, the Ohio Public Defender Commission sets a non-binding, recommended maximum fee schedule for appointed counsel. The Commission's recommended rates are currently $40 per hour out of court and $50 per hour in court. Recommended per case maximums in non-capital felony cases are: aggravated murder without death penalty specifications - $8,000 for two attorneys, $6,000 for one attorney; murder - $3,000; aggravated felony (first, second and third degree felonies) - $2,000; other felonies - $1,500. Some counties pay lower rates than suggested by the Commission, and a few pay higher rates. The Ohio Public Defender reimburses counties for up to 50% of the state or county rate (whichever is lower) paid to court-appointed counsel. Attorneys may petition the court for a waiver of the maximum if their county has an extraordinary fee clause in its fee schedule.

The Ohio Public Defender Commission's 1997 Annual Report lists the hourly rates paid in each county for felonies, misdemeanors, juvenile, appeals, death penalty and other cases. The average hourly rate for non-capital felonies paid among the counties in FY 1997 was $31.

Combination System

In four states (Alaska, California, North Dakota and Oklahoma), there is a combination of

more than one conflict case model and therefore no way to succinctly characterize the hourly compensation paid to court-appointed counsel.

- Alaska

In Alaska, non-capital felony cases not handled by the statewide public defender are handled by one of three types of counsel: staff, contract and "volunteer." The Office of Public Advocacy (OPA) has staff lawyers who handle a limited number of conflict cases. The OPA contracts with other lawyers at rates ranging between $65-$100 per hour, depending on the experience of the lawyer and his or her location. Lawyers who volunteer to take appointed cases and are not under contract are paid $50 per hour for out of court work and $60 per hour for work in court. There are different maximums for various types of cases for volunteer lawyers; $4,000 is the outside maximum, however, the maximum will be waived for cases with extraordinary circumstances.

- California

In California, trial-level indigent defense representation is organized at the county level. The majority of counties have a public defender, and several counties have a second public defender to handle conflict of interest cases. Some counties contract with lawyers who accept case assignments and receive flat fee-per-case payments, while others pay conflict counsel hourly rates.

Orange County has a public defender system that is organized into three segments, enabling it to handle up to three co-defendants without going to outside counsel. Conflict counsel in Orange County are reimbursed according to a flat fee schedule which pays $900 for a felony resolved prior to preliminary hearing, $1,160 for a felony bound over to superior court where there is a plea before a jury is selected, and a $400 per full day and $225 per half day per diem on top of the $1,160 for a case that goes to trial. The contracts also provide for extraordinary circumstances which must be approved by a judge.

In San Francisco County, court-appointed counsel receive $65 per hour for work on regular felonies and $80 per hour for work on serious felonies. There are no per case maximums imposed. The judges in San Francisco approve the rates set by the San Francisco Bar Association, which administers the assigned counsel panel and takes a two percent administrative fee from each payment to panel lawyers. The court forwards the payment to the Bar.

- North Dakota

In North Dakota, the vast majority of conflict cases are handled by contract attorneys working under two-year contracts in the state's seven judicial districts. In 1981 the North Dakota Supreme Court's advisory commission on indigent defense first established a guideline for the hourly rate paid to (those few) attorneys who are appointed outside of the contracts. The guideline was $50 per hour, and that was increased to $75 per hour in 1995. Actual payments, however, range between $50 per hour and $85 per hour.

During the 1999 legislative session, the Legislative Assembly directed the Supreme Court to pursue an equitable allocation of indigent defense funds among the judicial districts. Presiding judges examined the disparity in contract amounts among the judicial districts, and decided to set a goal of all contracts between $60 and $65 per hour. When negotiating contracts with individual districts, the Administrative Office of the Courts adhered to this goal. No district wound up having to cut payments, as rates above $65 were exceptions, and typically were paid on individual cases where counsel was appointed outside of a contract. Therefore, as of July 1, 1999, contract rates throughout North Dakota should be relatively on par throughout the state.

- Oklahoma

In Oklahoma, a statewide program, the Oklahoma Indigent Defense System (OIDS), is responsible for all indigent defense representation in 75 of the state's 77 counties. Counsel in these counties who are appointed by the court to felony cases are entitled to be paid statutory rates of compensation ($40 per hour out of court and $60 per hour in court with a $3,500 maximum). However, the majority of cases in these counties are handled by attorneys who work under annual contracts with OIDS, and receive significantly lower per-case payments than if they were working under the hourly amounts. Conflict counsel in two counties – Oklahoma and Tulsa -- are paid various rates.

The Federal Model: the Criminal Justice Act

The approach to appointing private counsel to represent indigent defendants charged with federal crimes is very similar to the "statutory hourly rate" approach used in a number of states. At the federal level, the Criminal Justice Act of 1964 (18 U.S.C. §3006A) authorizes payment for representation of indigent defendants accused of committing crimes. Under the Act, each United

States district court is required to develop a plan for furnishing counsel and investigative, expert and other services necessary for adequate representation in trial and appellate proceedings. The Criminal Justice Act (CJA) authorizes three methods for a court to provide counsel to indigent defendants: a Federal Public Defender Organization, a Community Defender Organization, and a panel of private attorneys.

Roughly half of the 94 federal judicial districts operate a Federal Public Defender Organization. A Federal Public Defender Organization consists of one or more full-time, federal salaried attorneys who are prohibited from having private law practices. The head of a Federal Public Defender Organization, the federal public defender, is appointed by the respective court of appeals to a renewable four year term and is paid a salary fixed by the court of appeals at a rate not greater than that of the United States attorney (prosecutor) for that district. A Federal Public Defender Organization operates under a budget approved by the Administrative Office of the United States Courts.

A Community Defender Organization (CDO) is a non-profit legal services organization incorporated under state laws and supervised by a board of directors. Thirteen CDOs currently serve 15 of the nation's judicial districts. CDOs may operate under grants approved by the Judicial Conference or they may opt to be reimbursed for their services on a case-by-case basis under the statutorily prescribed hourly rates which also apply to CJA panel attorneys.

CJA panel attorneys serve every district in the federal court system. In those districts where there is a Federal Public Defender Organization or a Community Defender Organization, panel attorneys are appointed to handle those cases in which the institutional defender has a conflict of interest -- approximately 25% of all cases. They handle all of the indigent defendant cases in those districts without a CDO or Federal Public Defender Organization.

Private attorneys are appointed on a case-by-case basis by a district court or court of appeals from a panel of lawyers approved by the court as qualified to handle federal criminal cases. Section 3006A(d) of title 18, United States Code, establishes hourly panel attorney payments of $45 for out-of-court work and $65 for in-court work, and authorizes the Judicial Conference to approve rates as high as $75 an hour. Congress is currently considering the Administrative Office of the United States Courts' request to raise the rates to $75 across the board.

Panel attorneys are also entitled to reimbursement for out-of-pocket expenses, such as travel. In order to receive payment for their services, panel attorneys submit vouchers to the clerk of the appointing court, specifying the number of hours devoted to the case and any accompanying expenses. Attorneys may receive up to $3,500 for felony cases, $2,500 for appeals and $1,000 for misdemeanor cases. These ceilings may be exceeded in complex or extended cases upon application to the court, and it is estimated that the felony maximum is exceeded in approximately 75% of all cases.

Conclusion

Standard 5-2.4 of the American Bar Association Standards for Criminal Justice, Providing Defense Services, Third Edition states, "Assigned counsel should receive prompt compensation at a reasonable hourly rate and should be reimbursed for their reasonable out-of-pocket expenses. Assigned counsel should be compensated for all hours necessary to provide quality legal representation..." This standard provides a measure against which jurisdictions can evaluate their compensation rates for court-appointed counsel.

This narrative and accompanying table illustrate the different approaches throughout the states in compensating non-public defender counsel who represent indigent defendants in non-capital felony cases. As the table shows, many states have established hourly rates and a per-case maximum, but in only two of these states - Mississippi and Virginia - is there no possibility of waiving the maximum upon a showing of extraordinary circumstances. Litigation in Mississippi challenging the constitutionality of the fee cap failed to increase or eliminate the per-case maximum, but succeeded in entitling court-appointed counsel to receive reimbursement for overhead costs. In addition to submitting vouchers for payment of attorneys' fees, counsel in Mississippi submit vouchers for reimbursement of overhead costs for every hour worked. *Wilson v. State,* 574 So.2d 1338 (Miss. S.Ct., 1990). See also *May v. State,* 672 S. 2d 1307 (Ala. App. 1993), cert. denied, *May v. State,* 672 S. 2d. 1310 (Ala. 1995), and *State v. Lynch,* 796 P.2d 1150 (Oklahoma S.Ct., 1990). There has been a significant amount of litigation concerning compensation for court-appointed and conflict counsel, and the Appendix to this narrative provides a partial listing of such litigation.

The use of an hourly rate for attorneys' fees plus a separate hourly rate to cover overhead is

the system endorsed by the *1992 Interim Report of the Committee to Review the Criminal Justice Act of the Judicial Conference of the United States.* The nine-member Committee was appointed by Chief Justice William H. Rehnquist to conduct a comprehensive analysis of the CJA program and to recommend appropriate legislative, administrative and procedural changes to the United States Judicial Conference. The Committee's report recommended enactment of a statutory method that ensures CJA panel attorneys a fair hourly fee over and above their reasonable overhead. One approach the report supports is the use of a national presumptive overhead figure, such as $25 an hour, which could be tailored on a regional basis using empirical data contributed by local bar associations, chambers of commerce and the CJA panel entity in a federal district. The overhead rate would be paid in addition to the compensation rate.

Finally, it is important to mention one concern with the court-appointed counsel compensation system, which is the potential for conflict of interest when judges approve the compensation and reimbursement claims of panel attorneys who appear before them. The *Interim Report of the Committee to Review the Criminal Justice Act* pointed out that when a judge approves a fee that is less than the amount sought, counsel may - rightly or wrongly - perceive the reduction as an "admonition, rebuke or retaliation for defense tactics." Judges, however, sometimes feel justified in cutting vouchers they feel are excessive for the type of case handled, relying on their own view of "what a case is worth." This practice, if done routinely, effectively reduces the authorized hourly rate or per-case maximum. The Committee addressed this issue by recommending utilization of a local administrator to review interim and final vouchers and to certify final payments. The Committee's report further recommended implementing a procedure to notify an attorney of the intent to reduce a payment to him or her and the reason for the reduction. In such a system, the attorney would have the opportunity to appeal a decision to reduce a voucher and judges would have the opportunity to comment on the administrator's initial determinations for payment.

Responding to the review committee's recommendations in the March 1993 *Report of the Judicial Conference of the United States on the Federal Defender Program*, the Judicial Conference rejected the proposal for local panel administrators but endorsed the recommendation that CJA panel attorneys receive compensation which covers reasonable overhead and a fair hourly fee.

Appendix

Selected Case Law Concerning Indigent Defendant Counsel Compensation

State Ex Rel Stephen v. Smith, 747 P.2d 816 (Kansas S.Ct., 1987)

State v. Lynch, 796 P.2d 1150 (Oklahoma S.Ct., 1990)

State v. Ryan, 444 N.W. 2d 656 (Nebraska, 1989)

State v. Smith, 681 P.2d 1374 (Arizona, 1984)

Wilson v. State, 574 So.2d 1338 (Miss. S.Ct., 1990)

May v. State, 672 S. 2d 1307 (Ala. App. 1993), cert. denied, May v. State, 672 S. 2d. 1310 (Ala. 1995)

In re: Rhem v. County of Richardson, 410 N.W.2d 92 (Neb. 1987)

Zarambia v. Superior Court, 912 P.2d 5 (Ariz. 1996)

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Rates of Compensation for Court-Appointed Counsel in Non-Capital Felonies at Trial, 1999

1999 Update[1]

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Contract Amount	Authority
	Out of Court	In Court					
Alabama	$30 [2]	$50	Class A Felony: $3,500 Class B Felony: $2,500 Class C Felony: $1,500	Yes			Code of Alabama §15-12-21
Alaska	$50	$60	$4,000	Yes		$65-$100 per hour	2 AA.C.60 Alaska Administrative Code
Arizona	Varies	Varies	Varies	Yes	Varies	$700-$8,000[3]	Az. Rev. Stat. Ann. §13-4013(a) grants authority to local court. In Pima and Maricopa counties, contracts are negotiated and administered by independent agencies.

[1] This is an update to the table produced in 1997.

[2] As of October 1, 2000, in-court payment will be increased to $60 per hour and out-of-court work will be reimbursed at a rate of $40 per hour

[3] In Maricopa County, attorneys with felony contracts receive $700 per case and attorneys with major felony contracts receive $8,000 per case. In Pima County, contract attorneys receive a flat fee of $800 for Group A felonies, with $50/hour additional after 3 trial days and 40 hours pretrial work, and they receive a flat fee of $3,000 for Group B felonies, with $50 per hour additional after 5 days of trial.

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1999 Update

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Contract Amount	Authority
	Out of Court	In Court					
Arkansas	Varies; $80-$85 is a typical rate.		Varies	Varies			Arkansas Code Annotated §16-87-209(f) grants authority to local judge to set the rates, while §16-87-2121 authorizes the Public Defender Commission to pay appointed counsel fees.
California	Varies. In San Francisco: $65 for felonies and $80 for serious or life felonies with no maximum				Varies. In Orange Co.: Plea - $900 Trial - $1,160 + $400/full day in trial; $225/half day in trial		California Penal Code §98.7.2
Colorado	Type A: $51 Type B: $47		Felony 2 (trial): $5,000 Felony 2 (no trial): $2,500 Felony 3 (trial): $3,500 Felony 3 (no trial): $1,750	Yes			Rates set by Chief Justice Directive 97-01, per Colorado Revised Statutes §21-2-105
Connecticut	$40	$60	None		Judicial District cases: $500/case Geographical Area cases: $250/case	Same as hourly rates when case goes to trial	Appointed Counsel rates are set by the State Public Defender and approved by the Public Defender Commission pursuant to §591-293 CGS, established in accordance with C.G.S.§51-291(12).

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State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Contract Amount	Authority
	Out of Court	In Court					
Delaware	$50[4]		None	Yes		Approximately $42,620 per year, plus up to $12,000 per year for Class A felony appointments.	Delaware Code Annotated 29 §4605 grants authority to Supreme Court.
D.C.	$50	$50	$2,450[5]	Yes			D.C. Code Ann. Sec. 11-2604(a)
Florida	Varies[6] In Dade County: $40	$50	Non-Capital, non-life felonies: $2,500; Life felonies: $3,000	Yes			Florida Statutes §925.036 grants authority to set hourly rates to Chief judge or Senior judge of the circuit.
Georgia	$45	$60[7]	Non-Capital Felonies: $2,500 Capital Felony where the death penalty is not sought: $5,000	Yes			Georgia Code Annotated §17-12-5 grants authority to local court.

[4]Hourly rate applies only to attorneys not on contract.

[5]No attorney can earn more than $96,000 annually on court appointments in D.C.

[6]This cost was voted in 1998 to be shifted to the State.

[7]Hourly rates apply to the 141 of 159 counties that meet GIDC Standards.

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State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Contract Amount	Authority
	Out of Court	In Court					
Hawaii	$40	$60	$3,000	Yes			H.R.S. § 802-5(b)
Idaho	Varies. Typical: $40	$50	None				Idaho Code §19-860(b) grants authority to local judge.
Illinois	$30	$40	$1,250	Yes			I.L.C.S. 5/113-3(c)
Indiana	$60[8]		None			Generally receive $20,000-$30,000 part-time annually; varies by county	Knox County Counsel v. State ex rel Kirk, 29 NE 2d 405 (1940 Ind.) grants authority to judges to set hourly rates.
Iowa	Class A felony: $60	$60	Class A felony: $15,000 Class B felony: $3,000 Class C felony: $1,200 Class D felony: $1,000			Class A felony: $60 $60 Class B felony: $55 $55 Other: $50 $50	I.G.S. §815.7 sets the rates. I.G.S. §13.B.4(3) grants the State Public Defender authority to contract with attorneys, and State Public Defender Admin. Rules set out fee limitations.
	Class B felony: $55	$55					
	Other: $50	$50					

[8]In those counties that meet Indiana Public Defender Commission Standards for Indigent Defense Services in Non-Capital Cases.

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1999 Update

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Contract Amount	Authority
	Out of Court	In Court					
Kansas	$50	$50	$5,000	Yes			K.S.A. 22-4501 et seq. grants authority to Kansas State Board of Indigents' Defense Services.
Kentucky	Non-violent felonies: $40 Violent felonies subject to 85% parole eligibility: $50		Non-violent felonies: $1800 Violent felonies subject to 85% parole eligibility: $3,000	No			K.R.S. Ann. 31.170(4)
Louisiana	Varies; $42 is typical rate.		None				La. Code Crim. Proc. Sec. 15-144 et. seq.
Maine	$40 [9]	$40	$2,500	Yes			Maine Revised Statutes Annotated Title 15 §810 grants authority to Superior Court.
Maryland	$30	$35	$1,000	Yes			Annotated Code of Maryland Art.27 §6(d) grants Public Defender authority to promulgate administrative law.

[9] As of July 1, 2000, rates will be increased to $50/hour for in-court and out-of-court work.

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1999 Update

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Contract Amount	Authority
	Out of Court	In Court					
Massachusetts	No distinction between in and out of court rates. $54: murder cases $39: superior court felonies and youthful offender cases $30: all other criminal cases, excluding murder cases and superior court felonies		None				Massachusetts General Laws Annotated Chapter 211D §11 grants authority to Committee for Public Counsel Services and legislative approval of rates.
Michigan	Varies widely		Varies				Michigan Compiled Laws Annotated §775.16 grants authority to presiding judge.
Minnesota	$50	$50	None			Salaried contract defenders earn between $32,000 and $70,000 per year depending on experience and size of contract.	No official authority; Public Defender establishes rates.
	Very few cases are handled outside of public defenders or contract defenders						

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1999 Update

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Contract Amount	Authority
	Out of Court	In Court					
Mississippi	Varies from county to county.		$1,000 plus overhead expenses which are presumptively set at $25 per hour. *Wilson v. State*, 574 So.2d 1338 (1990)	No			Miss. Code Ann. §99-15-17
Missouri	Rarely Used.			Yes	A/B felony: $400-$500 C/D felony: $300 Trial: $1,000		Mo. Rev. Stat. Sec. 600.017 grants authority to State Public Defender.
Montana	Varies. Typical: $60	$60	None				Montana Code Ann. §46-8-201(1) grants authority to local judge.
Nebraska	Varies. Typical: $60 Omaha: $45	$60 $65	Typically there is no maximum, but Omaha uses $3,500	Yes			Nebraska Code 29-1804.12 grants authority to local judge.
Nevada	$75		$2,500 if facing less than life without parole	Yes			N.R.S. 7.125

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1999 Update

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Contract Amount	Authority
	Out of Court	In Court					
New Hampshire	$60	$60	$3,000	Yes			Part 2 Art. 73A of New Hampshire Constitution grants authority to State Supreme Court.
New Jersey	$25	$30	None	Yes			N.J.S.A. §2A: 158A-7 grants authority to the New Jersey Public Defender.
New Mexico	Rarely Used.					Varies; $500-$600 per case is basic rate. Additional $700 for 1st/2nd degree cases at trial; additional $500 for 3rd/4th degree cases at trial.	New Mexico Statutes Annotated §31-15-7(11) authorizes Chief Public Defender to formulate a fee schedule.
New York	$25	$40	$1,200	Yes			Article 18-B of the County Law §722-b
North Carolina	Varies widely.		None				General Statutes of North Carolina §7A-452 grants authority to local judge.

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1999 Update

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Contract Amount	Authority
	Out of Court	In Court					
North Dakota	Varies Typical: $50-$85		None			Varies by judicial district: State's goal is $60–$65 per hour	
Ohio	Varies. Average rate paid in FY 1997 was $31 per hour. Public Defender Standards recommend: $40	$50	Public Defender Commission recommends: Aggravated Murder: $8,000 (2 attorneys), $6,000 (1 attorney); Murder: $3,000; Aggravated Felony: $2,000; Other Felonies: $1,500.	Yes			Ohio Revised Code Annotated §120.33 grants local board of county commissioners authority to set rate after soliciting local bar association for proposed rate schedule.[10]
Oklahoma	$40	$60[11]	$3,500[12]	Yes		Varies	22 Oklahoma Statutes §1355.8.G.2 establishes hourly rates; §1355.8c authorizes the Oklahoma Indigent Defense System Board to award contracts for the representation of indigents.

[10] Ohio Revised Code Annotated §120.04(7) authorizes State Public Defender to set rates at which Ohio Public Defender Commission will reimburse counties.

[11] In cases not under contract with Oklahoma Indigent Defense System and outside of Tulsa and Oklahoma counties.

[12] Ibid.

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1999 Update

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Contract Amount	Authority
	Out of Court	In Court					
Oregon	$40	$40[13]	None				O.R.S. §151.430(5) grants authority to State Court Administrator, but O.R.S. Ann. 135.055 sets min. hourly rate at $30/ hour.
Pennsylvania	Varies. As of Spring 1997, rates in Philadelphia County shifted to a per diem basis.		None				Pennsylvania Statutes Annotated Article 13A §9960.7 grants authority to local judge.
Rhode Island	Felony 1: $50 Felony 2: $35	Felony 1: $50 Felony 2: $35	Felony 1: $5,000 Felony 2: $2,500	Yes			General Laws of the State of RI §8-15-2 vests authority w/ Chief Justice. Supreme Court Executive Order No. 95-01
South Carolina	$40	$60	$3,500	Yes			Code of Law of S.C. Ann. §17-3-50
South Dakota	$55	$55	None				S.D.C.L. §23A-40-8 grants authority to local judge of circuit or county court.

[13]Some counties require payment of $50 per hour in Class A Measure 11 felony cases.

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1999 Update

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Contract Amount	Authority
	Out of Court	In Court					
Tennessee	$40	$50	$1,000	Up to $3,000			Supreme Court Rule 13
Texas	Varies widely		Varies widely			Varies widely	Texas Statutes Annotated Art. 26.05 grants authority to local judge.
Utah	Varies						Utah Code Annotated §77-32-3(3) grants authority to district court.
Vermont	$50	$50	Felony involving life in prison: $25,000 Major felony: $5,000 Minor felony: $2,000	Yes		$48,000-$54,000 per contractor based on experience; extra $7,500 for murder or attempted murder cases	13 V.S.A. §5205(a) and administrative order of the Vermont Supreme Court
Virginia	$40	$60	$845 to defend charges punishable for more than 20 years; $305 to defend other felony charges.	No			Code of Virginia §19.2-163(a) establishes maximum per case payments. Pursuant to §2.1-204, the Supreme Court of Virginia establishes hourly rates.

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1999 Update

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Contract Amount	Authority
	Out of Court	In Court					
Washington	Varies from $33-$60 King County: $33 Pierce County: $50 Spokane County: $40 Whatcom County: $60		Varies. King: $550 Pierce: $5,000 Spokane: $4,000 Whatcom County: none	Varies			Revised Code of Washington Annotated §36.26.090 grants authority to court.
West Virginia	$45	$65	$3,000	Yes			West Virginia Code Ann. §29-21-13a
Wisconsin	$40 plus $25 per hour for travel	$40	None				Wisconsin Statutes Annotated §977.08(4m)
Wyoming	$25-$50		None				Wyoming Rules of Criminal Procedure Rule 44(e)
U.S. Government	$45	$65[14]	$3,500	Yes			18 USC §3006 A (d)

[14]Up to $75 per hour can be authorized for work in and out of court.

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Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial
A State-By-State Overview, 1999

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Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial
A State-By-State Overview

Introduction

Since 1996, The Spangenberg Group has produced a table detailing compensation rates paid to court-appointed counsel who handle death penalty trial cases in the 38 states which permit imposition of the death penalty. The first table was published in July 1996, and the second, along with an accompanying narrative, was produced in April 1998. During the summer of 1999, we again updated the information, in order to provide the most accurate data regarding the rates of compensation, as well as information regarding how representation is provided in capital cases. This report was prepared on behalf of the American Bar Association's Bar Information Program (BIP), as were the two previous reports. The table which accompanies this narrative reflects the information collected during the course of our survey. As we did in the previous report, we have included citations to the authority for the compensation rates and/or maximum fees.

We have also provided information on the primary system each state uses for delivery of indigent defense services for capital trials. "Primary indigent defense system" refers to the way in which the majority of cases - those which do not involve conflicts of interest or public defender overload - are handled. This information reveals that in many states and counties, representation in most capital trial cases is provided by state or local public defender offices (for example, in Colorado, Connecticut, Delaware, Florida and Missouri). In these jurisdictions, the use of court-appointed counsel occurs far less often. When reviewing the accompanying table, it is important to keep in mind that the hourly compensation rate information pertains only to court-appointed counsel, not to public defenders (who are on salary) or contract defenders (who typically negotiate a flat or case by case fee for their services).

In a number of states, accurate data regarding appointed counsel compensation rates in capital trial cases is difficult to obtain. This difficulty is most pronounced in those states in which the judge establishes the compensation rate in accordance with statutory provisions that "reasonable compensation" be paid. In these states, compensation rates often vary significantly

throughout the state. Unfortunately, none of the "reasonable compensation" states maintains centralized records on precise amounts court-appointed counsel are paid. To collect this information, in each "reasonable compensation" state, we interviewed public defenders, court administrators, private counsel and/or others familiar with the jurisdiction's indigent defense system. The numbers reflected in the accompanying table are representative of the information provided to us through these interviews.

The previous update, in 1998, revealed two clear trends, one toward the creation of specialized statewide capital trial units, the other towards increased compensation rates for court-appointed counsel in capital trial cases. Eight states - Connecticut, Georgia, Kansas, Kentucky, Missouri, Nebraska, New York and Oklahoma - along with a number of circuit public defender offices in Florida, have separate units which handle and/or provide support for private counsel handling death penalty cases. Undoubtedly, the availability of a specialized support organization encourages private attorneys to take on capital trial cases.

The trend toward increased rates of compensation also serves to increase the number of qualified attorneys willing to handle capital trial cases. Since our last survey, hourly rates have been increased in four states (Alabama, Colorado, Connecticut and Georgia), and maximum compensation amounts have been eliminated or raised in three states (Alabama, Florida and Ohio). This trend reflects both a growing understanding of the complexities of providing effective representation in capital trial cases and a recognition that improved compensation rates will attract qualified counsel who are willing to take on the demands of a capital case.

It is important to mention that reimbursement vouchers submitted by assigned counsel are sometimes cut by the judges responsible for approving payment. This practice effectively reduces the authorized hourly rate or per-case maximum. The *1992 Interim Report of the Committee to Review the Criminal Justice Act*[1] addressed this practice, pointing out that when a

[1] The report was written by a nine-member committee, appointed by Chief Justice William H. Rehnquist to conduct a comprehensive analysis of the CJA program and to recommend appropriate legislative, administrative and procedural changes to the United States Judicial Conference.

judge approves a fee that is less than the amount sought, counsel may - rightly or wrongly - perceive the reduction as an "admonition, rebuke or retaliation for defense tactics." Judges, however, may sometimes feel justified in cutting vouchers they view as excessive, relying on their own view of "what a case is worth." The Committee addressed this issue by recommending that a local administrator review interim and final vouchers and certify final payments. The Committee's report further recommended implementing a procedure to notify an attorney of the intent to reduce a payment to him or her and the reason for the reduction. In such a system, the attorney would have the opportunity to appeal a decision to reduce a voucher and judges would have the opportunity to comment on the administrator's initial determinations for payment.

Funding and Organizational Schemes for Capital Trial Defense Services

As those familiar with the delivery of indigent defense services know, each state has a unique organizational scheme for delivering and funding the Constitutionally-mandated delivery of indigent defense services. To better understand the information contained in the accompanying table, this section describes how compensation rates are established for court-appointed counsel who provide capital trial defense services, how capital defense services are funded in each state, and how capital trial defense services are delivered in each state.

Establishment of Court-Appointed Counsel Compensation Rates

In just under half of the states which permit imposition of the death penalty, state statutory law grants to the trial court judge the authority to appoint counsel and authorize "compensation," or more commonly, "reasonable compensation," in capital trial cases. In these 16 states, compensation rates typically vary from county to county, and often vary from judge to judge and from case to case. The 16 states are: Arizona, Arkansas, California, Delaware, Florida, Georgia, Idaho, Montana, Nebraska, Ohio, Pennsylvania (except Philadelphia), South Dakota, Texas, Utah, Virginia and Washington. Additionally, in federal death penalty trial cases,

compensation rates are also set by federal judges who follow Criminal Justice Act guidelines regarding payment.

In four states, Alabama, Illinois, Mississippi and South Carolina, state statutory law sets the hourly compensation rate and maximum compensation amount. In Illinois, although state statute sets a maximum hourly rate for counsel, rates vary because local judges still have authority to set the actual compensation.

In nine states, along with Philadelphia, where over half of Pennsylvania's death penalty cases are processed, compensation rates are set by court rule, memorandum or order. These nine states are: Colorado, Indiana, Nevada, New Hampshire, New York, North Carolina, Oregon, Tennessee and Wyoming.

In Connecticut, Kansas, Louisiana and Oklahoma, authority to set compensation rates for private counsel has been delegated to the statewide indigent defense organization. In two states - Maryland and New Jersey - authority to set compensation rates for private counsel has been delegated to the state public defender.

Finally, in three states - Kentucky, Missouri and New Mexico - the state public defender contracts with private counsel to handle all conflict and/or overload capital trial cases, thereby eliminating the use of appointed counsel to handle these cases.

The following table indicates how compensation is determined for court-appointed counsel in capital cases:

Judge	Public Defender sets Hourly Rates	Contract with State Public Defender
Arizona	New Jersey	Kentucky
Arkansas	Maryland	Missouri
California		New Mexico
Delaware	**Statute**	
Florida	Alabama	**Court Rule or Order**
Georgia	Illinois	Colorado
Idaho	Mississippi	Indiana
Montana	South Carolina	Nevada
Nebraska		New Hampshire
Ohio		New York
Pennsylvania (except Philadelphia)	**Commission**	North Carolina
South Dakota	Connecticut	Oregon
Texas	Kansas	Philadelphia, Pennsylvania
Utah	Louisiana	Tennessee
U.S. Government	Oklahoma	Wyoming
Virginia		
Washington		

Funding for Capital Trial Defense Services

The source of funding for a state's indigent defense system is another important factor to consider when reviewing the accompanying chart. Each state's indigent defense system may be funded by state or county funds, or by a combination of these funds. The table below indicates how each of the 38 states funds representation of indigent capital defendants at trial:

State Funded	County Funded	State & County Funded
Arkansas	Alabama	Arizona
Colorado	California	Florida
Connecticut	Idaho	Georgia
Delaware	Illinois	Indiana
Kansas	Mississippi	Kentucky
Maryland	Montana	Louisiana
Missouri	Pennsylvania	Nebraska
New Hampshire	South Carolina	Nevada
New Jersey	South Dakota	Ohio
New Mexico	Texas	Oklahoma
New York	Utah	
North Carolina	Washington	
Oregon		
Tennessee		
Virginia		
Wyoming		

Overview: State-by-State Delivery of Capital Trial Defense Services

The provision of indigent defense services in **Alabama** varies from county to county. While three of the state's 67 counties operate public defender offices, the rest rely upon either appointed counsel or contract attorneys. Funding for indigent defense in Alabama comes from the fair trial tax fund, which is designed to reimburse counties for capital expenditures. If revenues from the fair trial tax fund are insufficient to cover the counties' costs, the state provides funds to cover the deficit. During the 1999 legislative session, Alabama's lawmakers raised the compensation rates for court-appointed counsel to $30 per hour for out-of-court work and $50

per hour for in-court work. These rates went into effect June 10, 1999, after the Governor took no action on the legislation. On October 1, 2000, a second round of increases will be implemented, raising in-court payment to $60 per hour and out-of court payment to $40 per hour. The law also eliminated a per case maximum in capital offense and life without parole cases.

For capital trial cases, all indigent defense representation in **Arizona** is funded by the counties. Each county organizes the delivery of services as it chooses, so the state has a mix of county public defenders, contract attorneys and assigned counsel.

In **Arkansas**, capital trial cases are handled by part-time county public defenders assisted by the Arkansas Public Defender Commission's Capital, Conflicts and Appellate Office, which also handles conflicts. According to §16-87-203 of the Arkansas Code, the Arkansas Public Defender Commission is to maintain two lists of private attorneys who are qualified and willing to be appointed to capital cases - one for lead counsel and one for assistant counsel. The Commission, which must update its lists annually, sends its lists of qualified attorneys to judges. While most judges appoint off the lists, a few do not. The Commission has adopted standards which contain eligibility requirements and specify that two qualified attorneys must be assigned to represent defendants in all cases where the death penalty is sought. On January 1, 1998, the state assumed responsibility for most indigent defense expenditures in Arkansas. Compensation rates are established by the trial court judge, and vary accordingly. Attorneys are generally paid by the hour rather than by flat fees; total payments range from $20,000 to $50,000.

In **California**, trial counsel in capital cases is provided and funded on a county-by-county basis, usually by a county public defender. Appointed counsel compensation rates vary from county to county.

The state-funded **Colorado** State Public Defender provides representation in capital cases in Colorado. Appointed counsel are assigned conflict cases by the Alternate Defense Counsel, which maintains a list of eligible attorneys. As of July 1, 1999, hourly compensation rates for trial counsel in death penalty cases are set at $65 per hour, in and out of court, with statutory caps

of $5,000 if there is no trial and $10,000 if there is a trial. These caps are routinely waived.

The **Connecticut** Division of Public Defender Services and Special Public Defenders (SPDs) - private attorneys who contract with the public defender to handle conflict and overload cases - provide representation in almost all death penalty cases in Connecticut. The Division of Public Defender Services has a specialized death penalty unit. Effective July 1, 1999, pursuant to §51-291 (12) C.G.S., Special Public Defenders in Connecticut receive $60 per hour with no per case maximum for their work on capital cases.

The Office of the Public Defender of the State of **Delaware** represents capital defendants at trial and on direct appeal. Conflict cases are primarily handled by a pool of private attorneys who contract with the state to handle conflict cases. The average annual flat-fee contracts are for $42,000 (per attorney), not including work on capital and non-capital murder cases. If contractors are assigned to handle a capital case, their first 50 hours of work are waived as work under contract and they are paid $60 per hour for each hour afterward. The contract program is administered by a circuit court judge, who selects the contract attorneys.

Each of **Florida's** 20 circuit public defender offices handles capital trials; many offices have capital trial divisions. Conflict cases are handled by court-appointed counsel, and the rates vary from judge to judge and circuit to circuit. In Dade County (Miami), the current compensation for court-appointed counsel in capital cases is set at $80 per hour with a $10,000 waivable per case maximum. By statute, the state is responsible for public defender salaries and "the necessary expenses of office," and the counties pay for office overhead expenses and court-appointed counsel costs. While state funds are distributed to the circuit public defender offices based on a funding formula designed to fairly distribute the monies, some counties make more funding available for indigent defense than others.

In **Georgia**, funding for indigent defense representation in capital trial cases comes from the counties, with limited state assistance from two state-funded organizations: the Georgia Indigent Defense Counsel (GIDC) and the Office of the Multi-County Public Defender. Most

capital trial cases are handled by county public defenders or appointed counsel. The Georgia Indigent Defense Commission recommends that counties pay rates of $45 per hour out of court and $60 per hour in court to counsel handling felony cases, and disallows the setting of a per-case maximum in capital felonies. As of March 4, 1999, through a Georgia Supreme Court order, the 141 of Georgia's 159 counties which meet the standards and guidelines set out by GIDC must adhere to these rates. In a subsequent revision to this order, the Georgia Supreme Court in November 1999 declared that counties adhering to GIDC guidelines must compensate attorneys in capital cases at a higher rate than the non-capital $45/$60 payments. GIDC receives an annual state appropriation to distribute among counties that meet its standards. The Office of the Multi-County Public Defender provides support for private counsel in many trial capital cases. Additionally, the Office is typically directly involved in 10-12 trials and 2-3 direct appeal cases at any one time and often serves as co-counsel.

Indigent defense services are funded and provided on a county-by-county basis in **Idaho**. Compensation for counsel appointed in capital trial cases ranges from $40 per hour to $100 per hour, depending on the county.

The majority of **Illinois'** 102 counties have county-funded public defender offices (by statute, counties with populations of 35,000 or more are required to have a public defender); the balance use either contract defenders or assigned counsel. In conflict cases, the circuit court judge appoints counsel and sets the compensation rate. During the 1999 legislative session, Illinois legislators approved a bill declaring that private attorneys representing an indigent client charged with a capital offense will be reimbursed at a rate not to exceed $125 per hour with no cap. In addition, the legislature created a Capital Litigation Trust Fund to assist counties in the prosecution and defense of capital cases.

Rule 24 of the **Indiana** Supreme Court Rules of Criminal Procedure governs trial capital cases for those counties which elect to comply with the rule. In exchange for compliance, the state, through the Indiana Public Defender Commission, reimburses the counties for 50% of the

cost of representation. Under Rule 24, two attorneys who meet the qualification standards set forth in the rule must be appointed to capital trial cases. The Indiana Public Defender Commission maintains a list of Rule 24-qualified attorneys. Recent death penalty training is required, as is periodic training. Under Rule 24, counsel are paid $70 per hour, in or out of court, with no per case maximum. Rule 24 also requires counties to adopt a legal representation plan and sets caseload limits for public defenders who handle capital cases.

Kansas' death penalty statute went into effect on July 1, 1994. The state-funded Kansas Board of Indigents Defense Services (BIDS) Death Penalty Defense Unit handles most capital trial cases, while conflict and overload cases are handle by panel attorneys. Counsel negotiate with BIDS for their fee at trial. BIDS reports that recent fees have all been $100 per hour, with no cap.

The state-funded **Kentucky** Department of Public Advocacy (DPA) has a capital trial unit with six attorneys. In addition to handling cases, the unit responds, on an informal basis, to inquiries from contract counsel who also handle capital cases. Judges appoint either the DPA office or local contract counsel in the area. Attorneys receive $12,500 per case at $50 per hour, plus expenses.

In **Louisiana,** most capital trial cases are handled by parish public defenders or contract counsel. While Louisiana's parishes cover the majority of costs associated with indigent defense, the state also contributes some funds through the Louisiana Indigent Defender Board (LIDB), including funds for experts and investigators. The LIDB also oversees selection and compensation of counsel in conflict and overload situations. Chapter 7 of the LIDB Standards addresses trial and direct appeal representation in capital cases in Louisiana, specifying that investigative, expert and other support services are to be made available, and requiring initial and ongoing training. Per LIDB standards, compensation for trial counsel is set at $57.65 per hour, up to a total of $78,000 per case for two attorneys. This total includes $5,000 intended for investigative fees. Finally, the LIDB contracts with a number of private attorneys to provide

back-up and consultation to attorneys handling capital cases.

The state-funded Office of the Public Defender in **Maryland,** which handles most capital trial cases, also acts as a support organization for assigned counsel. Compensation for assigned counsel in capital trial cases is set by the Office of the Public Defender at $30 per hour for work out of court and $35 per hour in court, with a $12,500 cap.

In **Mississippi,** which has a county-funded indigent defense system, county public defenders or court-appointed counsel are appointed by the court in capital trial cases. Compensation rates vary from county to county, but by statute (as interpreted in *Wilson v. State*, 574 So.2d 1338 (1990)), total compensation for trial work cannot exceed $1,000 plus overhead expenses, which are set at a presumptive rate of $25 per hour.

The **Missouri** State Public Defender System provides primary representation in all phases of capital cases and contracts with attorneys to handle conflict and overload cases. The Missouri State Public Defender has three separate divisions throughout the state which handle most capital cases, including first and second conflicts. If one division has a conflict, the case is sent to one of the other two offices. If the division has a conflict with two defendants, each case is sent to one of the other two offices. For other conflict and overload capital trial cases, the State Public Defender enters into contracts with private counsel. These flat-fee contracts range from $10,000 to $13,000 for lead counsel and $5,000 to $8,000 for co-counsel, excluding expenses. Court-appointed counsel are not used in Missouri.

In **Montana,** county public defenders, contract defenders and appointed counsel (funded by the counties, but reimbursed by the state) provide representation in capital trials. In conflict and overload cases, the court-appointed compensation rate varies from county to county.

Each of **Nebraska's** 93 counties organizes and provides most of the funding for its own indigent defense system. Some counties have public defender offices; the majority use appointed counsel or contract attorneys. In 1995, the Nebraska legislature created and funded the Nebraska Commission on Public Advocacy, which provides legal services and resources to assist counties

in providing effective assistance to indigent persons through its capital litigation, appellate and felony case divisions. Four Commission attorneys, two support staff and one investigator work on capital trial and direct appeal cases. For the most part, the Commission handles cases which are outside of Omaha and Lincoln where there is no public defender. The Commission is structured to help those small rural counties that would have difficulty financing the defense in a capital case. Except for those cases handled by the Commission, which receives a state general fund appropriation and federal grant money, all funding for capital case representation comes from the counties. Local judges have the authority to establish compensation rates for court-appointed counsel in capital cases and the rates vary, ranging from $40 per hour to $100 per hour.

Clark County (Las Vegas) and Washoe County (Reno), **Nevada's** two largest counties, fund their own indigent defense systems and each has a public defender program. Nevada's remaining counties may choose to participate in the state/county funded state public defender system, or opt to fund their own services to provide representation to indigent defendants. Nevada Supreme Court Rule 250 was promulgated "[t]o assure that capital defendants receive fair and impartial trials, post-conviction relief proceedings, and appellate review within the courts of the State of Nevada." For each stage of the proceedings, compensation for appointed counsel is set by statute at $75 per hour, in or out of court, with a $7,500 cap that is routinely waived.

In **New Hampshire**, the state-funded Public Defender handles capital trial cases. While the state has a death penalty law on the books it is rarely used; in the past 13 years, there has only been one death penalty trial in New Hampshire. If appointed counsel were necessary because of conflict or overload, New Hampshire Supreme Court Rule 47 establishes an hourly compensation rate of $60 per hour, in or out of court, up to a waivable $15,000.

The state-funded **New Jersey** Office of the Public Defender, which handles capital cases at all stages of the proceedings, also provides some support for conflict appointed counsel.

Compensation for assigned counsel at trial is $50 per hour, in or out of court.

The state-funded **New Mexico** Public Defender Department provides primary representation in capital cases in the state. Approximately half of the state's counties (the more populous ones) are served by one of the Public Defender Department's regional offices; private attorneys who contract with the Public Defender Department represent indigent defendants in the remaining counties. In conflict cases, contract counsel who are selected by the Public Defender Department receive the flat fee of $12,500 at trial.

New York's death penalty law went into effect on September 1, 1995. Unlike other (county-funded) indigent defense services in New York, all attorneys fees and expenses associated with the defense of indigent defendants accused or convicted of capital crimes in New York are funded by the state. The Capital Defender Office (CDO) was created by statute to provide representation and to support and assist at all stages of capital litigation. The CDO has contracted with attorneys and other indigent defense organizations (e.g., the New York Legal Aid Society Capital Defense Unit) for representation in capital cases. At trial, by statute, two attorneys must be appointed to represent an indigent defendant charged first degree murder or second degree murder, where the district attorney confirms upon inquiry by the court that the district attorney is undertaking an investigation to determine whether the defendant can or should be charged with murder in the first degree *and* the court finds that there is a reasonable likelihood that the defendant will be so charged. By statute, a screening panel has been established in each of the five judicial departments in the state. The screening panels recommend to the Court of Appeals a schedule of fees to be paid to counsel appointed to capital cases. The Court of Appeals approved the recommended compensation rate for trial counsel at $175 per hour for lead counsel and $150 per hour for co-counsel, with no cap.

However, in December 1998, the Court reduced these rates, simultaneously altering the rate structure so that the payment varies depending on whether the work was done before or after the prosecution announced its intent to seek the death penalty. Lead attorneys in capital cases are

now to be reimbursed at a rate of $125 per hour for their work after the prosecution has given notice of intent to seek the death penalty, and $100 per hour for their work before notice is given. Associate counsel receive $100 per hour after notice, and $75 per hour before notice.

In **North Carolina**, the state pays for indigent defense expenditures and local public defenders or appointed counsel handle capital trial cases. The North Carolina Administrative Office of the Courts has recommended that counsel be paid $85 per hour, with no cap. However, trial judges actually set the rate.

Ohio's indigent defense system is funded through a combination of county and state monies; capital cases are handled by county public defenders or appointed counsel. Ohio's Supreme Court Rule 65, which governs which attorneys are certified as eligible to take capital case appointments, is mandatory in all courts in Ohio. Rule 65 calls for appointment of two attorneys at all levels and requires the Rule 65 Committee to develop the rosters of certified attorneys and to send them to judges. While hourly compensation rates are determined and paid county-by-county, the Ohio Public Defender Commission establishes the level of maximum compensation, which currently is $20,000. The Commission also reimburses counties for up to 50% of their expenditure on attorneys' compensation, but the rate of reimbursement fluctuates each year, depending on the Commission's budget. Generally, it is between 40% and 50% of the amount paid by the county.

In **Oklahoma's** two largest counties, Tulsa and Oklahoma (Oklahoma City), the counties fund indigent defense services at the trial and direct appeal levels. Both counties have full-time public defender offices. The state provides funds for the Oklahoma Indigent Defense System (OIDS), which oversees the delivery of legal services throughout the rest of the state. OIDS has separate capital trial, capital direct appeal, non-capital direct appeal and capital state post-conviction divisions. For cases with which OIDS attorneys have a conflict of interest, appointed attorneys are paid hourly rates of $60 per hour out of court and $80 per hour in court for lead counsel, and $50 per hour out of court and $70 per hour in court for co-counsel. Lead attorneys

receive up to $20,000, and co-counsel fees are capped at $5,000.

In **Oregon**, the state provides all funding for indigent defense services. Most capital trial cases are handled by attorneys working under contract with the Indigent Defense Services Division of the State Court Administrator's Office. These contracts range from approximately $140,000 to $169,000 per year per full-time employee, and include 1800 to 1850 hours of representation. For those cases not handled by contract counsel, compensation for appointed counsel is set by the Indigent Defense Services Division of the State Court Administrator's Office at $55 per hour for lead counsel and $40 per hour for co-counsel, with no cap. Occasionally, as a result of a petition by co-counsel, the rate of $50 or $55 per hour has been authorized for co-counsel in a capital case.

Each of **Pennsylvania's** 67 counties organizes and funds its own indigent defense delivery system. No state funds are available for indigent defense representation in Pennsylvania. In Philadelphia, as of spring 1997, a "Modified Guaranteed Fee System" was introduced to replace its hourly fee system. Under the new system, compensation paid to court-appointed counsel is calculated on a per diem basis. For example, court-appointments in cases that require one trial day lasting more than three hours will be compensated on a per diem basis which includes a preparation fee of $1,700 and $200 for the in-court time that lasts more than three hours. Attorneys working on cases lasting more than one day receive $1,900 for the first day of trial ($1,700 preparation fee plus $200 for more than three hours in-court time), and an additional per diem of $200 for each half-day (three hours or less) and $400 for each full day (three hours or more).

In **South Carolina**, capital trial cases are handled by county public defenders, contract counsel or South Carolina Supreme Court-certified appointed counsel. County and state monies fund the state's indigent defense system. By statute, trial counsel are paid at least $50 per hour out of court and $75 per hour in court, with a waivable $25,000 cap. However, judges often raise the compensation rates to $90-$110.

Each of **South Dakota's** 67 counties organizes and funds its own indigent defense delivery system for capital trial, direct appeal and state post-conviction representation. It is reported to us that assigned counsel is paid $55 per hour, in or out of court, with no cap, for every stage of the proceedings.

In **Tennessee**, with the exception of Shelby County (Nashville) and Davidson County (Memphis), which have their own respective county public defender offices funded through a combination of state and local monies, the state funds indigent defense and each judicial district has an independent public defender office. In early April 1997 the Tennessee Supreme Court amended Rule 13 of the Rules of the Supreme Court of Tennessee. The revised rule covers compensation, qualification and appointment of counsel in death penalty cases. Under Rule 13, lead counsel are paid $75 per hour out of court and $100 per hour in court, while co-counsel receive $60/$80 per hour. There is no cap on fees.

Each of **Texas'** 254 counties organizes and funds its own indigent defense delivery system for capital trial representation. No state funds are available. While a few counties have public defender programs, the majority rely upon assigned counsel or contract defenders. Compensation rates, which are established by district court judges, vary from county to county. For example, in Smith County (Tyler, TX), two attorneys will be appointed to a capital cases. Lead counsel will receive $100 per hour, up to a cap of $45,000. Co-counsel will be paid $50 per hour, up to a cap of $22,500. In Dallas County, on the other hand, a fee schedule has been instituted. As of February 4, 1999, pursuant to Art. 26.05 C.C.P., the fee schedule is as follows:

Activity	Minimum-Maximum Rates
Court Appearance	$100-$300
Motion Hearing	$350-$1,000
Voir Dire	$350-$1,000
Trial	$350-$1,500

Hourly rates for all activities range from $40 to $250. Each judge may set a fee within

the minimum and maximum rate listed above.

In **Utah**, all indigent defense costs relating to capital trial representation are absorbed by the counties. County public defender or contract counsel handle capital trial cases. Utah Supreme Court Rule of Criminal Procedure 8 addresses appointment of counsel in capital cases, requiring that two or more attorneys must be appointed for capital trials. We noted in our 1998 report that contract public defenders in Salt Lake County are paid a total of $80,000 for work on capital cases, and could ask the county commissioners for reimbursement of extraordinary costs. This practice has now spread throughout the state, and twenty of Utah's 29 counties now participate in a capital defense risk pool. Those counties which contribute money to the pool can draw from the pool to reimburse attorneys in capital cases, for up to $80,000 for two attorneys per case.

In **Virginia**, where the state funds indigent defense, capital trial cases are handled either by attorneys from 19 regional public defender offices (serving about one-third of the state) or appointed counsel, who handle conflicts from the public defender offices, and all cases filed in the rest of the state. In capital cases, the Virginia Supreme Court recommends that circuit court judges, who set the compensation rate, pay $40 per hour out of court and $60 per hour in court. However, some judges, particularly those in Northern Virginia, establish higher rates. There is no cap on attorneys' fees.

Indigent defense services in **Washington** are funded and organized on the county level for trial representation. Per statute, the trial court awards "reasonable compensation," which varies from county to county, ranging from $60 to $125 per hour, with no cap.

By practice, the **Wyoming** State Public Defender, which handles capital trial and direct appeal cases, assigns two attorneys to both capital trials and direct appeals. Rule 44 of the Wyoming Rules of Criminal Procedure set appointed counsel rates at no less than $25 per hour and no more than $50 per hour. There is no per case maximum.

At trial, federal capital defendants are represented by either **Federal** Public Defenders or CJA panel attorneys. By 18 U.S.C.§ 3005, two attorneys must be appointed to federal death penalty trial cases. Twenty-one U.S.C. § 848(q)(10)(A) addresses compensation of counsel, providing that the rate of compensation shall not exceed $125 per hour, in or out of court. There is no cap on fees. The AOC Guidelines allow for interim payments.

Conclusion

Guideline 10.1(A) of the *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) provides:

> Capital counsel should be compensated for actual time and services performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation.

Increasingly, the state supreme courts, commissions, judges and legislatures charged with setting assigned counsel compensation rates in capital trial cases are following this guideline. For example, in April 1997, the Tennessee Supreme Court issued amended Rule 13 of the Rules of the Supreme Court of Tennessee, which addresses appointment, qualifications and compensation of counsel for indigent defendants in capital and non-capital cases. In capital trial cases, the amended rule requires appointment of two attorneys, establishes qualification standards, and provides that lead counsel will be paid $100 per hour in court and $75 per hour out of court, while co-counsel will be paid $80 per hour in court and $60 per hour out of court. In fact, since our previous surveys, a number of states have increased appointed counsel compensation rates in capital trial cases; these improved compensation rates reflect the highly complex work associated with capital trial representation and help assure that indigent defendants charged with capital crimes are provided effective representation of counsel.

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Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, 1999

State	Primary Indigent Defense System for Capital Trial Representation*	Hourly Rate		Per Case Maximum	Authority
		Out-of-Court	In-Court		
Alabama	Contract Counsel, Assigned Counsel & County Public Defender (in three counties)	$30 [1]	$50	None	Alabama Code §15-12-21(d)
Arizona	County Public Defender, Contract Counsel & Assigned Counsel	Varies from county to county, ranging from $45-$100		Varies from county to county. In Maricopa County (Phoenix), attorneys are paid a flat fee of $10,000 per capital case, and an additional $10,000 if the case goes to trial.	Ariz. Rev. Stat. Ann. §13-4013(a) and Az. R. Crim. P. 6.7(b) both require that the trial court judge award "reasonable compensation."
Arkansas	Part-time County Public Defender, assisted by Arkansas Public Defender Commission's Capital, Conflicts and Appellate Office.	Varies from judge to judge, ranging from $80-$100		None. Total payments generally range from $20,000 to $50,000.	Arkansas Code Annotated §16-87-209(f) grants authority to local judge to set "reasonable fees," while §16-87-2121 authorizes the Public Defender Commission to pay appointed counsel fees.
California	County Public Defender, Contract Counsel & Assigned Counsel	Varies from county to county, ranging from $50-$150+		None. In Los Angeles, total payments generally range from $60,000 to $200,000 per attorney.	California Penal Code §987.2(a) provides that assigned counsel "shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court."

* "Primary Indigent Defense System" refers to the way in which non-conflict, non-overload cases are handled.
N/A = Not Applicable.

[1] As of October 1, 2000, in-court payment will be increased to $60 per hour and out-of-court work will be reimbursed at a rate of $40 per hour

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Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, 1999

State	Primary Indigent Defense System for Capital Trial Representation*	Hourly Rate		Per Case Maximum	Authority
		Out-of-Court	In-Court		
Colorado	State Public Defender	$65		$5,000 if no trial; $10,000 if trial. However, these caps are routinely waived.	Co. Rev. Stat. §21-1-105 provides that assigned counsel "shall be awarded reasonable compensation and reimbursement for expenses necessarily incurred," while the Colorado Supreme Court sets the hourly compensation rates.
Connecticut	State Division of Public Defender Services**	$60		None	Pursuant to C.G.S. §51-293, established in accordance with C.G.S. §51-291(12), appointed counsel rates are set by the State Public Defender and approved by the Public Defender Commission.
Delaware	Office of the Public Defender of the State of Delaware	Under contract terms, contractors assigned to capital cases are paid $60 after waiving their first 50 hours.		None	Delaware Code Annotated 29§4605 specifies "the attorney shall be awarded reasonable compensation and expenses necessarily incurred..."

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N/A = Not Applicable. ** = Specialized death penalty trial unit.

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Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, 1999

State	Primary Indigent Defense System for Capital Trial Representation*	Hourly Rate		Per Case Maximum	Authority
		Out-of-Court	In-Court		
Florida	Circuit Public Defender	Varies from Circuit to Circuit, ranging from $40-$100. Dade County: $80		Varies by county. In Dade county: $10, 000 and it is waivable.	While Florida Statutes §925.036(d) establishes a $3,500 cap for compensation to counsel in capital trial cases, the cap was held unconstitutional by the Florida Supreme Court in *White v. County Board of Commissioners* 537 So.2d 1367 (Fl. 1989).
Georgia	County Public Defender & Assigned Counsel assisted by Georgia Multi-County Public Defender**	$45[2]	$60[3]	None	Georgia Code Annotated §17-12-5(a) requires the Superior Court to prescribe compensation and approve expenses necessarily incurred.
Idaho	County Public Defender & Assigned Counsel	Varies from county to county, but generally: $50-$75	$40-$100	None	Idaho Code §19-856 specifies that "the court shall prescribe reasonable compensation for [appointed counsel] and approve the expenses necessarily incurred by him in the defense of the needy person."

* "Primary Indigent Defense System" refers to the way in which non-conflict, non-overload cases are handled.
N/A = Not Applicable. ** = Specialized death penalty unit.

[2] For the 141 of 159 counties participating in the Georgia Indigent Defense Council's grants to counties subsidy program.

[3] Ibid.

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Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, 1999

State	Primary Indigent Defense System for Capital Trial Representation*	Hourly Rate		Per Case Maximum	Authority
		Out-of-Court	In-Court		
Illinois	County Public Defender, Contract Counsel & Assigned Counsel	Varies from county to county. In Dupage county: $50-80 depending on Chief Judge. In Cook County (Chicago) by statute:	$30 $40	None	725 ILCS 5/113-3(c) requires payment of a "reasonable fee" to assigned counsel.
Indiana	County Public Defender & Assigned Counsel	Varies from county to county, but $70 for those counties that comply with R.Crim. P. 24	$70	None for those counties that comply with R. Crim. P. 24	Indiana R. Crim. P. 24
Kansas	State Board of Indigents' Defense Services** & Assigned Counsel	$100		None.	K.S.A. 22-4523 and Kansas Board of Indigents' Defense Services Regulation 105-5-2(b) both provide that the Board may enter into contracts with private counsel by negotiation.

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Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, 1999

State	Primary Indigent Defense System for Capital Trial Representation*	Hourly Rate		Per Case Maximum	Authority
		Out-of-Court	In-Court		
Kentucky	State Department of Public Advocacy** & Contract Counsel	$50	$50	$12,500 plus reasonable expenses.	Pursuant to Chapter 31 of the Kentucky Revised Statutes Annotated, the Kentucky Department of Public Advocacy contracts with private counsel to handle conflict capital trial cases at $50 per hour, in- or out-of-court, up to $12,500.
Louisiana	Parish Public Defender & Contract Counsel	$57.65	$57.65	$78,000 for two attorneys (may be waived).	Louisiana Indigent Defender Board Standard 11-2.1, pursuant to Louisiana Supreme Court Rule 31(e)
Maryland	State Office of the Public Defender	$30	$35	$12,500	Annotated Code of Maryland Art.27A §6(d) requires that the State Public Defender establish a fee schedule for court-appointed counsel.
Mississippi	County Public Defender & Assigned Counsel	Varies from county to county.		$1,000 plus overhead expenses per *Wilson v. State*, 574 So.2d 1338 (1990), which are presumptively set at $25 per hour.	Miss. Code Ann. §99-15-17

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Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, 1999

State	Primary Indigent Defense System for Capital Trial Representation*	Hourly Rate	Per Case Maximum	Authority
		Out-of-Court / In-Court		
Missouri	State Public Defender**	N/A	N/A	Pursuant to Chapter 600 of Mo. Rev. Stat., for conflict and overload capital trial cases, the Missouri Public Defender enters into flat-fee contracts with private counsel for $10,000 to $13,000 for lead counsel and $5,000 to $8,000 for co-counsel. Reimbursable expenses are not included in these contract totals.
Montana	County Public Defender, Assigned Counsel & Contract Counsel	Varies from county to county.	None	Montana Code Ann. §46-8-201(1) specifies that the district court judge is to pay assigned counsel "reasonable compensation."
Nebraska	County Public Defender, Contract Counsel, Assigned Counsel or Commission on Public Advocacy**	Varies from judge to judge, ranging from $40-$100 / $40-$100 In Lancaster County: $85	None	Nebraska Code 29-1804.12 requires that the district court judge "fix reasonable expenses and fees."
Nevada	County Public Defender & State Public Defender	$75	$7,500, but routinely waived.	Nev. Rev. Stat. §7.125 grants to the courts the authority to establish rates in excess of those legislatively set, and Nevada Supreme Court Rule 25 establishes the hourly compensation rate and per case maximum in capital cases.

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N/A = Not Applicable. ** = Specialized death penalty unit.

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Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, 1999

State	Primary Indigent Defense System for Capital Trial Representation*	Hourly Rate		Per Case Maximum	Authority
		Out-of-Court	In-Court		
New Hampshire	State Public Defender	$60[4]	$60	$15,000 but may be waived.	N.H. Rev. Stat. §604-A:4 requires that appointed counsel be "reasonably compensated ...and...reimbursed for expenses reasonably incurred," while New Hampshire Supreme Court Rule 47 establishes the hourly and maximum compensation rates.
New Jersey	State Office of the Public Defender	$50	$50	None	The New Jersey Public Defender sets the compensation rate for appointed counsel pursuant to N.J.S.A. §2A: 158A-7(h).

* "Primary Indigent Defense System" refers to the way in which non-conflict, non-overload cases are handled.
N/A = Not Applicable.

[4] Per Supreme Court Rule 47 which establishes the assigned counsel compensation rate in felony cases. Because the death penalty is so infrequently pursued in New Hampshire, there is no established rate for assigned counsel handling capital trial cases.

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Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, 1999

State	Primary Indigent Defense System for Capital Trial Representation*	Hourly Rate		Per Case Maximum	Authority
		Out-of-Court	In-Court		
New Mexico	State Public Defender Department & Contract Counsel	N/A	N/A	N/A	Pursuant to N.M. Stat. Ann. §31-15-7(11), for conflict and overload cases, the New Mexico Public Defender contracts with private attorneys for the flat fee of $12,500 per capital trial case (excluding expenses).
New York	Capital Defender Office**, County Public Defender & Assigned Counsel	Pre notice: Lead Counsel: $100; Co-counsel: $75 Post-notice: Lead Counsel: $125; Co-counsel: $100[5]		None	November 21, 1996 Order of the New York Court of Appeals, pursuant to N.Y. Judiciary Law §35-b(5)(a).
North Carolina	Local Public Defender & Assigned Counsel	$85[6]		None	1994 memorandum from N. Carolina Administrative Office of the Courts to Superior Court Judges, pursuant to Gen. Stat. N.C. §7A-452(d) which requires appointed counsel be paid "reasonable compensation."

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N/A = Not Applicable. ** = Specialized death penalty trial unit.

[5] As of December 1998, rates vary depending on whether work is done before the prosecutor announces his/her intention to seek the death penalty (pre-notice), or if work is done after the prosecutor's decision to seek the death penalty (post-notice).

[6] The Administrative Office of the Courts, which reimburses counties for indigent defense costs in North Carolina, recommends that counsel be paid in all capital cases at $85 per hour, with no cap. However, judges actually set the rates, which are frequently lower than $85 per hour.

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Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, 1999

State	Primary Indigent Defense System for Capital Trial Representation*	Hourly Rate		Per Case Maximum	Authority
		Out-of-Court	In-Court		
Ohio	County Public Defender & Assigned Counsel	Varies from county to county, ranging from: $20-$40 [7]	$30-$50	$20,000 but may be waived.	Ohio State Public Defender is authorized to set the maximum compensation rate per Ohio Revised Code §120.04 and Ohio's 88 county commissions set the hourly compensation rate for their respective counties.
Oklahoma	Oklahoma Indigent Defense System** & County Public Defender	$60 lead counsel; $50 co-counsel [8]	$80 lead counsel; $70 co-counsel [9]	$20,000 for lead counsel; $5,000 for co-counsel.[10]	22 Oklahoma Statutes §1355.4.C.11[11]

* "Primary Indigent Defense System" refers to the way in which non-conflict, non-overload cases are handled.
N/A = Not Applicable. ** = Specialized death penalty unit.

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[7] One county in Ohio uses the fee schedule of $20/hour for out-of-court and $30/hour for in-court work. The rest range from $30-40/hour out-of-court and $40-$50/hour in-court.

[8] In Oklahoma's two largest counties, Tulsa and Oklahoma (Oklahoma City), the counties fund indigent defense services at the trial and direct appeal levels. The state provides funds for the Oklahoma Indigent Defense System (OIDS), which oversees delivery of indigent defense services throughout the rest of the state. OIDS' appointed counsel compensation rate, set by OIDS' Board of Directors pursuant to 22 Oklahoma Statutes §1355.4.C.11, is $60/$80 per hour, out-of-court and in-court, up to $20,000 for lead counsel and $5,000 for co-counsel in capital trial cases.

[9] *Ibid.*

[10] *Ibid.*

[11] *Ibid.*

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Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, 1999

State	Primary Indigent Defense System for Capital Trial Representation*	Hourly Rate		Per Case Maximum	Authority
		Out-of-Court	In-Court		
Oregon	Contract Counsel	Lead Counsel: $55 Co-counsel: $40[12]		None	Or. Rev. Stat. Ann. §151.430(5) specifies that appointed counsel is entitled to compensation, and Oregon Judicial Department Indigent Defense Payment Policies and Procedures 3.1(B) sets the hourly rate.
Pennsylvania	County Public Defender	Varies from county to county. As of Spring 1997, rates in Philadelphia shifted to a per diem basis.		None. In Philadelphia, however, the amount paid to counsel is subjected to judicial review.	16 P.S. §9960.7 requires appointed counsel "be awarded reasonable compensation, and reimbursement for expenses necessarily incurred," to be established by the trial court judge. In Philadelphia, Local Court Rule 406,[13] establishes the hourly and maximum compensation rate.

* "Primary Indigent Defense System" refers to the way in which non-conflict, non-overload cases are handled.
N/A = Not Applicable.

[12] In some cases, co-counsel is authorized to receive $50 or $55 per hour. This can occur after a petition by co-counsel.

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Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, 1999

State	Primary Indigent Defense System for Capital Trial Representation*	Hourly Rate		Per Case Maximum	Authority
		Out of Court	In Court		
South Carolina	County Public Defender	$50 However, the rates are often raised to $90-$110 by the judges.	$75	$25,000, but may be waived.	South Carolina Code §16-3-26
South Dakota	County Public Defender, Contract Counsel & Assigned Counsel	By practice: $55	$55	None	S.D.C.L. §23A-40-8 requires payment of "just and reasonable compensation" by judge.
Tennessee	District Public Defender	Lead counsel: $75 Co-counsel: $60	$100 $80	None	Tenn. Code §40-14-206 provides that rules governing reimbursement of appointed counsel are to be prescribed by the Tennessee Supreme Court and Rule 13 establishes the rates.
Texas	Assigned Counsel, Contract Counsel and County Public Defenders (in a few of Texas' 254 counties)	Varies from county to county.		Varies	Texas Statutes Annotated Art. 26.05(a) specifies that appointed counsel "shall be paid a reasonable attorney's fee" and "shall be reimbursed for reasonable expenses."

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N/A = Not Applicable.

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Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, 1999

State	Primary Indigent Defense System for Capital Trial Representation*	Hourly Rate		Per Case Maximum	Authority
		Out of Court	In Court		
Utah	County Public Defender & Contract Counsel[14]	Varies from county to county.		$80,000 per case for both attorneys in the 20 out of 29 counties that participate in a risk pool.	Utah Code Annotated §77-32-3(3) provides that assigned counsel is entitled to compensation.
Virginia	Local Public Defender or Assigned Counsel	Varies from circuit court judge to circuit court judge, but generally:	$40 $60	None	Code of Virginia §19.2-163(2) provides that appointed counsel is to be awarded "an amount deemed reasonable by the court."
Washington	County Public Defender, Contract Counsel & Assigned Counsel	Varies from county to county, but generally: $60-$125		None	Revised Code of Washington Annotated §36.26.090 specifies that appointed counsel is to be awarded "reasonable compensation."

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N/A = Not Applicable.

[14] Contract public defenders in Salt Lake City are paid a total of $80,000 to split between two attorneys.

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Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, 1999

State	Primary Indigent Defense System for Capital Trial Representation*	Hourly Rate		Per Case Maximum	Authority
		Out of Court	In Court		
Wyoming	State Public Defender	No less than $25 per hour; no more than $50 per hour		None	Wyoming Stat. §7-6-109(b) states that the appointing court may recommend a reasonable rate of compensation and Wyoming Supreme Court Rule 44 sets the compensation rate for non-capital felony cases.
U.S. Government (Federal Death Penalty Prosecutions)	Federal Public Defender, Community Defender Organizations & Criminal Justice Act Panel Attorneys	$125	$125	None	21 U.S.C. §848(q)(10)(A) states that for all federal capital prosecutions commenced on or after April 24, 1996, the presiding judicial officer shall set an hourly compensation rate not to exceed $125 per hour.

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N/A = Not Applicable.

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Analysis of Indigent Defense Expenditures & Caseloads in Comparable State-Funded Systems, FY 1997

State	Population (1993)	EXPENDITURES: Actual	Cost per Capita	Public Defender	Assigned Counsel	CASELOAD: Statewide Cases	Statewide Cost/Case	Public Defenders Cases	Public Defenders Cost/Case	Assigned Counsel Cases	Assigned Counsel Cost/Case	Detailed Statewide Totals: Felony	Misdemeanor	Juvenile	Appeal	Other	Ratios: Felony/Msdr.	Felony/All Cases
CO*[1]	3,565,959	$26,444,260	$7.42	$20,234,109	[illegible]	65,387	$404.43	58,958	$343.20	[illegible]	[illegible]	32,518	15,212	9,766	474	7,417[2]	213.77%	49.73%
CT*	3,277,316	$20,814,611	$6.35	$18,664,611	$2,150,000	86,505	$240.62	76,900	$242.71	9,605	$223.84	70,305		11,830	440	3,930[3]	75.28%[4]	37.42%[5]
IA	2,814,064	$27,855,490	$9.90	$11,456,981	$16,398,509	95,900	$290.46	60,763	$183.31	35,137	$466.70	9,222[6]	34,319	5,597	499	11,126[7]	26.87%[8]	15.18%[9]
MA	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MD*	4,964,898	$36,588,453	$7.37	N/A	N/A	153,340	$238.61	146,590	N/A	6,750	N/A	146,123			820	6,397[12]	N/A	N/A
MN	4,517,416	$41,000,000	$9.08	$40,790,000	$210,000	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MO*	5,233,849	$23,169,886	$4.43	$22,693,975	$475,911	71,172	$325.55	70,843	$315.56	329	$1,446.54	30,140	21,926	3,220	1,398	14,488[19]	137.46%	42.35%
NC*	6,945,180	$51,756,903	$7.45	$19,305,025	$32,451,878	141,488	$365.80	42,910	$449.90	98,578	$329.20	119,148		14,253	134	7,953[20]	28.09%[21]	17.25%[22]
NJ*	7,879,164	$57,295,000	$7.27[23]	$48,295,000	$9,000,000	88,343	$648.55[24]	78,079	$618.54[25]	10,264	$876.85	57,857	–	19,978	2,985	7,523[26]	N/A	65.49%
NM*	1,616,483	$17,956,300	$11.11	$12,215,861	$5,740,439	59,154	$303.55	40,472	$301.83	18,682	$307.27	20,000	29,562	9,137	455	–	67.65%	33.81%
OR*	3,031,867	$53,258,841	$17.57	$53,258,841		135,175	$394.00	N/A	N/A	N/A	N/A	34, 996	40,417	10,027	2,525	47,210[27]	86.59%	25.89%
WI	5,037,928	$56,045,000	$11.12	$39,646,048	$16,398,952	118,555	$472.73	79,471	$498.87	39,084	$419.58	20,104	48,456	32,384	3,013	14,588[28]	41.49%	16.96%
WV	1,820,137	$20,400,000[29]	$11.21	$8,500,000	$11,900,000	62,784	$324.92	35,999	$236.12	26,785	$444.28	12,363	21,446	8,979	898	19,098[30]	57.65%	19.69%

* = Death Penalty States
N/A = Not Available

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October 29, 1997

[illegible] = FY 1996 Data

1. On January 1, 1997, Colorado transferred the budget for conflict of interest cases from the State Public Defender Office to the new Office of Alternative Defense Counsel. Data for the first six months of the alternative provider is currently unavailable. Forecasts based on the first six months of FY 1997 project that the conflict caseload will approximate the FY 1996 caseload. Expenditure and caseload data combine FY 1997 Public Defender information and FY 1996 conflict information.

2. Caseload Detail: Felony Partial Service Cases = 3,885; Misdemeanor Partial Service Cases = 2,271; Juvenile Partial Service Cases = 1,261.

3. Caseload Detail: Violation of Parole = 3,555; Other (Sentence Reviews and Psychiatric Hearings) = 375.

4. No distinction is made between felony and misdemeanor assigned counsel cases in Connecticut. Felony to misdemeanor ratio and felony to total ratio reflect public defender cases only.

5. *Ibid.*

6. Caseload Detail for Iowa's assigned counsel cases are unavailable. Figures shown are public defender caseload detail only.

7. Caseload Detail: Children in Need of Assistance = 4,296; Termination of Parental Rights = 355; Parole Revocation & Mental Commitments = 6,475.

8. Caseload detail for Iowa's assigned counsel cases are unavailable. Felony to misdemeanor ratio and felony to total cases ratio are public defender ratios only.

9. *Ibid.*

10. Massachusetts Committee for Public Counsel Services (CPCS) has a public defender division that has offices in each of the state's 14 counties. The public defenders are primarily responsible for handling felony cases. Since felony cases are generally among the most costly to handle, Massachusetts' public defender cost per case figure is significantly higher then in those states where the public defenders represent indigent defendants in misdemeanor and infraction cases.

11. Caseload Detail: Children in Need of Supervision = 5,247; Child Protection = 7,971; Termination of Parental Rights = 557; Minor Seeking Abortion = 664; Civil Commitment = 3,035; Rogers Cases (Forced Medication) = 1,340; Miscellaneous = 1,634.

12. Caseload Detail: Involuntary Institutionalization = 6,397.

13. Caseload detail for Minnesota's assigned counsel cases are unavailable. Figures shown are public defender caseload detail only.

14. Minnesota has two categories of misdemeanors. "Misdemeanors" have a maximum incarceration penalty of up to 90 days. "Gross Misdemeanors" have a maximum incarceration penalty of up to one year. In FY 1996, Minnesota public defenders handled 84,721 misdemeanor cases and 14,493 gross misdemeanor cases.

15. The figure is an approximation. The Minnesota State Public Defender does not differentiate between juvenile delinquency and dependency cases in its record keeping. A representative from the public defenders reported that approximately 85% of their 36,981 juvenile cases were delinquency cases.

16. Caseload Detail: Parole Revocations = 1,718; Prison Discipline = 2,450; Child in Need of Protective Services = 5,547; Miscellaneous (Extradition & Probation Hearings) = 18,220.

17. Caseload detail for Minnesota's assigned counsel cases are unavailable. Felony to misdemeanor ratio and felony to total cases ratio are public defender ratios only.

18. *Ibid.*

19. Caseload Detail: Parole Revocation & Probation Hearings = 13,445; Juvenile Dependency Cases = 865; Other (Writs & Mental Health) = 178.

Caseload Detail: Adult Involuntary Commitment = 2,055; Ju ile Involuntary Commitment = 823; Guardian ad Litem for J niles = 360; Post-Dispositional A ity (Non-Appellate) = 4,715.

21. No distinction is made between felony and misdemeanor cases for North Carolina's assigned counsel cases. Felony to misdemeanor ratio and felony to total cases ratio are public defender cases only.

22. *Ibid.*

23. The New Jersey State Public Defender is not responsible for handling non-indictable cases. Non-indictable cases include misdemeanors, DWI/DUI cases and traffic violations. These types of cases are among the least costly to handle. Therefore, New Jersey's cost per capita and cost per case figures are significantly higher than in those states where the public defenders represent indigent defendants in misdemeanor and infraction cases.

24. *Ibid.*

25. *Ibid.*

26. Caseload Detail: Child Abuse and Neglect Cases = 7,523.

27. Caseload Detail: Extradition = 955; Probation Violations = 21,332; Contempt = 2,608; Civil Commitment = 1,603; Juvenile Dependency & Review Cases = 19,347; Termination of Parental Rights = 801; Psychiatric Review Board Hearings = 328; Miscellaneous = 236.

28. Caseload Detail: Civil Commitment = 4,931; Paternity Cases = 96; Parole Revocation = 4,243; Special Cases = 5,328.

29. The Executive Director of the West Virginia Public Defense Services (WVPDS) reports that at some point during each fiscal year, WVPDS depletes its resources. When this occurs, private assigned counsel must petition the courts to allow them to receive their compensation during the next fiscal year. Because of rising caseloads, the debt level carried over from year to year has risen steadily. In FY 1995, the WVPDS debt was $1,000,000 at the close of the fiscal year. At the close of FY 1996, it had risen to $3,000,000. This year the debt is approximately $5,000,000. Therefore, although the actual expenditure for FY 1997 was $18,400,000, we have added $2,000,000 to reflect the actual cost of those cases handled in FY 1997. The Executive Director of WVPDS states that the debt cycle is corrected with a legislative funding increase every four years.

30. Caseload Detail: Mental Hygiene = 11,139; Abuse & Neglect Cases = 6,805; Parole Revocation/Probation Hearings = 1,154.

COUNTY CONTRACT FOR COUNSEL TO INDIGENTS

151.010 Public defender services by county. (1) The governing body of a county, on behalf of the county, may contract with an attorney, group of attorneys or full-time not-for-profit public defender organization for the provision by the attorney, group of attorneys or organization of services as counsel for indigents in proceedings in which a court or magistrate has the power to appoint counsel to represent an indigent and the county is required to pay compensation for that representation. If a contract is with an attorney or group of attorneys, each attorney who will provide services under the contract shall satisfy the standards of eligibility established under ORS 151.430 (3)(a). If a contract is with a public defender organization, the organization shall satisfy the standards of eligibility established under ORS 151.430 (3)(b).

(2) A court or magistrate may appoint an attorney who is, or an attorney member of a public defender organization that is, under a contract with a county as provided in this section to represent an indigent in any proceeding in which the court or magistrate has the power to appoint counsel to represent an indigent and the county is required to pay compensation for that representation. [1971 c.432 §1; 1973 c.836 §311; 1985 c.502 §11]

151.020 [1971 c.432 §2; repealed by 1985 c.502 §13]

151.030 [1971 c.432 §3; repealed by 1985 c.502 §13]

151.040 [1971 c.432 §4; 1983 c.740 §22; repealed by 1985 c.502 §13]

151.050 [1971 c.432 §5; repealed by 1985 c.502 §13]

151.060 [1971 c.432 §6; repealed by 1985 c.502 §13]

151.070 [1971 c.432 §7; repealed by 1985 c.502 §13]

151.080 [1971 c.432 §8; repealed by 1985 c.502 §13]

151.090 [1971 c.432 §9; repealed by 1985 c.502 §13]

151.150 [1981 s.s. c.3 §117; 1985 c.502 §9; renumbered 151.460]

STATE PUBLIC DEFENDER

151.210 Definitions for ORS 151.220 to 151.280. As used in ORS 151.220 to 151.280, unless the context requires otherwise:

(1) "Committee" means the Public Defender Committee appointed under ORS 151.270.

(2) "Defender" means the Public Defender appointed under ORS 151.280. [Formerly 138.710]

151.220 Public Defender; term; qualifications; deputies. (1) The Public Defender's term is four years, and the defender may be reappointed. The office of defender becomes vacant upon the conditions prescribed in ORS 236.010, upon the Public Defender Committee's finding of any of the causes enumerated in ORS 241.425 (1) to (3), or upon the defender's failure to comply with subsection (2) of this section.

(2) The defender shall be an active member of the Oregon State Bar.

(3) To qualify for office the individual appointed defender shall file with the Secretary of State a signed oath of office to the effect that the individual will support the Constitution of the United States and the Constitution of Oregon, and that the individual will faithfully and honestly perform in office.

(4) The defender and the deputies of the defender shall be members of the exempt service established by ORS 240.200. One secretary for the defender shall be a member of the unclassified service.

(5) The defender, and any of the deputies of the defender who receive a salary of $10,000 per year or more, shall not engage in the private practice of law.

(6) The defender and the deputies of the defender shall not be employed in any capacity by a district attorney or other public prosecutor. [Formerly 138.740]

151.230 Salary and expenses. (1) The Public Defender shall receive such annual salary as is provided by law. The defender shall receive the minimum salary unless such salary is or has been altered by the Public Defender Committee.

(2) The defender shall be paid by the state in the same manner as other state officers are paid. Such salary shall be the full compensation to the defender for all services, except for the allowance of expense as a state officer. [Formerly 138.750; 1983 c.740 §23]

151.240 Administrative powers of defender. (1) When it is necessary to enable the Public Defender to perform the duties of the defender, the defender may:

(a) Employ deputies with the power and authority of the defender.

(b) Employ other individuals, including expert investigators, witnesses and interpreters.

(c) Contract for the purchase of materials or other services.

(d) Consult with and, in appropriate cases, join in the defense, any attorney who had previously represented the individual in a case which resulted in a conviction under consideration in the proceeding where the defender represents the individual. Any compensation paid such attorney for services rendered under this paragraph shall be paid solely as provided by ORS 138.490.

(e) Make or assist in making any study, survey or report upon the need for, use of and availability of legal aid to indigent per-

sons in the State of Oregon, and accept payment therefor.

(2) Subject to the express approval of the Public Defender Committee, the defender may accept gifts, grants or services from, or contract with nonprofit organizations, educational institutions and other state or federal agencies; in rendering legal aid to persons without means to retain an attorney and in studying, surveying and reporting on the need, use and availability of such aid in the State of Oregon.

(3) Payment for materials and services procured under this section shall be made in the same manner as other state expenses are paid. [Formerly 138.760]

151.250 When defender may render services. (1) In accordance with subsections (2) to (4) of this section and the determinations of the Public Defender Committee under ORS 151.280 (2) or (7), the Public Defender may act as attorney at any stage of a proceeding before any court, including the Supreme Court, for an individual who is committed to the legal and physical custody of the Department of Corrections pursuant to ORS 137.124, and the proceeding is other than:

(a) A habeas corpus proceeding;

(b) A proceeding for which counsel is appointed under ORS 135.045, 135.050, 419B.195, 419B.205, 419C.200, 426.100; or

(c) A proceeding of contempt of court.

(2) The defender may act only at the request of the individual described in subsection (1) of this section, or, if no such request is made, at the request of the court or magistrate.

(3) The individual on whose behalf the defender is requested to act shall submit to the defender, in the form prescribed by the committee, an affidavit of the financial circumstances of the individual unless the trial court in the case already determined the individual to be indigent for purposes of the specific case or the individual appeared in the case through court appointed counsel. If so, the request or individual need only so indicate and provide the defender information necessary to substantiate. However, if the request relies on the trial court's previous determination that the individual is indigent, the trial court, in its discretion, may require the individual to submit a new statement of assets, liabilities and income. When the trial court so requires, the individual shall submit the affidavit in the form required by this subsection.

(4) At the request of the defender or an individual who seeks the defender's aid, the court or magistrate before whom a proceeding is pending or to whom an application for relief has been made, shall finally determine whether the individual is eligible under this section for the defender's aid. [Formerly 138.770; 1973 c.694 §19; 1987 c.320 §84; 1991 c.724 §26; 1993 c.33 §303; 1995 c.117 §3]

151.260 Register of proceedings. The Public Defender shall keep a register in which the defender shall make a note of each proceeding in which the defender serves in an official capacity. The right to custody of the register passes to the defender's successor in office, and the defender shall deliver the register to a successor in office. [Formerly 138.780]

151.270 Public Defender Committee; appointment; expenses; term. (1) The Supreme Court shall appoint a Public Defender Committee of not fewer than five individuals, who, in the opinion of the court, are qualified by training or experience to perform the functions of the committee. A majority of the committee is a quorum for the transaction of business.

(2) Each member is entitled to compensation and expenses as provided in ORS 292.495.

(3) Each member's term is four years and the member may be reappointed. [Formerly 138.720]

151.280 Duties of committee. The Public Defender Committee shall:

(1) Appoint a Public Defender;

(2) Determine policies and procedures for the performance of the defender's functions;

(3) Determine standards of eligibility for the defender and deputies;

(4) Approve the original estimate sheet in connection with the budget for the defender's office and generally be responsible for supervision of the expenditures made for the defender's office;

(5) Prescribe a form of oath of financial circumstances for use under ORS 151.250 (3);

(6) Prescribe a formula of apportionment of expenses; and

(7) Where the defender is unable to perform fully authorized functions, determine the nature and extent of the services the defender shall render. [Formerly 138.730; 1983 c.740 §24]

151.290 Public Defender's Account. There hereby is established in the General Fund of the State Treasury an account to be known as the Public Defender's Account. All moneys received by the Public Defender shall be paid into the State Treasury and credited to the Public Defender's Account. All moneys in the Public Defender's Account hereby are appropriated continuously for and, subject to approval by the Public Defe

Committee, shall be used by the Public Defender in carrying out the purposes of ORS 138.480 to 138.500, 138.590 and 151.210 to 151.290. [Formerly 138.790]

151.410 [1985 c.502 §2; repealed by 1987 c.803 §27]

151.420 [1985 c.502 §3; repealed by 1987 c.803 §27]

STATE INDIGENT DEFENSE PROGRAM

151.430 Duties of State Court Administrator. (1) The State Court Administrator shall conduct a continuing study and evaluation of various methods for the provision of appointed counsel compensated at state expense to represent persons in the state courts.

(2) The State Court Administrator shall develop, evaluate and modify as appropriate for each judicial district a plan for the provision of appointed counsel compensated by the state to represent persons in proceedings in the circuit court in the judicial district and in appeals therefrom. A plan may apply to one judicial district or two or more adjoining judicial districts.

(3) The State Court Administrator shall establish professional qualification standards for:

(a) Appointed counsel compensated at public expense to represent persons in the state courts; and

(b) Full-time not-for-profit public defender organizations whose attorney members serve as appointed counsel compensated at public expense to represent persons in the state courts.

(4) The State Court Administrator shall provide copies of professional qualification standards established under subsection (3) of this section to all judges or other entities who have the power to appoint counsel referred to in subsection (3) of this section.

(5) The State Court Administrator shall establish a schedule of fair compensation payable to appointed counsel compensated by the state to represent persons in the state courts. No compensation set forth in the schedule shall be less than $30 per hour if the compensation is paid on an hourly basis.

(6) The State Court Administrator shall establish policies and procedures including, but not limited to, cost guidelines and standards for the approval and payment of compensation and expenses incurred in the defense of persons whose legal counsel is required to be paid by the State Court Administrator pursuant to ORS 151.450.

(7) Subsections (2), (3) and (5) of this section do not apply to the Public Defender established by ORS 151.280 or deputies of the defender.

(8) The State Court Administrator shall establish standards and procedures for contracting for services of counsel under ORS 151.460.

(9) The State Court Administrator may delegate the administration of services required under ORS 135.055 to court employees and may contract for performance of the services when the administrator determines it is efficient and effective to do so. Any delegation or contract under this subsection must be in accordance with established written policies and procedures. Funds from the State Court Indigent Defense Account may be expended for purposes of contracts entered into under this subsection. [1985 c.502 §5; 1987 c.803 §10; 1995 c.677 §2]

Note: District courts in Oregon abolished January 15, 1998. Pursuant to section 130, chapter 658, Oregon Laws 1995, Legislative Counsel has substituted words designating "circuit courts" for words designating "district courts" or deleted references to "district courts," or both, in 151.430. See notes preceding 1.001 for further explanation.

151.440 [1985 c.502 §6; repealed by 1987 c.803 §27]

151.450 Additional duties and powers of administrator. The State Court Administrator shall:

(1) Pay the compensation for counsel, other than the Public Defender established by ORS 151.280, appointed to represent indigents in the state courts, and other costs and expenses of that representation that are required to be paid by the state under ORS 33.015 to 33.155, 34.355, 135.055, 138.490, 138.500, 138.590, 161.327, 161.365, 161.385, 419A.200, 419B.195, 419B.201, 419B.205, 419B.518, 419C.200, 419C.206, 426.100, 426.135, 426.275, 426.307, 427.265, 427.295, 436.265 or 436.315 or any other provisions of law that expressly provide for payment of such compensation costs or expenses by the State Court Administrator.

(2) Develop a system for conducting financial and performance audits of indigent defense contracts. [1985 c.502 §7; 1987 c.803 §11; 1991 c.724 §27; 1991 c.750 §9; 1993 c.33 §304]

151.460 Authority of administrator to provide counsel to indigents. (1) The State Court Administrator, on behalf of the state, may contract with an attorney, group of attorneys or full-time not-for-profit public defender organization for the provision by the attorney, group of attorneys or organization of services as counsel for indigents in proceedings in which a court or magistrate has the power to appoint counsel to represent an indigent and the state is required to pay compensation for that representation. If a contract is with an attorney or group of attorneys, each attorney who will provide services under the contract shall satisfy the professional qualification standards established under ORS 151.430 (3)(a). If a contract

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CERTIFICATION

I hereby certify that the accompanying summary and detailed statements are true and correct to the best of my knowledge and belief and that the arithmetic accuracy of all numerical information has been verified.

Public Defender	1320 Capitol St NE, Ste 200, Salem OR 97303
Agency Name	*Agency Address*
Shawn S McCrea	Chair, State Public Defender Committee
Signature	*Title*

Notice: Requests of those agencies headed by a board or commission must be approved by those bodies of official action and signed by the board or commission chairperson. The requests of other agencies must be approved and signed by the agency director or administrator.

___ Agency Request _x_ Governor's Recommended ___ Legislatively Adopted Budget Page ___

BUDGET REPORT and MEA[illegible] SUMMARY -- 69th Legislative Assembly

Agency	Budget Page	LFO Analysis Page	Bill Number	Biennium
Public Defender	K-6	307	SB 5515	1997-99

Subcommittee: Public Safety/Regulation

Prepared by: George Naughton, Department of Administrative Services

Senators: Gordly, Hamby, Stull

Reviewed by: Larry Niswender, Legislative Fiscal Office

Representatives: Johnston, Kruse, Oakley, Prozanski, Watt

Chairperson: Senator Jeanette Hamby, Chair

Date: April 18, 1997

BUDGET SUMMARY	1995-97 Estimated Expenditures	1997-99 Governor's Budget Rec.	1997-99 Committee Recommendation	Differences from Governor's Rec.	Percentage Committee Change from Governor's Recommended	Percentage Committee Change from 1995-97 Estimated
General Fund	$ 3,948,686	$ 4,591,285	$ 4,446,896	$ -144,389	-3.1%	+12.6%
Other Funds - Limited	0	1,122	1,122	0	0.0%	0.0%
Total	$ 3,948,686	$ 4,592,407	$ 4,448,018	$ -144,389	-3.1%	+12.6%
POSITION SUMMARY						
Authorized Positions	33	36	36	0.00		
Full-time Equivalent (FTE) Positions	32.01	36.00	34.75	-1.25		

REVENUE DISCUSSION

The Public Defender is funded by an appropriation from the General Fund. It also receives miscellaneous revenues from the periodic sale of surplus property.

SUMMARY OF SUBCOMMITTEE ACTION

The Public Defender provides quality legal representation for indigent defendants who appeal their criminal convictions and sentences. They also represent indigent inmates and parolees who are appealing the decisions of the Board of Parole and Post-Prison Supervision. During the 1995-97 biennium, the Public Defender's workload increased both in number of cases and in the complexity of the issues raised on appeal. The Public Defender anticipates that this workload increase will continue into the 1997-99 biennium.

The Subcommittee approved a 1997-99 General Fund appropriation for the Public Defender of $4,446,896, which represents a 12.6 percent increase over the 1995-97 Legislatively Approved Budget. The Subcommittee reduced the Recommended Budget by $144,389 General Fund and 1.25 full-time equivalent (FTE) positions for a series of technical adjustments that more accurately reflect the Public Defender's budget. The technical adjustments include: A recalculation of the Secretary of State Audits Division charges that reduces Package No. 030 by $313 General Fund; a reduction in Package No. 102 of $117,076 General Fund and 1.25 FTE to reflect phase-in of one permanent Death Penalty/Complex Case Deputy (0.75 FTE), one limited duration Mixed Caseload Deputy (0.50 FTE), and one limited duration Office Specialist (0.50 FTE) based on changes in conviction forecasts for the 1997-99 biennium; and a $27,000 General Fund reduction from savings created by the agency's landlord breaking its lease during the 1995-97 biennium. The Subcommittee anticipates the agency will be able to charge the landlord for moving and hauling expenses, as well as receiving free computer cabling at its new location.

The Subcommittee discussed the fact that during the last two biennia the Public Defender's office has been forced to increase its staffing levels to address ongoing caseload issues. The Subcommittee encouraged the agency to work with the Department of Administrative Services to study whether the increased administrative burden should cause a reclassification of the agency's two administrative positions, the Public Defender and the Chief Deputy Public Defender. If the classification study shows that the positions merit reclassification, the agency may return to the Emergency Board with that request.

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PUBLIC DEFENDER
George Naughton: 378-4587

DESCRIPTION	GENERAL FUND	LOTTERY FUNDS	OTHER FUNDS LIMITED	OTHER FUNDS NONLIMITED	FEDERAL FUNDS LIMITED	FEDERAL FUNDS NONLIMITED	TOTAL ALL FUNDS	POS	FTE
1997-99 GOVERNOR'S BUDGET	4,591,285	$ 0	$ 1,122	$	$	$	$ 4,592,407	36	36.0(
SUBCOMMITTEE ADJUSTMENTS									
Package 030 - Secretary of State Audits Division	(313)						(313)		
Package 102 - Staffing Increases	(117,076)						(117,076)	0	(1 2!
Package 103 - Agency Move	(22,200)						(22,200)		
Package 104 - Technological Support	(4,800)						(4,800)		
TOTAL ADJUSTMENTS	(144,389)	0	0	0	0	0	(144,389)	0	(1.25
SUBCOMMITTEE RECOMMENDATION	4,446,896	$ 0	$ 1,122	$ 0	$ 0	$ 0	$ 4,448,018	36	34.75
% Change from Governor's Budget	(3.10)	–	0.00	–	–	–	(3.10)	0.00	(3.50

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AGENCY SUMMARY

Mission Statement

The State Public Defender is established to file appeals for indigent persons convicted of crimes ranging from Class C Misdemeanors to Aggravated Murder for which the death penalty is imposed. Our goal is to provide the greatest degree of legal expertise and skill possible to meet the needs of each individual client. In addition, the State Public Defender strives to assist the legal community in providing top quality defense at all levels in order to maintain fairness, justice, and due process of law for those accused of crimes and to assist in maintaining the efficiency of the system.

Current Statutory Authority

The Public Defender renders services pursuant to authority created by ORS 138.500, 144.337, and 151.250.

Current Status

The Public Defenders Office operates within a single decision unit incorporating death penalty/complex case, felony, misdemeanor and parole functions.

A. Decision Unit I Programs

1. Death Penalty/Complex Case Appeals
2. Direct Felony Appeals
3. Misdemeanor Appeals
4. Parole Appeals

The State Public Defender's Office currently consists of 23 attorneys (this includes one limited duration position) and 13 support staff (this includes one limited duration position), the breakdown for which is as follows:

Attorneys

1 Public Defender
1 Chief Deputy Public Defender
3 Death Penalty Attorneys
12 Felony Attorneys
6 Misdemeanor and mixed caseload Attorneys (including Parole appeals)

Support Staff

1 Office Assistant 2
1 Office Specialist 1
10 Office Specialist 2's
1 Executive Assistant

Current Workload/Environmental Factors

1. Death Penalty Cases

Our office has obligated itself to accept no more than ten death penalty appeals per biennium. We have three deputy public defenders who are designated as death penalty attorneys. At present, we have nine cases for which

a brief has been filed, and which are at various stages of activity within the system. Additionally, we have six cases for which brief due dates have been established, but for which we have not filed briefs.

Because of the nature and complexity of death penalty cases, we estimate that a death penalty case requires two attorneys (which is in compliance with the American Bar Association and other national standards). In order to properly prepare these cases, it takes these attorneys approximately three months to prepare an appeal brief. Although it rarely takes less time than that, it can often take longer, if the issues are sufficiently complex to require more research and issue development.

The death penalty attorneys have also been assigned cases from our normal felony caseload. In assigning felony cases to the death penalty attorneys, the assumption was that the death penalty would not preclude the attorneys from handling these cases. The previous standard was to assign death penalty attorneys half a felony caseload. This has proven to be wrong and not workable.

As of March 1, 1999, the three death penalty attorneys had a total of 64 pending felony merit cases, and 35 guilty plea/no contest/probation revocation cases. This is an average of 21 merit briefs per attorney, which means that each death penalty attorney has an average of five months' (at four cases per month) of cases, independent of the death penalty appeals. This cannot continue. With six pending death penalty cases, these attorneys have enough cases for the entire coming biennium, even if they had no Court of Appeals' cases at all.

The Court of Appeals caseloads must be removed from the death penalty attorneys, in order for them to complete their death penalty work. This means that our agency must find another way to handle the 64 felony merit cases which are currently assigned to the death penalty attorneys. A solution for this problem has not yet been found. As one of our policy packages, we are requesting that the Legislature authorize funds for the hiring of three additional attorneys, to take these caseloads from the death penalty attorneys. After the current caseload is finished, these attorneys could be assigned cases from the increasing number of appeals, documented hereinafter, that are being referred to this office.

2. Caseload

We have divided our caseload, both felony and misdemeanor, into two separate types of cases. We call these "merit" cases, and "non-merit" or "Balfour" cases. These are defined as follows:

"Merit" Cases -- Cases which are referred to us as appeals from jury trials, trials before the court, or stipulated facts trials, which will involve one or more legitimately arguable issues on appeal. The issues range from pretrial motions to suppress evidence based on alleged constitutional violations, to evidentiary rulings during trial, to sentencing issues, These cases involve reading between 50 and 6,000 (approximately) pages of transcript and they all involve filing an Appellant's Brief in the Court of Appeals which contains assignments of error supported by arguments.

Non-merit or Balfour Cases – A "Balfour" case is based on the Supreme Court decision in State v Balfour, 311 Or App 434, 814 P2d 1069 (1991). In that case, the Supreme Court provided a method by which appellate counsel could analyze a potential appeal, and determine that there are, in fact, no arguable issues on appeal. Because these cases have no merit, there is no necessity to advance a frivolous argument to the Court of Appeals. In these cases, the appellate attorney files a "skeleton" , or Part A brief. This brief does no more than recite the procedural history of the case. No argument is advanced. The inmate is given the opportunity to file a "Part B", which allows the inmate to advance any legal issues he wants, which is then attached to the Part A brief. These cases usually involve less expenditure of time. Most of the guilty plea, no contest, and probation violation appeals fall within this category. Additionally, some of the merit cases, originally thought to have appealable issues, ultimately fall in this category.

The total caseload went up four years ago and remains high. This is true irrespective of the crime rate. There are two primary reasons for this:

- The increase in population in the State of Oregon.
- Ballot Measure 11 Offenses

The caseload is increasing because the population is increasing. The crime rate per 1,000 may be leveling off or going down. However, the population of Oregon increased by 13% between 1990-97 (308,000 people)

(according to the Center for Population Research Census at Portland State University). The raw number of crimes committed (and appeals therefrom) has gone up at approximately a rate of 12.7% from 1993-97. See attached Appendix 1.

A second factor in the caseload increase is Ballot Measure 11. Ballot Measure 11 was the constitutional amendment passed in the 1994 election which set a fixed amount of time for certain felonies. In almost every instance, this had the effect of increasing the sentence on the offender. As a practical matter, this has caused an increase in the number of appeals. Previously, someone who may have gotten a lighter sentence would not appeal, either feeling that the sentence was justified, or having bargained for a sentence which was then imposed by the court. Now, such sentences are not available, and nearly everybody who receives a Ballot Measure 11 sentence appeals. This has contributed to the ten percent rise in appeals per year.

Caseload Numbers (All)

The following are the numbers of cases taken in by month from July 1, 1997 to January 31, 1999.

July '97	221
Aug '97	256
Sept '97	173
Oct '97	182
Nov '97	142
Dec '97	200
Jan '98	187
Feb '98	173

March '98	177	
April '98	170	
May '98	144	
June '98	149	
July '98	151	
Aug '98	139	
Sept '98	166	
Oct '98	182	
Nov '98	163	
Dec '98	168	
Jan '99	169	
TOTAL	3,312	(for 19 months)

This projects to 4,188 for the 1997-99 biennium.

1997-99 Final Projections

	Cases	Current
Death Penalty	7	- one over for 3 attorneys
Felony Trial	1,542	12 att = 5.4 per att per mo
Felony Non-trial	1,435	12 att = 5.0 per att per mo
Misdemeanor/Parole	1,152	5.5 att = 8.7 per att per mo

Another way of measuring production is briefs filed per month. Beginning July 1, 1997, the breakdown is as follows:

Month	Merit Briefs	Balfour Briefs		
July '97	77	54		
Aug '97	64	62		
Sept '97	64	55		
Oct '97	59	46		
Nov '97	68	75		
Dec '97	22	14		
Jan '98	45	31		
Feb '98	72	48		
March '98	54	53		
April '98	68	52		
May '98	54	57		
June '98	82	82		
July '98	24	45		
Aug '98	46	44		
Sept '98	45	48		
Oct '98	35	38		
Nov '98	54	42		
Dec '98	36	42		
Jan '99	48	64		
TOTALS	1,017	952	GRAND TOTAL	1,969 for 19 months

This works out to 2.89 merit briefs per FTE and 2.70 Balfour briefs per FTE per month (18.5 FTE).

History

In 1963 the legislature established the Office of Public Defender for the purpose of providing representation for inmates in post-conviction relief proceedings. During the same session, ORS 138.500(I) was amended to provide representation by the Public Defender for indigent defendants in direct appeals, if the Public Defender was "able to serve." During the 1973 legislative session, ORS 421.194 and 144.335 were enacted to extend to inmates the right to appeal to the Court of Appeals from adverse decisions of the Disciplinary committee and Parole Board. The Public Defender was statutorily obligated to represent inmates in appeals from Parole Board determinations. The agency voluntarily accepted responsibility for representing inmates in disciplinary appeals.

In July 1985, the Public Defender initiated its Death Penalty Appeal program. Two Deputy Public Defenders were assigned to jointly represent six indigent inmates convicted of aggravated murder and sentenced to death per biennium. Such cases are lengthy and complex. Representation by agency staff continues through proceedings at the United States Supreme Court level.

In July 1987, the agency was directed to establish a pilot program to handle indigent defense claims in areas of post-conviction relief, habeas corpus, and Psychiatric Security Review Board (PSRB) trials and appeals for those inmates incarcerated or residing in state institutions within the borders of Marion County. In addition, a misdemeanor appeal unit was created permitting the Public Defender to represent indigent individuals in appeals of misdemeanor convictions

statewide. The pilot program was funded for a single year, granted funding to continue operations in July 1988, and continued as a fully funded project within the 1989-91 Budget.

In November 1989 the Public Defender ceased its voluntary representation of prison disciplinary sanction appeals, because of an expanding caseload in mandated subject areas. Because of a rise in caseload, the agency was forced to "revert" or turn away direct appeal cases during the 1989-91 biennium, requiring the State Court Administrator's Office (SCAO) to provide representation at state expense for the overflow.

The 1991 legislature focused upon arriving at an appropriate division of responsibility between the SCAO and the State Public Defender. The Public Defender identified its core function as the provision of appellate services in direct criminal appeals and judicial (appellate) review of parole matters. Ultimately, HB 2416 was passed which, as amended, returned habeas corpus, post-conviction relief and PSRB trials and appeals to the SCAO. The Public Defender accepted responsibility for representation in (l) six original death sentence appeals per biennium; (2) all felony trial appeals beyond 204 assigned to the State Court Administrator; (3) all felony and misdemeanor guilty plea, no contest plea and probation violation appeals; (4) up to 318 misdemeanor trial appeals; and (5) all parole appeals.

In 1993, the division of responsibility remained the same, and continued through the 1995-97 biennium. During this period the Public Defender experienced a dramatic increase in both misdemeanor and felony direct trial appeals. The rise was largely attributable to initiatives such as Ballot Measure 11, which had a ripple effect from the trial level up through all

stages of appeal and post-conviction levels. The agency has experienced a significant increase in serious felony trial appeals. As a consequence, the agency received funding for three limited duration employees in January 1996. These positions were assigned to the felony unit, mixed caseload unit, and support staff.

B. Caseloads[1]

Case Type	93-95 Actuals	95-97 Actuals	% Change	97-99 Final Projection
Death Penalty	6	10	66.01%	7
Felony Trial-type	1,290	1,519	17.75%	1,542
Felony non-Trial-type	1,315	1,499	13.99%	1,435
Misdemeanor (Trial and non-Trial-types)/Parole	849	968	14.01%	1,152
TOTALS	3,460	3,996		4,136

[1] For comparative caseload standards, see Appendix 2.

Assumptions Affecting Program

In the absence of legislation reducing appeals, it can be assumed that the volume of appeals referred to this office will continue to increase by approximately ten percent per year. This assumption reflects the same figures from the Oregon Attorney General's Office. The only possible action which could impact the workload of this office is to select a number of cases each month to "revert", or decline to be appointed as appellate counsel based on ORS 151.280. By declining to accept cases, or reverting, we could be in control of our caseload.

The complexity of cases cannot be controlled. Complexity of cases varies from case-to-case, without predictability. Occasionally, a misdemeanor may take longer than a murder case, although the reverse is usually true.

Moreover, the complexity of cases is impacted by the initiative process. Historically, ballot measure initiatives generate new issues which must be litigated on appeal. Our office, more often than not, has served as the "point man" for these cases. We have filed the key challenges to the Death Penalty, Ballot Measure 11, Ballot Measure 40, and Senate Bill 936. This has been the historical trend. Should the voters pass new ballot measures, which raise new issues, it can be assumed our agency will handle any appeals that arise thereunder. Appeals arising in this manner tend to consume a great deal of time. For example, to challenge Ballot Measure 40, a team of five attorneys was assembled, dividing up the

issues amongst them. It could be estimated that the challenge to Ballot Measure 40 consumed approximately 250-300 attorney hours.

It is important to remember that our caseload is not self generated. It is dependent on the number of cases filed by District Attorneys throughout the state. The complexity of appeals referred to this office is dictated by how many cases go to trial, and how many issues are raised during trial or sentencing by trial attorneys.

Proposed Solution

Expansion of the State Public Defender's Office can be controlled by the number of cases accepted by this agency. Regardless of the number of appeals filed, or referred to this office, a fixed quota of cases could be established. That quota could be established on a monthly basis, and we propose a rate of four merit cases (jury trials, before the court trials, respondent's briefs) per FTE attorney per month. We would continue to take all of the guilty plea/no contest plea/probation revocation appeals, because most of these tend to be Balfour cases. Once we have reached our quota of merit cases per month, the rest of the cases would be reverted to the State Court Administrator's Office.

This would insure that the State Public Defender's Office does not continue to ask for a expansion by hiring more attorneys. As the rate of cases taken in would be fixed, so the number of attorneys doing these cases would be fixed. Any variables in the caseload would be handled outside of this agency.

Reorganization of the Office

Because of the increased caseload, and the resulting increase in the number of attorneys and secretaries on staff, it will be necessary to rearrange and reorganize this office to reflect changing needs. A chart of the current office organization, and a chart of the desired reorganization appear at pages 38 and 39 respectively, of this budget request document.

The reorganization would be as follows: there would continue to be a Public Defender and a Chief Deputy Public Defender, as now exist. A new level of administration should be created through the addition of four "team leaders" whose authority would be roughly equivalent to the authority enjoyed by the Chief Deputy Public Defender now. These team leaders would be responsible for the monitoring of caseloads of attorneys on their team, reviewing issues, preparing for oral argument, and critiquing and editing briefs. These attorneys would maintain one-half a normal caseload. The office will need three new felony deputy attorneys because the three death penalty and complex caseload attorneys are currently maintaining a caseload that is roughly equivalent to three-quarters of a normal felony caseload in addition to the death penalty appeals. This cannot continue. The death penalty/complex caseload is too rigorous and difficult to allow these attorneys to maintain any Court of Appeals caseload. Three attorneys are necessary to take over these caseloads

as they currently exist. We are asking for 2 law clerks as an approach to completing a significant portion of the Balfour cases to save attorney time.

We will need one Support Services Supervisor 2 and two Support Services Supervisor 1's. Currently, the executive assistant/office manager has too many duties. That person is required to oversee the preparation and monitoring of the budget, as well as to train secretaries and provide backup services when secretaries are out. In addition, we need two full time secretaries to provide support for the new attorneys, and one clerical person to provide backup for the intake portion of our office.

Primary Goals

We define our primary goals as follows:

A. Continuing to provide the best service that can be obtained for direct misdemeanor, felony and death penalty appeals to assure that the clients of this agency receive the utmost in fairness and due process of the law, and to assure that the system functions smoothly and efficiently.

1. This goal requires that we divide the office as defined above in order to adequately monitor attorney caseloads for quality of work as well as quantity of cases.
2. Because the canons of ethics require attorneys to accept a limited number of cases, we will be required to revert cases to the SCAO for reassignment as defined earlier in this document.

B. Attorneys are required to have 15 hours per year of continuing legal education, including two hours per year of ethics credits. For this reason, we will need to request a sufficient amount of money to send our attorneys to seminars. Because the death penalty involves national issues, it will be necessary to increase the request for travel to allow our attorneys to attend national seminars on death penalty issues, as well as other non-capital seminars.

C. It is necessary for this agency to maintain a high degree of efficiency in the technology and equipment available. Too often in the past this office has fallen behind, requiring the large provision of funds for us to catch up. We request sufficient funds to maintain a high level of technology capability given the high volume of our caseload.

D. Under the heading "community outreach", this agency will assist in the following:

1. The assistance of attorneys at trial level with any issues necessary for them to adequately prepare a case for appeal, including filing or responding to writs of mandamus.
2. The direct assistance of death penalty trial attorneys, by consultation and appearance, to prepare death penalty cases for appeal, post-conviction, and federal habeas corpus.
3. The education of attorneys as to the needs of appellate attorneys to better ensure that appeal issues are properly preserved, to enhance the efficiency of the criminal justice system.

4. Through the use of technology, to provide information to trial attorneys and others by putting data and legal briefs on our web page site.
5. We will need to interact on a more frequent basis with agencies outside this state, to better track issues that are being raised, both in connection with the death penalty, and other criminal justice issues, to keep Oregon current and to protect the individual rights of those accused of crime and to enhance the efficiency of the system.
6. To produce seminars that will allow attorneys in this state and elsewhere the ability to better prepare cases, to enhance the efficient running of the system.

A. Workload and Performance Measures

1. The agency anticipates the following caseloads, based on the number of cases that it will accept each month per attorney, both with and without the requested attorneys in this budget:

   A. Death penalty/complex cases: 10 Death Penalty cases per biennium, with complex cases assigned to these 3 attorneys as each attorney becomes available.

   B. Felony cases: We will accept 48 cases per attorney per year, which is 4 merit/trial cases a month. We will continue to accept 4 guilty plea/probation revocation appeals per attorney per month.

C. Misdemeanor cases: We will accept 8 mixed (misdemeanor or parole appeals) per attorney per month.

1997-99 Budgeted Staffing

The Public Defenders Office was provided funding for staffing to handle the following caseloads (by type):

Case Type	Budgeted Caseload
Death Penalty	10
Felony Trial-type	1,516
Felony non-Trial-type	1,380
Misdemeanor/Parole	858

Proposed 1999-01 Staffing Additions

The current agency workload referral rate is above the 1997-99 budget projection. It is anticipated to continue to increase during the next biennium. The staffing increase is based on the need to relieve the death penalty/complex caseload attorneys of virtually all of their currently existing Court of Appeals' caseloads. Felony deputy caseloads will be reduced to the more realistic rate of 48 trial-type cases per attorney per year. The misdemeanor/parole deputy caseload will increase to eight per month. The caseload totals would be as follows:

CaseType	Accepted Caseload	1999-2001 Projected Caseload	Projected Overflow
Death Penalty	10		
Felony Trial-type	1,248 (4 per mo for 13 FTE att)	1,626	378 cases
Felony non-Trial-type	1,248 (4 per mo for 13 FTE att)	1,404	155 cases
Misdemeanor/Parole	1,152 (8 per mo for 6 FTE att)	1,245	93 cases
TOTAL	3,658	4,275	626

The State Public Defender Committee has adopted caseload standards to assure adequate representation by appellate counsel. The standards by attorney category are:

Mixed Caseload Deputy: 8 cases per month (combination misdemeanor/parole/simple felony)

Felony Deputy: 4 Trial-type cases per month
4 Non-Trial-type cases per month

Death Penalty/Complex: 5 death penalty cases per year (plus complex Court of Appeals cases depending on attorney availability).

Team Leaders: 2 felony trial-type cases per month
2 felony non-trial-type cases per month

The Chief Deputy Public Defender and the Public Defender will not have a caseload, and will accept cases only as assigned by the Public Defender.

M E M O R A N D U M

DATE: September 9, 1998

TO: David E. Groom, Public Defender

CC: Peter Gartlan, Chief Deputy Public Defender

FROM: Jesse Wm. Barton, Deputy Public Defender

SUBJECT: Caseload Analysis

INTRODUCTION & SUMMARY

This caseload analysis ignores death penalty cases. It also ignores the 200 (or more) "drug free zone" cases the office has assigned during the current biennium.

During the 1991 legislative session, the office set caseload standards for individual attorney positions. Those standards exceeded the standards which previously existed. Unfortunately, the office did not observe the new standards. Instead it kept virtually all referred cases. This gradually created a noticeable caseload problem.

From the current biennium and to the next, the office is projected to carry an overload of 38.5, 55, and 294 felony trial, felony non-trial, and misdemeanor/parole cases, respectively. However, the office was shut down effectively for the month of December 1997. That shut down will increase the overload totals to 101.5, 112, and 330, for felony trial, felony non-trial, and misdemeanor/parole cases, respectively.

The projected overload of felony cases--101.5 trial-type and 112 non-trial type--is approximately the caseload standard for one felony deputy for a biennium. The projected overload of 330 misdemeanor/parole cases is approximately the caseload standard for 2.1 misdemeanor deputies for a biennium.

Discussion

Through August 31, 1998—the first 14 months of the current biennium—the following total number of cases were assigned to attorneys:

Cases Assigned Thru 8/31/98

Felony trial-type	761
Felony non-trial-type	734
Misdemeanor/Parole	504[1]

From the first 14 months of case assignment data, total case assignments for the entire biennium can be projected with reasonable accuracy. Assuming the average number of monthly case assignments for the first 14 months will continue for the rest of the biennium, projections would be made by dividing actual assignments by 14/24.[2] That gives the following:

Projected Total Case Assignments, 1997-99

Felony trial-type	1,431
Felony non-trial type	1,258
Misdemeanor/Parole	864

It is critical to recognize however that during the 1995-97 biennium, the office accepted a caseload total which exceeded the caseload standard adopted by the Public Defender Committee and approved by the legislature. The office could not and did not complete those excess cases. They were carried over into the current biennium. Therefore, the office's caseload total for the current biennium will equal the total number of cases assigned plus excess cases carried over from the last biennium.[3]

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[1]The number of misdemeanor cases can be broken down into trial and non-trial type. As will be discussed later, a misdemeanor deputy's caseload is 6.5 cases of all types per month. Consequently, there is no point in distinguishing between misdemeanor case types.

[2]Another way to project biennium totals is by applying an algebraic formula derived from total case assignments in the 1995-97 biennium and total case assignments through August 31, 1996. That method projects totals that are 98-99 percent the same as the monthly-average projection used here.

[3]Excess cases carried over must be distinguished from cases carried over because they were assigned too late in the biennium to be handled during the biennium (e.g., a case assigned on June 30, 1997 realistically could not be handled during the 1995-97 biennium). Excess cases carried over refers to cases that could not be handled during the biennium because they were assigned in excess of caseload standards.

The number of excess cases carried over is the total number of cases actually assigned during the last biennium, minus the total number of cases that should have been assigned under caseload standards and staffing levels. The numbers of cases actually assigned during the last biennium are as follow:

Cases Assigned; 1995-97

Felony trial-type	1,519
Felony non-trial type	1,449
Misdemeanor/Parole	951

The numbers of felony cases that should have been assigned under 1995-97 staffing levels and caseload standards are as follow:

	Monthly Standard			Biennium Totals	
Position[4]	Trial	Non-trial	FTE[5]	Trial	Non-trial
PD	1	2	1	24	48
CDPD	2	2	1	48	48
CCD	2.25	2	2	108	96
FD	4.5	4	11.25	1,215	1,080
TOTALS				1,395	1,272

The office had 4.25 FTE Misdemeanor/Parole Deputies (M/PD) during the 1995-97 biennium. Their monthly caseload is 6.5 cases each. Thus, the office should have assigned the following number of misdemeanor/parole cases:

- 4.25 M/PDs x 6.5 cases/month x 24 months = 663 total cases

[4] "PD" means Public Defender. "CDPD" means Chief Deputy Public Defender. "CCD" means Complex Case Deputy. "FD" means Felony Defender.

[5] "FTE" means full-time equivalency.

The excess caseload carryover, from the last biennium to the current, can be determined by subtracting from the total numbers of cases that were assigned the number of cases that should have been assigned under the caseload standards and staffing levels. The excess carryover totals are as follows:

	Felony Trial	Felony Non-trial	Misdemeanor/ Parole
Assigned	1,519	1,449	951
Standard	1,395	1,272	663
Carryover	124	177	288

Adding these excess carryovers to the projected case assignments for the current biennium yields the following total projected case assignments for the biennium:

Projected Case Assignments + Excess Carryover: 1997-99

Felony trial	1,431 + 124 =	1,555
Felony non-trial	1,258 + 177 =	1,435
Misdemeanor/Parole	864 + 288 =	1,152

The final question addresses the number of cases the office was budgeted to handle given current staffing levels and the caseload standards. The office was budgeted to handle felony cases as follows:

	Monthly Standard			Biennium Totals	
Position	Trial	Non-trial	FTE	Trial	Non-trial
PD	1	2	1	24	48
CDPD	2	2	1	48	48
CCD	2.25	2	2.75	148.5	132
FD	4.5	4	12	1,296	1,152
TOTALS				1,516.5	1,380

The office has 5.5 FTE Misdemeanor/Parole Deputies during this biennium. It thus was budgeted to handle misdemeanor/parole cases as follows:

- 5.5 M/PDs X 6.5 cases/month x 24 months = 858 total cases

From this information, the numbers of excess cases the office will not complete this biennium, and will carry over to next biennium, can be projected. The projected excess carryover equals the numbers of excess cases carried over from last biennium plus the projected numbers of cases assigned this biennium, minus the numbers of cases the office was budgeted to handle this biennium. These projections are as follow:

	Felony Trial	Felony Non-trial	Misdemeanor/ Parole
Assigned + Carryover	1,555	1,435	1,152
Standard	1,516.5	1,380	858
Excess	38.5	55	294

Again, the excess numbers are the numbers of cases the office has committed to handle, but will not handle during the current biennium. Those cases will be carried over into the 1999-2001 biennium, thus continuing the case overload cycle.

Furthermore, it is important to recall that the office was shut down, effectively for the month of December 1997. During that month, case assignments continued. This means attorneys effectively had only 23 months to do 24 months worth of work. It also means that a month's worth of cases budgeted to be done this biennium will not be. They instead will become excess cases and will be carried over to the next biennium. They should be included in the projection of excess cases which will be carried over to the next biennium.

In any one month, during the first six months of the current biennium, the office was budgeted to handle 63, 57, and 36 felony trial, felony non-trial, and misdemeanor/parole cases, respectively. The office thus will carry over that many more cases, for the following totals:

Total Projected Excess Case Carryover to 1999-2001 Biennium

Felony trial	38.5	+ 63	=	101.5
Felony non-trial	55	+ 57	=	112
Misdemeanor/Parole	294	+ 36	=	330

APPENDIX 1

CRIME OCCURENCES 1990-97

YEAR	1990	1993	1997	% 90-97	% 93-97
Crime	394,203	417,830	470,814	19.4 2.77/yr.	12.7 2.18/yr.
Population	2,842,321	3,038,000	3,217,000	13.2	5.9

Source of crime statistics: Oregon State Police, Law Enforcement Data System. Note: The 1993 statistic is low, because the Pendleton Police Department did not submit a report for that year.

Source of population statistics: Center for Population Research & Census, Portland State University. Note: 1990 statistics is the actual census count. The 1993 & 1997 statistics are estimates.

APPENDIX 2

COMPARATIVE CASELOAD STANDARDS

AGENCY	ANNUAL STANDARD
State of Oregon Public Defender	58
Model Standard (ABA and National Legal Aid and Defender Ass'n (NLADA))	25
Indiana Public Defender Council	25
California State Public Defender	25
Washington State	
Nielsen & Broman	36
Washington Appellate Project (WAP)	33
Colorado State Public Defender	25
New York Legal Aid Society's Criminal Appeals Bureau	25

Summary of 1999-2001 Budget

PUBLIC DEFENDER

	TOTALS			FUND TYPE					
	POS	FTE	ALL FUNDS	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonlimited Other	Nonlimited Federal
1997-99 LEGISLATIVELY ADOPTED BUDGET	36	34.75	4,446,871	4,445,749		1,122			
Emergency Board Actions (through 4/98)			144,592	144,592					
1997-99 Legislatively Approved Budget	36	34.75	4,591,463	4,590,341		1,122			
Base Budget Adjustments:									
Net Cost of 1997-99 Position Actions:									
Administrative, Biennialized E-Board, Phase-Out	(2)	(0.75)	65,862	65,862					
Estimated Cost of 1999-2001 Merit Increase			79,875	79,875					
PERS Adjustment			40,542	40,542					
Base Debt Service Adjustment									
Base Nonlimited Adjustment									
Subtotal: 1999-2001 Base Budget	34	34.00	4,777,742	4,776,620		1,122			
Essential Packages:									
Package No. 010									
Vacancy Factor (Increase)/Decrease									
Non-PICS Personal Service Increase/(Decrease)			1,849	1,849					
Subtotal			**1,849**	**1,849**					
Package No. 020									
Phased-In Programs Excl. One-Time Costs									
Phase-Out Programs and One-Time Costs			(98,659)	(98,659)					
Subtotal			**(98,659)**	**(98,659)**					
Package No. 030									
Cost of Goods & Services Increase/(Decrease)			41,488	42,610		(1,122)			
Rent Exception			35,000	35,000					
State Govt Service Charges Increase(Decrease)			14,214	14,214					
Subtotal			90,702	91,824		(1,122)			
Package No. 040									
Mandated Caseload Increase/(Decrease)									
Package No. 050									
Fund Shifts or Revenue Reductions									
Package No. 060									
Technical Adjustments									
Subtotal: 1999-2001 Current Service Level	34	34.00	4,771,634	4,771,634					

please put 2 lim. pos in 1 perm. rollup of salary adj.

____ Agency Request X Governor's Recommend ____ Legislatively Adopted Budget Page 32

Summary of 1999-2001 Budget
Public Defender

	TOTALS			FUND TYPE					
	POS	FTE	ALL FUNDS	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonlimited Other	Nonlimited Federal
CURRENT SERVICE LEVEL - **page 1 subtotal**	34	34.00	4,771,634	4,771,634					
Policy Packages:									
101 - Expansion of Limited Duration Positions	2	2.00	184,211	184,211					
102 - Staff Increases/Reclasses	9	9.00	733,385	733,385					
103 - Salary Parity witb AG's Office	2	1.50	413,000	413,000					
104 - Increased Legal Education Cont			20,000	20,000					
105 -Technology Support			30,000	30,000					
106 - Additional Space			72,000	72,000					
Total 1999-2001 Budget	47	46.50	6,224,230	6,224,230					
Percent Change From 1997-99 Leg. Approved	30.6%	33.8%	35.6%	35.6%	-	-100.0%	-	-	-
Percent Change From Current Service Level	38.2%	36/8%	30.4%	30.4%	-	-	-	-	-

___ Agency Request X Governor's Recommend ___ Legislatively Adopted Budget Page 33

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REDUCTION OPTION – 10 PERCENT REDUCTION

The Governor's recommended budget for our agency is $4,878,772. A 10 percent reduction would be $487,877. We have been asked to submit a budget package that includes a 10 percent reduction. This package reflects that result.

In order to absorb such a reduction, we would have to reduce our staffing levels by two felony deputy positions, one mixed caseload deputy position, and two secretarial positions (as well as eliminate associated services and supplies).

Eliminating two felony and one mixed caseload deputy positions would require us to revert to the State Court Administrator's Office (SCAO), for reassignment to private attorneys theoretically capable of handling appeals, a total of 288 trial-type and 288 non-trial-type cases that we otherwise would be able to manage under the Governor's recommended budget. The 288 non-trial-type cases equate to 60 trial-type cases. (Each 48 non-trial-type cases approximately equal 10 trial-type cases.) Thus, we would have to revert to the SCAO an equivalent of 348 trial-type cases.

It takes an average of 40 hours to complete a trial-type case. The current hourly rate for court-appointed work is $40. Therefore, the cost to the SCAO for these reverted cases would be as follows: 348 trial-type cases x 40 hours per case x $40 per hour = $556,800. We also would anticipate that the appointed attorneys would bill the SCAO an

additional $30,000 for associated expenses. However, if the hourly rate for attorneys fees is raised to $55 per hour, the cost for these cases would be $765,600, plus $30,000 in associated expenses.

These figures do not take into account the administrative problems (which translate directly into hours of work time) for the staff of the Attorney General and Court of Appeals. Most attorneys have no experience with the demands of the appeal process. Past experience with reverting cases has shown that the court system would suffer untold expenses if these cases were sent to the SCAO.

Additionally, there would be existing cases that the three attorney positions would have assigned to them at the time of elimination. Each attorney has approximately 30 cases awaiting briefing, so eliminating three attorney positions would leave 90 cases unassigned. Remaining staff could not absorb these cases, so they would have to be reverted to the SCAO as well. At $40 per hour, the 90 cases would cost the SCAO $144,000 plus $7,800 in associated expenses. At $55 per hour, the cases would cost the SCAO $198,000 plus $7,800 in associated expenses.

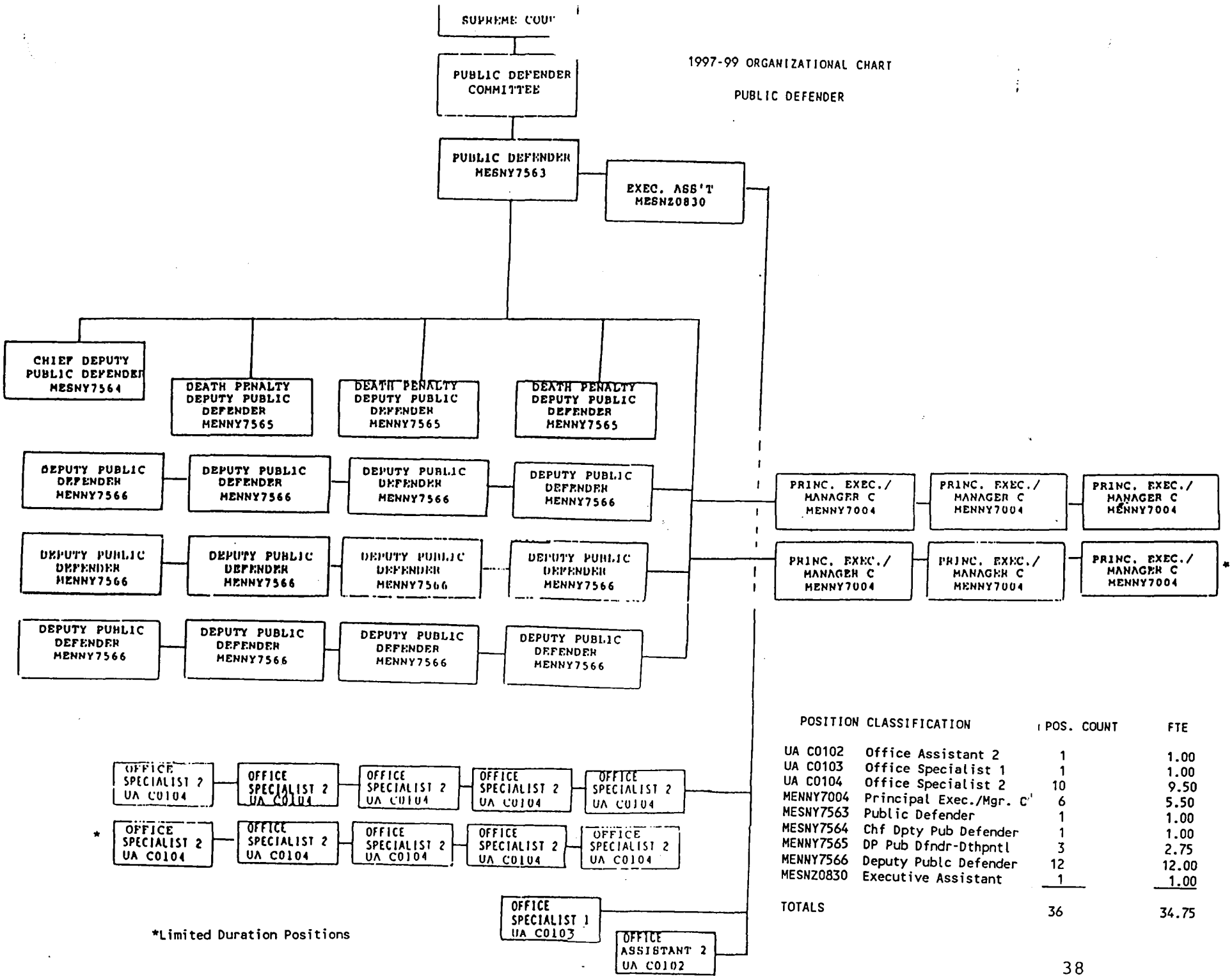
The costs to the state's general fund, via the SCAO, of our reverting the 348 new and 90 existing cases are summarized as follows:

	@ $40/hour	@ $55/hour
348 new cases reverted	$556,800	$765,600
+ expenses	30,000	30,000
90 existing cases reverted	144,000	198,000
+ expenses	7,800	7,800
TOTALS	$738,600	$1,001,400

Factoring in the $487,877 the 10 percent cut would save from our budget, the 10 percent cut would cost the state's general fund, via the SCAO, $250,723 using the $40 hourly rate ($487,877 - 738,600 = <$250,723>). Using the $40 hourly rate, the 10 percent cut would cost the state's general fund, via the SCAO, $513,523 ($487,877 - 1,001,400 = <$513,523>).

REDUCTION OPTION – 2 ½ PERCENT - $121,969 of the Governor's Recommended Budget

Where the cuts would be is unclear, but hopefully this would not come at the expense of any positions.

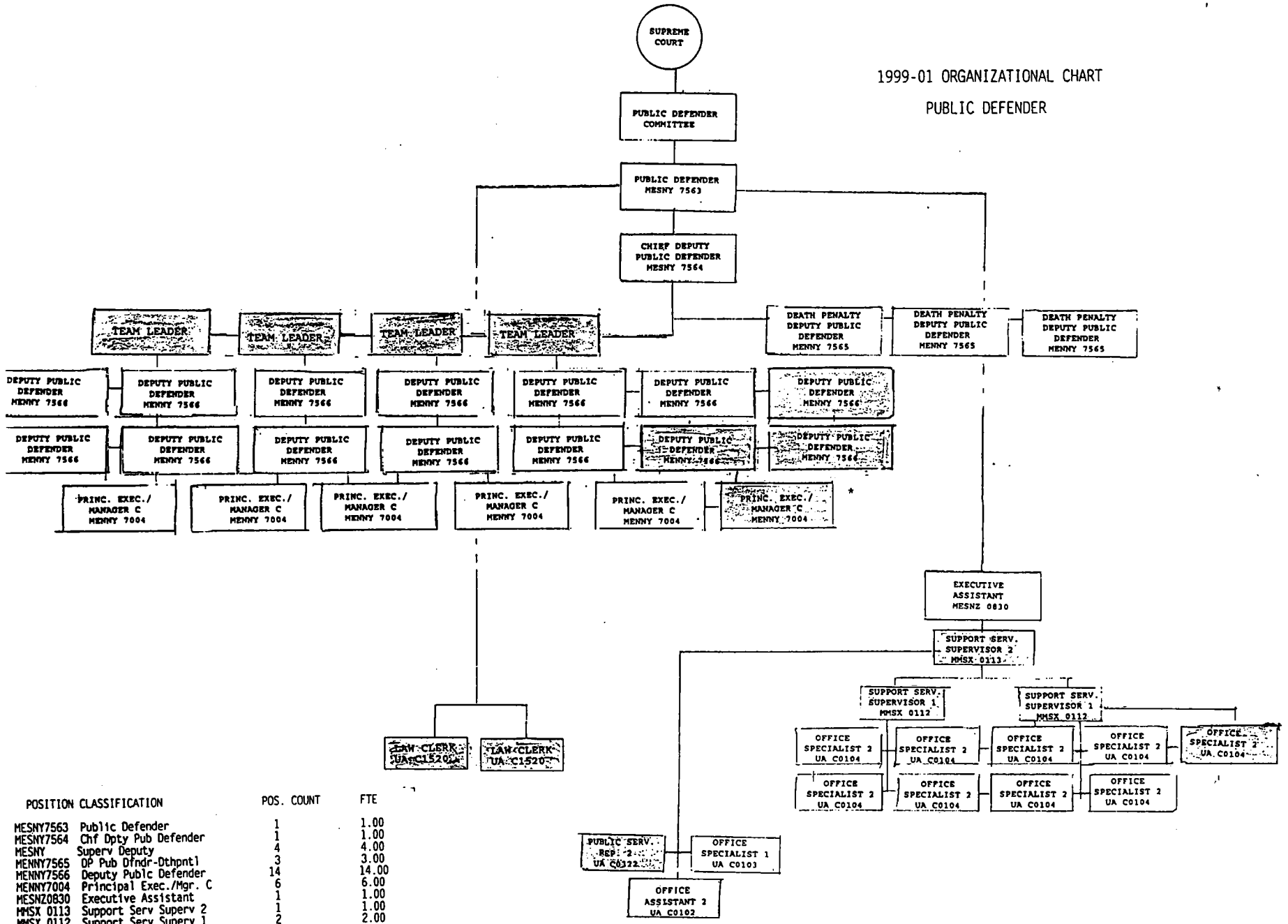


POSITION CLASSIFICATION		POS. COUNT	FTE
UA C0102	Office Assistant 2	1	1.00
UA C0103	Office Specialist 1	1	1.00
UA C0104	Office Specialist 2	10	9.50
MENNY7004	Principal Exec./Mgr. C	6	5.50
MESNY7563	Public Defender	1	1.00
MESNY7564	Chf Dpty Pub Defender	1	1.00
MENNY7565	DP Pub Dfndr-Dthpntl	3	2.75
MENNY7566	Deputy Publc Defender	12	12.00
MESNZ0830	Executive Assistant	1	1.00
TOTALS		36	34.75

*Limited Duration Positions

1999-01 ORGANIZATIONAL CHART

PUBLIC DEFENDER



POSITION	CLASSIFICATION	POS. COUNT	FTE
MESNY7563	Public Defender	1	1.00
MESNY7564	Chf Dpty Pub Defender	1	1.00
MESNY	Superv Deputy	4	4.00
MENNY7565	DP Pub Dfndr-Othpntl	3	3.00
MENNY7566	Deputy Public Defender	14	14.00
MENNY7004	Principal Exec./Mgr. C	6	6.00
MESNZ0830	Executive Assistant	1	1.00
MMSX 0113	Support Serv Superv 2	1	1.00
MMSX 0112	Support Serv Superv 1	2	2.00
UA C1520	Law Clerk	2	1.00
UA C0104	Office Specialist 2	9	9.00
UA C0322	Public Ser 2	1	1.00
UA C0103	Office Sp 1	1	1.00
UA C0102	Office A 2	1	1.00
TOTALS		47	46.00

*Limited Duration Positions

BUDGET STRUCTURE — AUTOMATED BUDGET INFORMATION SYSTEM (ABIS) — GOVERNOR'S BUDGET

		1995-97 ACTUAL	1997-99 APPROVED BUDGET	1997-99 BIENNIAL ESTIMATE	1999-01 REQUESTED BUDGET	1999-01 GOVERNOR'S BUDGET	1999-01 ADOPTED BUDGET
CLS/PKG: 900	TOTAL BASE BUDGET						
GENERAL		3,947,506	4,590,341	4,590,341	4,736,078	4,776,620	
OTHER			1,122	1,122	1,122	1,122	
ALL FUNDS		3,947,506	4,591,463	4,591,463	4,737,200	4,777,742	
FTE		32.01	34.75	34.75	34.00	34.00	
CLS/PKG: 010	NON-PICS PSNL SVC ADJUSTMENTS PGM UNIT: 010-00-00			RANK: 000			
GENERAL					1,849	1,849	
CLS/PKG: 020	PROGRAM ADJUSTMENTS PGM UNIT: 010-00-00			RANK: 000			
GENERAL					-98,659	-98,659	
CLS/PKG: 030	INFLATION/PRICE LIST ADJUSTMTS PGM UNIT: 010-00-00			RANK: 000			
GENERAL					56,824	91,824	
OTHER					-1,122	-1,122	
ALL FUNDS					55,702	90,702	
CLS/PKG: 101	EXPANSION OF LTD OUR POSITIONS PGM UNIT: 010-00-00			RANK: 000			
GENERAL					182,411	184,211	
FTE					2.00	2.00	
CLS/PKG: 102	STAFF INCREASES/RECLASSES PGM UNIT: 010-00-00			RANK: 000			
GENERAL					726,329	733,385	
FTE					9.00	9.00	
CLS/PKG: 103	SALARY PARITY WITH AG'S OFFICE PGM UNIT: 010-00-00			RANK: 000			
GENERAL					408,640	413,000	
FTE					1.50	1.50	
CLS/PKG: 104	INCREASED LEGAL EDUCATION CONT PGM UNIT: 010-00-00			RANK: 000			
GENERAL					20,000	20,000	

AGENCY: 18200 PUBLIC DEFENDER — AGENCY

ABISR013
BUDSTR
GOV BUDG
FORM BP01

AGENCY-WIDE SUMMARY
CONSOLIDATED SUMMARY

FORM F1SHAD

BUDGET STRUCTURE — AUTOMATED BUDGET INFORMATION SYSTEM (ABIS) — GOVERNOR'S BUDGET

		1995-97 ACTUAL	1997-99 APPROVED BUDGET	1997-99 BIENNIAL ESTIMATE	1999-01 REQUESTED BUDGET	1999-01 GOVERNOR'S BUDGET	1999-01 ADOPTED BUDGET
CLS/PKG: 105	TECHNOLOGY SUPPORT — PGM UNIT: 010-00-00 — RANK: 000						
GENERAL					30,000	30,000	
CLS/PKG: 106	ADDITIONAL SPACE — PGM UNIT: 010-00-00 — RANK: 000						
GENERAL					72,000	72,000	
CLS/PKG: 905	TOTAL BASE AND PACKAGES						
GENERAL		3,947,506	4,590,341	4,590,341	6,135,472	6,224,230	
OTHER			1,122	1,122			
ALL FUNDS		3,947,506	4,591,463	4,591,463	6,135,472	6,224,230	
FTE		32.01	34.75	34.75	46.50	46.50	
CLS/PKG: 930	TOTAL OPERATING BUDGET						
GENERAL		3,947,506	4,590,341	4,590,341	6,135,472	6,224,230	
OTHER			1,122	1,122			
ALL FUNDS		3,947,506	4,591,463	4,591,463	6,135,472	6,224,230	
FTE		32.01	34.75	34.75	46.50	46.50	
CLS/PKG: 999	TOTAL BUDGET						
GENERAL		3,947,506	4,590,341	4,590,341	6,135,472	6,224,230	
OTHER			1,122	1,122			
ALL FUNDS		3,947,506	4,591,463	4,591,463	6,135,472	6,224,230	
FTE		32.01	34.75	34.75	46.50	46.50	

AGENCY: 18200 PUBLIC DEFENDER

AGENCY-WIDE SUMMARY
CONSOLIDATED SUMMARY

AGENCY
ABISRO13
BUDSTR
GOV BUDG
FORM BP01

FORM F1SHAD

AUTOMATED BUDGET INFORMATION SYSTEM (ABIS) GOVERNOR'S BUDGET

BUDGET STRUCTURE	1995-97 ACTUAL	1997-99 APPROVED BUDGET	1997-99 BIENNIAL ESTIMATE	1999-01 REQUESTED BUDGET	1999-01 GOVERNOR'S BUDGET	1999-01 ADOPTED BUDGET
BUDSTR: 010-00-00 GENERAL PROGRAM						
GENERAL	3,947,506	4,590,341	4,590,341	6,135,472	6,224,230	
OTHER		1,122	1,122			
ALL FUNDS	3,947,506	4,591,463	4,591,463	6,135,472	6,224,230	
TOTAL						
GENERAL	3,947,506	4,590,341	4,590,341	6,135,472	6,224,230	
OTHER		1,122	1,122			
ALL FUNDS	3,947,506	4,591,463	4,591,463	6,135,472	6,224,230	

AGENCY: 18200 PUBLIC DEFENDER

PROGRAM SUMMARY

AGENCY
ABISRO12
BUDSTR
GOV BUDG
FORM BP01

FORM FISHAD

DETAIL OF OTHER FUNDS AND FEDERAL FUNDS REVENUE

Source	Fund	1995-97 Actual	1997-99 Legislatively Adopted	1997-99 Estimated	1999-2001 Agency Request	1999-2001 Governor's Recommended	1999-2001 Legislatively Adopted
Sale of Surplus Prop.	Other	1,207	1,122	1,122	0	0	

____ Agency Request __x__ Governor's Recommended ____ Legislatively Adopted Budget Page 43

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BUDGET STRUCTURE — AUTOMATED BUDGET INFORMATION SYSTEM (ABIS) — GOVERNOR'S BUDGET

		1995-97 ACTUAL	1997-99 APPROVED BUDGET	1997-99 BIENNIAL ESTIMATE	1999-01 REQUESTED BUDGET	1999-01 GOVERNOR'S BUDGET	1999-01 ADOPTED BUDGET
REVENUE CATEGORIES							
810000	BEGINNING BALANCE						
	OTHER	960	1,122	1,207			
GENERAL FUND							
820500	GENERAL FUND APPROPRIATION						
	GENERAL	3,948,686	4,590,341	4,590,341	6,135,472	6,224,230	
OTHER FUNDS REVENUES							
SALES INCOME							
846509	OTHER SALES INCOME						
	OTHER	141					
OTHER							
848500	OTHER REVENUES						
	OTHER	106					
TRANSFER IN							
860500	TRANSFER IN - INTRAFUND						
	OTHER		768				
TRANSFER OUT							
870500	TRANSFER OUT - INTRAFUND						
	OTHER		-768				
AVAILABLE REVENUES							
TOTAL	ALL FUNDS AVAILABLE FOR EXP						
	GENERAL	3,948,686	4,590,341	4,590,341	6,135,472	6,224,230	
	OTHER	1,207	1,122	1,207			
	ALL FUNDS	3,949,893	4,591,463	4,591,548	6,135,472	6,224,230	
EXPENDITURE CATEGORIES							
TOTAL EXPENDITURES							
TOTAL	ALL EXPENDITURES						
	GENERAL	3,947,506	4,590,341	4,590,341	6,135,472	6,224,230	
	OTHER		1,122	1,122			
	ALL FUNDS	3,947,506	4,591,463	4,591,463	6,135,472	6,224,230	

AGENCY: 18200 PUBLIC DEFENDER — AGENCY

ABISR001
BUDSTR
GOV BUDG
FORM BP01

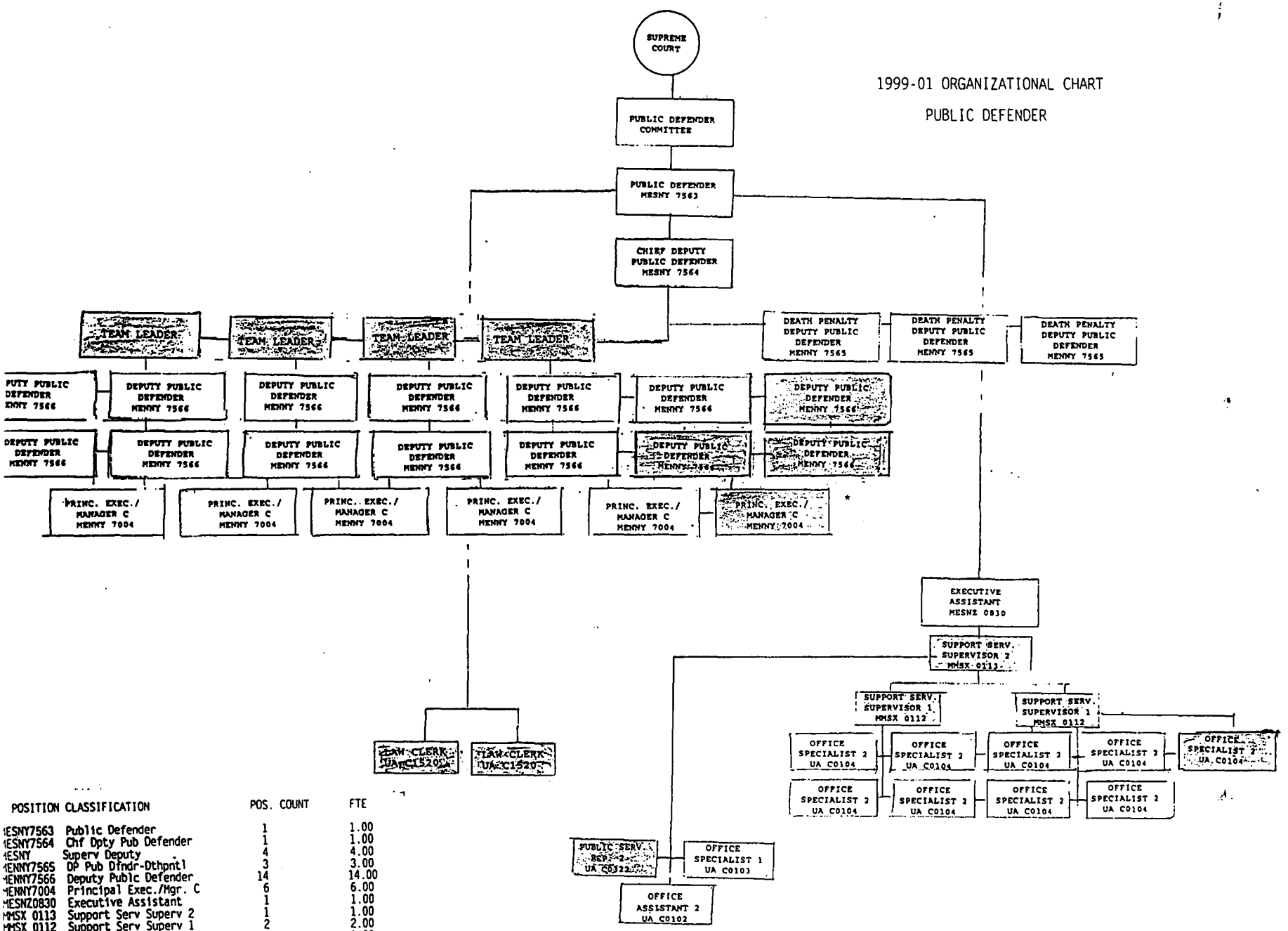
AGENCY-WIDE SUMMARY
REVENUES AND DISBURSEMENTS SUMMARY

FORM F1SMAQ

		1995-97 ACTUAL	1997-99 APPROVED BUDGET	1997-99 BIENNIAL ESTIMATE	1999-01 REQUESTED BUDGET	1999-01 GOVERNOR'S BUDGET	1999-01 ADOPTED BUDGET
REVERSIONS AND ENDING BALANCES							
999310	REVERSIONS GENERAL	-1,180					
TOTAL	ENDING BALANCE OTHER	1,207		85			

1999-01 ORGANIZATIONAL CHART

PUBLIC DEFENDER



POSITION	CLASSIFICATION	POS. COUNT	FTE
MESNY7563	Public Defender	1	1.00
MESNY7564	Chf Dpty Pub Defender	1	1.00
MESNY	Superv Deputy	4	4.00
MENNY7565	DP Pub Dfndr-Dthpntl	3	3.00
MENNY7566	Deputy Public Defender	14	14.00
MENNY7004	Principal Exec./Mgr. C	6	6.00
MESNZ0830	Executive Assistant	1	1.00
MMSX 0113	Support Serv Superv 2	1	1.00
MMSX 0112	Support Serv Superv 1	2	2.00
UA C1520	Law Clerk	2	1.00
UA C0104	Office Specialist 2	9	9.00
UA C0322	Public Serv Rep 2	1	1.00
UA C0103	Office Specialist 1	1	1.00
UA C0102	Office Assistant 2	1	1.00
TOTALS		47	46.00

*Limited Duration Positions

POLICY PACKAGE NO. 101 – EXPANSION OF LIMITED DURATION POSITIONS – TOTAL COST $184,211

The 1997 Legislature allowed this office one mixed caseload deputy of limited duration, and one clerical support staff of limited duration. At this point, we have accepted cases for this limited duration deputy at the rate of seven misdemeanor or mixed caseload cases per month. If we did not have this attorney, these cases would have to be reverted to the State Court Administrator's Office. This would constitute seven cases per month, or 84 cases per year, or 168 cases per biennium, for which private counsel would be sought by the State Court Administrator

PROGRAM OPTION PACKAGE FISCAL IMPACT SUMMARY

Package No. 101 - Expansion of Lmtd Dur

PERSONAL SERVICES

Classification No.	Classification Name	# of Pos.	FTE	SR	Avg. Step	Avg. Salary	Avg. OPE	GF	Lottery	OF	FF	Non-limited	All Funds
Y7004	PRIN EXEC MGR C	1	1	28X	3	3,305	1,124	110,526					110,526
C0104	OFF SPEC 2	1	1	15	5	1,983	674	73,685					73,685
				Salaries				184,211					184,211
				Overtime									
				Shift Differential									
				Other Differentials									
				Reconciliation									
Total Personal Services								184,211					184,211

SERVICES AND SUPPLIES

(List by ABIS accounts)						
Total Services and Supplies						

CAPITAL OUTLAY

(List by ABIS accounts)						
Total Capital Outlay						

SPECIAL PAYMENTS						
(List by ABIS accounts)						
Total Special Payments						
TOTAL REQUEST	184,211					184,211
TOTAL POSITIONS/FTE	2 (2.00)					2 (2.00)

____ Agency Request __x__ Governor's Recommended ____ Legislatively Adopted Budget Page 48

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POLICY PACKAGE NO. 102 A– STAFFING INCREASE – TOTAL COST

This policy package requests that the Legislature authorize three new deputy public defenders to be hired. The purpose for three attorneys is to assume the caseloads, set out at page 17-18 of this budget narrative, which are currently being assigned to the death penalty attorneys. As noted, the death penalty attorneys also have a Court of Appeals' caseload. These three attorneys would replace the death penalty attorneys handling these cases. That would allow the death penalty attorneys to devote their time to nothing but death penalty appeals. If these attorney positions are authorized, it will also be necessary to have two Office Specialist 2's. The approximate personal services costs are $449,280.

POLICY PACKAGE NO. 102-B – SUPERVISORY POSITIONS

The present organization of this office has two administrative positions and one office manager for 36 employees. We believe it necessary to reorganize the office in order to provide better supervision for the attorneys. We request that the Legislature provide the funding for four new positions, to be assumed by currently existing staff: this would represent an upgrade for people who already work here. These attorneys would be called "team leaders" and their functions would be to:

- Handle one-half a regular felony caseload
- Edit briefs
- Assist attorneys in preparing for oral argument
- Assist attorneys in determining whether issues should be raised
- Provide review for Balfour briefs

Currently, these functions are either being performed by the Public Defender and Chief Deputy, or they are not being performed at all. It has become impossible for the Public Defender and Chief Deputy to supervise all the above listed duties for the attorneys, especially if new attorneys are hired and must be trained.

Also needed is a Support Services Supervisor 2 and two Support Services Supervisor 1's..

POLICY PACKAGE NO. 102C – PUBLIC SERVICE REPRESENTATIVE 2

A Public Service Representative 2 would also be responsible for opening files on appeal from parole board decisions. Because of the overburdening of the secretarial staff by regular felony and misdemeanor and mixed caseload, these duties have already been transferred to the receptionist. The establishment of a Public Service Representative 2, with these additional duties, is necessary. The Office Assistant 2 position would then be filled by a new employee to assist at the intake desk, for which we have a great need. The approximate personal services cost would be $49,056.

PROGRAM OPTION PACKAGE FISCAL IMPACT SUMMARY

Package No. 102 - STAFF INCREASES - RECLASSES

PERSONAL SERVICES

Classification No.	Classification Name	# of Pos.	FTE	SR	Avg. Step	Avg. Salary	Avg. OPE	GF	Lottery	OF	FF	Non-limited	All Funds
Y7566	DEPUTY PUBLIC DEFENDER	3	3.00	30	2	3,641	1,238	351,288					351,288
X0112	SUPPORT SERVICES SUPER 1	2	2.00	17	2	1,937	659	124,608					124,608
X0113	SUPPORT SERVICES SUPER 2	1	1.00	19	2	2,127	723	68,400					68,400
C0104	OFFICE SPECIALIST 2	2	2.00	15	2	1,745	593	97,992					97,992
C0322	PUBLIC SERVICE REP 2	1	1.00	12	2	1,525	519	49,056					49,056
				Salaries				691,344					691,344
				Overtime									
				Shift Differential									
				Other Differentials									
				Reconciliation				42,041					42,041
Total Personal Services								733,385					733,385

SERVICES AND SUPPLIES

(List by ABIS accounts)						
Total Services and Supplies						

CAPITAL OUTLAY

(List by ABIS accounts)						
Total Capital Outlay						

SPECIAL PAYMENTS						
(List by ABIS accounts)						
Total Special Payments						
TOTAL REQUEST	733,385					733,385
TOTAL POSITIONS/FTE	9 (9.00)					9 (9.00)

____ Agency Request __x__ Governor's Recommended ____ Legislatively Adopted Budget Page 52

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POLICY PACKAGE NO. 103 A. – SALARY PARITY WITH ATTORNEY GENERAL'S OFFICE

This agency performs work that is equivalent to the work performed by the staff of the Appellate Division in the Attorney General's Office. The Attorney General's Office, by its own statistics, restricts the number of cases handled by each attorney to about 50 per year. This is equivalent to the number of cases that we should be handling. The Attorney General's attorneys handle the appeals filed by this office, so the work is obviously equivalent. This office has not received raises for attorneys doing comparable work.

For example, a classification halfway between the Solicitor General and the Assistant Solicitor General would be equivalent to the State Public Defender classification. The Solicitor General's step 1 pays $5,551. The Assistant Solicitor General's step 1 pays $5,031. That is 10.4 percent more than the State Public Defender's step 1, which pays $4,794. Therefore, funding is requested for salary increases in the following amounts (numbers in parentheses are number of positions within each classification):

Public Defender (1)	$ 15,302
Chief Deputy Public Defender (1)	$ 15,894
Death Penalty Deputies (3)	$ 45,786
Felony Deputies (12)	$170,040
Mixed Caseload Deputies (5)	$ 54,797
TOTAL	$301,819

POLICY PACKAGE NO. 103 B – LAW CLERKS

This office has a high volume of low merit cases (guilty plea and probation violation appeals, for example) which are presently handled by attorneys. These cases could be handled by law clerks, with minimal supervision, at great savings of attorney time. Presently, we are not budgeted for law clerks, although the Attorney General's Office has a number of people at that position. Two law clerks would allow us to take more cases (and revert fewer cases) of all types, because of the time saved by attorneys. The approximate personal services costs are $65,124

PROGRAM OPTION PACKAGE FISCAL IMPACT SUMMARY

Package No. 103 - SALARY PARITY WITH AG'S OFFICE AND 2 PART-TIME LAW CLERKS

PERSONAL SERVICES

Classification No.	Classification Name	# of Pos.	FTE	SR	Avg. Step	Avg. Salary	Avg. OPE	GF	Lottery	OF	FF	Non-limited	All Funds
Y7004	Prnc/Exec Mgr C	(5)	(5.00)	28X	5	3,629	1,234	(435,528)					(435,528)
Y7565	Dep Public Def - Dth Pen	5	5.00	33	7	5,218	1,774	600,840					6000,840
Y7566	Deputy Public Defender 2	(7)	(7.00)	30	6	4,400	1,496	(834,912)					(834,912)
Y7563	Public Defender	(1)	(1.00)	37	2	5,132	1,745	(123,168)					(123,168)
Y7564	Chief Deputy Pub Def	(1)	(1.00)	36	5	5,662	1,925	(135,888)					(135,888)
7014	Prin/Exec Mgr H	1	1.00	39	3	5,662	1,925	135,888					135,888
Z7517	Physician Specialist	1	1.00	38	5	6,238	2,121	149,712					149,712
C1520	Law Clerk	2	1.50	16	2	1,809	615	65,124					65,124
U7505	Sr Assistant Att Gen	7	7.00	36	5	5,376	1,828	903,264					903,264
				Salaries				325,332					325,332
				Overtime									
				Shift Differential									
				Other Differentials									
				Reconciliation				87,668					87,668
Total Personal Services								413,000					413,000

SERVICES AND SUPPLIES

(List by ABIS accounts)							
Total Services and Supplies							

CAPITAL OUTLAY

(List by ABIS accounts)							
Total Capital Outlay							

SPECIAL PAYMENTS							
(List by ABIS accounts)							
Total Special Payments							
TOTAL REQUEST	413,000						413,000
TOTAL POSITIONS/FTE	2 (1.50)						2 (1.50)

___ Agency Request ___x___ Governor's Recommended ___ Legislatively Adopted Budget Page 56

POLICY PACKAGE NO. 104 – INCREASED CONTINUING LEGAL EDUATION BUDGET – TOTAL COST $20,000

The State Public Defender's Office is made up attorneys who have a requirement of 15 hours per year of continuing legal education, including two hours per year of ethics. A certain number of these hours can be obtained from local seminars, which provide instruction in criminal law generally. For example, the Oregon Criminal Defense Lawyers Association's (OCDLA) annual seminar and business meeting in June provides ten hours of continuing legal education, and usually one or two hours of ethics. However, our office specializes in appeals, which rarely are a topic for the more broadly presented program for all criminal defense lawyers, most of whom do trial work.

It is also necessary for the death penalty attorneys to maintain a high level of knowledge about the changes in death penalty law throughout the country. It is occasionally important that death penalty attorneys attend seminars out of state. Death penalty issues are complex, and changes in the law present new issues which must be studied, and for which preparations must be made. The best example of this is the AEDPA or Death Penalty Act of 1996, which completely changed the rules of appeal, post-conviction, and federal habeas corpus. Attorneys for the government and for the defense are still trying to determine how these issues will be resolved. This is merely an example of the continuing nature of the legal education required for death penalty attorneys. We are requesting that the Legislature authorize a budget for $20,000 for the next biennium for continuing legal education, including some out-of-state travel for seminars.

PROGRAM OPTION PACKAGE FISCAL IMPACT SUMMARY

Package No. 104 – CONTINUING LEGAL EDUCATION

PERSONAL SERVICES													
Classification No.	Classification Name	# of Pos.	FTE	SR	Avg. Step	Avg. Salary	Avg. OPE	GF	Lottery	OF	FF	Non-limited	All Funds
				Salaries Overtime Shift Differential Other Differentials Reconciliation									
Total Personal Services													

SERVICES AND SUPPLIES							
(List by ABIS accounts)	10,000						10,000
920600 Instate Travel	10,000						10,000
921000 Out-of-State Travel							
Total Services and Supplies	20,000						20,000

CAPITAL OUTLAY						
(List by ABIS accounts)						
Total Capital Outlay						

SPECIAL PAYMENTS						
(List by ABIS accounts)						
Total Special Payments						
TOTAL REQUEST	20,000					20,000
TOTAL POSITIONS/FTE						

____ Agency Request ___x Governor's Recommended ____ Legislatively Adopted Budget Page 58

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POLICY PACKAGE NO. 105 – TECHNOLOGY SUPPORT – TOTAL COST $30,000

This agency was required to pay the sum of $39,018 in the past biennium which was not budgeted. This was for technological services and supplies, required for the updating and installation of computer equipment in our new office. It is not anticipated that this sum will be needed for the next biennium. However, the amount of $30,000 is requested for upgrades, and any problems that we might encounter with the Y2K problem. Whenever we have a computer problem, it is necessary for us to contact the individual who set up our computer system and database, which is at a cost of $100 per hour. As noted, his billing in the past has been in the amount of $39,018. If we are not authorized this amount, or if unanticipated problems exceed this amount, it will be necessary for us to go to the Emergency Board for future requests.

PROGRAM OPTION PACKAGE FISCAL IMPACT SUMMARY

Package No. 105 - TECHNOLOGY SUPPORT

PERSONAL SERVICES													
Classification No.	Classification Name	# of Pos.	FTE	SR	Avg. Step	Avg. Salary	Avg. OPE	GF	Lottery	OF	FF	Non-limited	All Funds
				Salaries Overtime Shift Differential Other Differentials Reconciliation									
Total Personal Services													

SERVICES AND SUPPLIES							
(List by ABIS accounts)	15,000						15,000
932000 Data Processing Software	15,000						15,000
932100 Data Processing Hardware							
Total Services and Supplies	30,000						30,000

CAPITAL OUTLAY						
(List by ABIS accounts)						
Total Capital Outlay						

SPECIAL PAYMENTS						
(List by ABIS accounts)						
Total Special Payments						
TOTAL REQUEST	30,000					30,000
TOTAL POSITIONS/FTE						

____ Agency Request x Governor's Recommended ____ Legislatively Adopted Budget Page 60

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POLICY PACKAGE NO. 106 – ADDITIONAL SPACE – TOTAL COST $72,000

Should the legislature grant the number of attorneys and clerical staff as requested in Policy Package No. 102, this agency will be presented with a dilemma. The present space is inadequate to house this number of attorneys and clerical staff. Therefore, it may be necessary to seek other accommodations. As of the presentation of this budget, it is possible that the current location will be adequate if further office space is offered by the current landlord which can be used by this agency upon a re-negotiation or redrafting of the lease. Previous tenants occupying space which would meet this agency's requirements were paying $3,000 per month.

PROGRAM OPTION PACKAGE FISCAL IMPACT SUMMARY

Package No. 106 – ADDITIONAL SPACE

PERSONAL SERVICES													
Classification No.	Classification Name	# of Pos.	FTE	SR	Avg. Step	Avg. Salary	Avg. OPE	GF	Lottery	OF	FF	Non-limited	All Funds
				Salaries Overtime Shift Differential Other Differentials Reconciliation									
Total Personal Services													

SERVICES AND SUPPLIES							
(List by ABIS accounts) 925501 Facilities Rental and Taxes	72,000						72,000
Total Services and Supplies	72,000						72,000

CAPITAL OUTLAY							
(List by ABIS accounts)							
Total Capital Outlay							

SPECIAL PAYMENTS							
(List by ABIS accounts)							
Total Special Payments							
TOTAL REQUEST	72,000						72,000
TOTAL POSITIONS/FTE							

____ Agency Request ___x Governor's Recommended ____ Legislatively Adopted Budget Page 62

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		1995-97 ACTUAL	1997-99 APPROVED BUDGET	1997-99 BIENNIAL ESTIMATE	1999-01 REQUESTED BUDGET	1999-01 GOVERNOR'S BUDGET	1999-01 ADOPTED BUDGET
CLS/PKG: 900	TOTAL BASE BUDGET						
TOTAL	PERSONAL SERVICES						
	GENERAL	3,371,054	3,885,221	3,811,001	4,030,958	4,071,500	
TOTAL	SERVICES AND SUPPLIES						
	GENERAL	576,452	606,061	677,604	606,061	606,061	
	OTHER		1,122	1,122	1,122	1,122	
	ALL FUNDS	576,452	607,183	678,726	607,183	607,183	
TOTAL	CAPITAL OUTLAY						
	GENERAL		99,059	101,736	99,059	99,059	
TOTAL	ALL EXPENDITURES						
	GENERAL	3,947,506	4,590,341	4,590,341	4,736,078	4,776,620	
	OTHER		1,122	1,122	1,122	1,122	
	ALL FUNDS	3,947,506	4,591,463	4,591,463	4,737,200	4,777,742	
TOTAL	AUTHORIZED FTE POSITIONS						
	FTE	32.01	34.75	34.75	34.00	34.00	
CLS/PKG: 010	NON-PICS PSNL SVC ADJUSTMENTS	PGM UNIT: 010-00-00		RANK: 000			
TOTAL	PERSONAL SERVICES						
	GENERAL				1,849	1,849	
TOTAL	ALL EXPENDITURES						
	GENERAL				1,849	1,849	
CLS/PKG: 020	PROGRAM ADJUSTMENTS	PGM UNIT: 010-00-00		RANK: 000			
TOTAL	SERVICES AND SUPPLIES						
	GENERAL				-14,000	-14,000	
TOTAL	CAPITAL OUTLAY						
	GENERAL				-84,659	-84,659	
TOTAL	ALL EXPENDITURES						
	GENERAL				-98,659	-98,659	

		1995-97 ACTUAL	1997-99 APPROVED BUDGET	1997-99 BIENNIAL ESTIMATE	1999-01 REQUESTED BUDGET	1999-01 GOVERNOR'S BUDGET	1999-01 ADOPTED BUDGET
CLS/PKG: 030	INFLATION/PRICE LIST ADJUSTMTS PGM UNIT: 010-00-00			RANK: 000			
TOTAL	SERVICES AND SUPPLIES						
	GENERAL				56,421	91,421	
	OTHER				-1,122	-1,122	
	ALL FUNDS				55,299	90,299	
TOTAL	CAPITAL OUTLAY						
	GENERAL				403	403	
TOTAL	ALL EXPENDITURES						
	GENERAL				56,824	91,824	
	OTHER				-1,122	-1,122	
	ALL FUNDS				55,702	90,702	
CLS/PKG: 101	EXPANSION OF LTD DUR POSITIONS PGM UNIT: 010-00-00			RANK: 000			
TOTAL	PERSONAL SERVICES						
	GENERAL				182,411	184,211	
TOTAL	ALL EXPENDITURES						
	GENERAL				182,411	184,211	
TOTAL	AUTHORIZED FTE POSITIONS						
	FTE				2.00	2.00	
CLS/PKG: 102	STAFF INCREASES/RECLASSES PGM UNIT: 010-00-00			RANK: 000			
TOTAL	PERSONAL SERVICES						
	GENERAL				726,329	733,385	
TOTAL	ALL EXPENDITURES						
	GENERAL				726,329	733,385	
TOTAL	AUTHORIZED FTE POSITIONS						
	FTE				9.00	9.00	
CLS/PKG: 103	SALARY PARITY WITH AG'S OFFICE PGM UNIT: 010-00-00			RANK: 000			
TOTAL	PERSONAL SERVICES						
	GENERAL				408,640	413,000	

		1995-97 ACTUAL	1997-99 APPROVED BUDGET	1997-99 BIENNIAL ESTIMATE	1999-01 REQUESTED BUDGET	1999-01 GOVERNOR'S BUDGET	1999-01 ADOPTED BUDGET
TOTAL	ALL EXPENDITURES						
	GENERAL				408,640	413,000	
TOTAL	AUTHORIZED FTE POSITIONS						
	FTE				1.50	1.50	
CLS/PKG: 104	INCREASED LEGAL EDUCATION CONT PGM UNIT: 010-00-00				RANK: 000		
TOTAL	SERVICES AND SUPPLIES						
	GENERAL				20,000	20,000	
TOTAL	ALL EXPENDITURES						
	GENERAL				20,000	20,000	
CLS/PKG: 105	TECHNOLOGY SUPPORT PGM UNIT: 010-00-00				RANK: 000		
TOTAL	CAPITAL OUTLAY						
	GENERAL				30,000	30,000	
TOTAL	ALL EXPENDITURES						
	GENERAL				30,000	30,000	
CLS/PKG: 106	ADDITIONAL SPACE PGM UNIT: 010-00-00				RANK: 000		
TOTAL	SERVICES AND SUPPLIES						
	GENERAL				72,000	72,000	
TOTAL	ALL EXPENDITURES						
	GENERAL				72,000	72,000	
CLS/PKG: 905	TOTAL BASE AND PACKAGES						
TOTAL	PERSONAL SERVICES						
	GENERAL	3,371,054	3,885,221	3,811,001	5,350,187	5,403,945	
TOTAL	SERVICES AND SUPPLIES						
	GENERAL	576,452	606,061	677,604	740,482	775,482	
	OTHER		1,122	1,122			
	ALL FUNDS	576,452	607,183	678,726	740,482	775,482	

		1995-97 ACTUAL	1997-99 APPROVED BUDGET	1997-99 BIENNIAL ESTIMATE	1999-01 REQUESTED BUDGET	1999-01 GOVERNOR'S BUDGET	1999-01 ADOPTED BUDGET
TOTAL	CAPITAL OUTLAY						
	GENERAL		99,059	101,736	44,803	44,803	
TOTAL	ALL EXPENDITURES						
	GENERAL	3,947,506	4,590,341	4,590,341	6,135,472	6,224,230	
	OTHER		1,122	1,122			
	ALL FUNDS	3,947,506	4,591,463	4,591,463	6,135,472	6,224,230	
TOTAL	AUTHORIZED FTE POSITIONS						
	FTE	32.01	34.75	34.75	46.50	46.50	
CLS/PKG: 930	TOTAL OPERATING BUDGET						
TOTAL	PERSONAL SERVICES						
	GENERAL	3,371,054	3,885,221	3,811,001	5,350,187	5,403,945	
TOTAL	SERVICES AND SUPPLIES						
	GENERAL	576,452	606,061	677,604	740,482	775,482	
	OTHER		1,122	1,122			
	ALL FUNDS	576,452	607,183	678,726	740,482	775,482	
TOTAL	CAPITAL OUTLAY						
	GENERAL		99,059	101,736	44,803	44,803	
TOTAL	ALL EXPENDITURES						
	GENERAL	3,947,506	4,590,341	4,590,341	6,135,472	6,224,230	
	OTHER		1,122	1,122			
	ALL FUNDS	3,947,506	4,591,463	4,591,463	6,135,472	6,224,230	
TOTAL	AUTHORIZED FTE POSITIONS						
	FTE	32.01	34.75	34.75	46.50	46.50	
CLS/PKG: 999	TOTAL BUDGET						
TOTAL	PERSONAL SERVICES						
	GENERAL	3,371,054	3,885,221	3,811,001	5,350,187	5,403,945	
TOTAL	SERVICES AND SUPPLIES						
	GENERAL	576,452	606,061	677,604	740,482	775,482	
	OTHER		1,122	1,122			
	ALL FUNDS	576,452	607,183	678,726	740,482	775,482	

BUDGET STRUCTURE — AUTOMATED BUDGET INFORMATION SYSTEM (ABIS) — GOVERNOR'S BUDGET

		1995-97 ACTUAL	1997-99 APPROVED BUDGET	1997-99 BIENNIAL ESTIMATE	1999-01 REQUESTED BUDGET	1999-01 GOVERNOR'S BUDGET	1999-01 ADOPTED BUDGET
TOTAL	CAPITAL OUTLAY						
	GENERAL		99,059	101,736	44,803	44,803	
TOTAL	ALL EXPENDITURES						
	GENERAL	3,947,506	4,590,341	4,590,341	6,135,472	6,224,230	
	OTHER		1,122	1,122			
	ALL FUNDS	3,947,506	4,591,463	4,591,463	6,135,472	6,224,230	
TOTAL	AUTHORIZED FTE POSITIONS						
	FTE	32.01	34.75	34.75	46.50	46.50	

FORM F1SHAD

AFFIRMATIVE ACTION POLICY
FOR
PUBLIC DEFENDER

I. INTRODUCTION

The purpose of this policy is to initiate and maintain an affirmative action program in the office of Public Defender, in keeping with the directive of the Governor; state and federal laws and regulations; Executive Orders of the President of the United States of America concerning affirmative action; discrimination/non-discrimination guidelines appropriate under the Civil Rights Acts; and equal employment opportunity (EEO) policies of which our good faith efforts must be directed.

II. POLICY STATEMENT

It is the policy of the Public Defender that no person shall be discriminated against by reason of race, religion, color, national origin, sex, age, marital status, physical or mental disability not shown to prevent adequate performance of available work. All personnel actions of the Public defender shall be administered according to this policy.

The Affirmative Action Policy and Plan shall be adhered to by all staff of the Public Defender. Supervisory and management staff, in particular, shall assure that the intent, as well as the stated requirements, are implemented in all employee relationships and personnel practices. In addition, it is the duty of every employee of the Public Defender to create a job environment atmosphere which is conducive to the nondiscrimination policies, and free of any form of discriminatory harassment. The application of this policy is the individual responsibility of all administrative and supervisory staff, and each shall be evaluated on his/her performance in achieving this affirmative action policy.

It is further the policy of the Public Defender to establish this program of affirmative action to provide for a method of eliminating the effects of past and present discrimination, intended and unintended, which is indicated by analysis of present employment patterns, practices and policies. Any person with questions about the affirmative action program is welcomed and encouraged to voice their concerns to the Public Defender or Affirmative Action Officer.

DAVID E. GROOM
State Public Defender

DATE: March 11, 1999

DURATION OF PLAN

This Affirmative Action Plan is in effect from October 1, 1988, and is ongoing.

APPROVAL

As the Public Defender, I hereby authorize and approve this Plan.

DAVID E. GROOM

III. INTERNAL AND EXTERNAL DISSEMINATION

The Affirmative Action plan will be posted in plain sight at all times for employee use and referral. Any agency or member of the public requesting a copy of the Public Defender Affirmative Action plan shall be provided one at no cost.

IV. RESPONSIBILITIES FOR IMPLEMENTATION

RESPONSIBILITY FOR IMPLEMENTATION

The person assigned the responsibility of discharging the EEO/AA function for the Public Defender will be David E. Groom, located at 1320 Capitol St. NE, Salem, OR 97303; Phone: (503) 378-3349 ext. 228.

Responsibilities will include, but are not necessarily limited to:

1. Advising the head of the respective state agency of the preparation of equal employment opportunity programs, procedures, regulations, reports, and the agency's affirmative action plan.

2. Evaluating, from time to time, the sufficiency of total agency program for equal employment opportunity and reporting thereon to the head of the agency with recommendations as to any improvements or corrections needed, including remedial or disciplinary action of the managerial or supervisory employees who have failed to cooperate fully or who are in violation of the program.

3. Making changes in programs and procedures designed to eliminate discriminatory practices when so authorized by the head of the agency.

4. Evaluating tests, employment policies, practices and reporting to the head of the agency any such policies, practices and qualifications which have unequal impact on minorities, women or the handicapped.

5. Providing for counseling of an aggrieved employee or applicant for employment who believes that he or she has been discriminated against because of race, color, religion, sex, marital status, national origin, mental or physical handicap.

6. Assuming responsibility for the Public Defender's internal auditing of the affirmative action plan.

RESPONSIBILITIES OF SUPERVISORS

The following responsibilities are assigned to supervisors:

1. Briefing all new employees on the Public Defender's affirmative action plan and their role in supporting it.

2. Periodically reviewing training programs, hiring and promotion patterns to remove impediments to the attainment of affirmative action goals and objectives.

3. Regularly discussing the affirmative action policy with subordinates to be certain policies are being followed.

4. Conducting periodic reviews to ensure:

   A. EEO information and affirmative action policies are properly displayed.

   B. All facilities for the use and benefit of employees are in fact desegregated, both in policy and use, exclusive of those areas excepted in federal laws and regulations.

   C. Minorities, females and handicapped employees are afforded a full opportunity and are encouraged to participate in agency sponsored educational training, recreation and social activities.

   D. All facilities shall be accessible to handicapped employees or clients.

5. Becoming thoroughly familiar with details of the affirmative action plan; keeping all subordinate employees appraised of progress under the plan; and exerting special effort to further agency goals and objectives.

V. UTILIZATION ANALYSIS

A. Workforce Analysis

Of a total workforce of 37, 21 are female and 16 are male. At present, there are four minorities in the office. There are eight females at the professional level.

B. Job Group Analysis

This office is comprised of three job groups: officials and administrators; professionals; and office and clerical. The group "officials and administrators" contains two positions, which are currently being filled by males. The professional group represents the 21 office staff attorneys. At present, eight of these positions are filled by women. Currently, three of the attorney positions are filled by the minority sector. The office and clerical staff includes 13 positions, all which are currently being filled by females.

VI. PROBLEM ANALYSIS AND ACTION PLAN

Based upon the foregoing planning factors and related statistical data, our planned objectives for improving our EEO/affirmative action plan are as follows:

1. Expanding the activities of our affirmative action program to specifically enhance employment opportunities for protected class individuals not represented in the present labor force.

2. Increasing our distribution of protected class employees at all salary range levels to an approximation of their labor force participation rate in the geographic area from which we employ.

3. Ongoing assessment and evaluation of minority group and female staffing to ensure we are making progress toward our stated goals.

4. Continue working, when feasible, with Department of Administrative Services, HRMD in the refinement of recruitment techniques, examination procedures, and merit system standards to facilitate the placement and promotion of minority group persons and female personnel.

5. Actively participating on affirmative action committees and organizations in executive levels of state government and community activities; and programs where participation would enhance our agency's affirmative action program.

TARGET DATES FOR GOALS/PLANNED ACTION

1. Goal: Expand present EEO/affirmative action programs.

Planned Action: Assure our affirmative action plan is publicized and that all employees are made aware of this provision of our EEO/affirmative action plan.

Responsibility of: Supervisors

Target Date: Ongoing.

2. Goal: Achieve within the Public Defender an improved minority work force representation.

Planned Action: Improve and expand recruitment activity. Develop more referral sources for qualified minority applicants.

Responsibility of: Public Defender and/or Affirmative Action Officer.

Target Date: Ongoing.

3. Goal: Increase representation of protected class individuals in all salary ranges.

Planned Action: Continue to offer maximum opportunity for protected class individuals to attend supervisory and management training courses.

Responsibility of: Affirmative Action Officer.

Target Date: Ongoing.

4. Goal: To ensure that employees are familiar with agency policies regarding EEO/affirmative action plan.

Planned Action: All new employees are to be briefed during induction orientation. All new employees will be provided with a copy of the affirmative action plan.

Responsibility of: Affirmative Action Officer and Supervisors.

Target Date: All new employees will be briefed and provided information at the earliest date possible after the hire.

5. Goal: Periodically evaluate and report to the Public Defender, supervisors and employees on affirmative action progress success and/or new developments.

Responsibility of: Affirmative Action Officer.

Target Date: Ongoing.

6. Goal: Eliminate any and all forms of harassment based on race, sex, age, color, national origin, marital status, or handicap.

Responsibility of: All employees.

Target Date: Ongoing.

7. Goal: Supervisors will be held accountable for negative work environment fostered by themselves or their subordinates.

Responsibility of: Public Defender, Supervisors, Affirmative Action Officer.

Target Date: Ongoing.

8. Goal: All complaints will be held confidential and will be investigated by the affirmative action officer or other persons designated by the Public Defender. The

affirmative action officer will report results of investigation to the Public Defender. If complaint is legitimate, corrective action will be taken.

Responsibility of: Supervisors, Affirmative Action Officer, other persons designated by the Public Defender involved in the investigation.

Target Date: Ongoing.

9. Goal: The agency will include in the performance evaluation of all management personnel, the supervisor's effectiveness in achieving affirmative action objectives as a key consideration of the supervisor's performance. This will comply with House Bill 2966 (ch. 454, Oregon Law 1981). Preparers and reviewers of performance appraisals will make appropriate comments on the performance appraisal forms so as to indicate compliance with the law and this goal.

Responsibility of: Preparer of performance appraisal, reviewer of performance appraisal, Affirmative Action Officer, supervisors.

Target Date: Ongoing.

VII. DEVELOPMENT AND IMPLEMENTATION OF PROGRAMS

RECRUITMENT AND APPOINTMENT

All employees appointed as a result of underfilling for affirmative action purposes will be accorded the same training and promotional considerations that exist for any employee. When necessary, special training and development programs will be implemented to provide an underfilling employee the knowledge and skills necessary to meet the job requirements at the higher level.

Until such time as the minority, handicapped, and female under-representation is eliminated, all vacancies will be viewed in the light of minority, female and handicapped appointments. It is understood that all appointments will be made of individuals who are believed to be qualified or in the case of an underfill, who are trainable and able to meet the prescribed qualifications within a maximum period of two years.

PROCEDURE:

Supervisor:	1.	Advising the personnel section of vacancy through the staffing request procedure.
Personnel Officer:	2.	Calling for an affirmative action list for all open competitive recruitments.
	3.	Reviewing the list of applicants, for managerial and professional positions, to ensure that eligible women, minority and handicapped candidates are considered.
	4.	Discussing special recruitment actions with Supervisor, if certificates for professional positions do not contain affirmative action candidates.
	5.	Pursuing the possibility of an underfill, if special recruitment is untimely, otherwise inadvisable, or unsuccessful.
	6.	With approval of Supervisor, negotiate with Executive Department an appropriate underfill.

	7.	Initiating recruitment.
	8.	Screening applicants and referring qualified candidates to the Supervisor for consideration.
Supervisor:	9.	Interviewing and selecting the most qualified candidate.
	10.	Notifying the Personnel Officer of the selection and notifying unsuccessful interviewees within two weeks.
Personnel Officer:	11.	Processing the appointment.
	12.	In an underfill situation, advising affected employee that he or she is an underfill, the reasons for the underfill, and the requirements necessary to qualify for reclassification to the allocated level (per Article 19, Section 1, Teamsters Contract).

13. Assisting the Supervisor in the identification of training necessary to accomplish completion of underfill in the negotiated time frame.

14. Monitoring fulfillment of negotiated terms of underfill.

VIII. AUDITING, EVALUATING AND REPORTING

1. Periodically reviewing training programs, hiring and promotion patterns to remove impediments to the attainment of affirmative action goals and objectives.

2. Conducting periodic reviews to ensure:

A. EEO information and affirmative action policies are properly displayed.

B. All facilities for the use and benefit of employees are in fact desegregated, both in policy and use, exclusive of those areas excepted in federal laws and regulations.

C. Minorities, females and handicapped employees are afforded a full opportunity and are encouraged to participate in agency sponsored educational training, recreation and social activities.

D. All facilities shall be accessible to handicapped employees or clients.

IX. EQUAL OPPORTUNITY AND SEXUAL HARASSMENT COMPLAINTS

INFORMAL

Informal complaints can be submitted in written or verbal form to the Public Defender or the AAO. Immediate action will be taken to resolve complaints, or if an investigation is warranted, a formal complaint will be requested.

FORMAL

A formal complaint of alleged discrimination may be filed with the Public Defender or Affirmative Action Officer. The Public Defender will offer full cooperation in the EEO complaint process. The AAO has the authority to mediate complaints and take any necessary steps to eliminate or

correct violations of the program. All complaints will be held confidential, and will be investigated by the affirmative action designee or other person(s) designated by the Public Defender. Immediately after the complaint is received, the AAO will review the complaint and determine if an investigation is warranted. An investigation should be completed with a two-week time frame. The results of the investigation will be reported to the Public Defender. If the complaint is legitimate, corrective action will be taken immediately or the AAO will resolve any conflicts through mediation. A satisfactory solution to any complaint should be accomplished within a month of its receipt or as soon thereafter as is feasible. Nonretaliation to the complainant is guaranteed and will be upheld by the appointing authority. All complaints received will be logged and appropriate records kept of action taken.

Complaints will also be received by the Governor's Affirmative Action Office, the Civil Rights Division of the Bureau of Labor and Industries, and/or the federal Equal Employment Opportunity Commission.

X. AFFIRMATIVE ACTION FOR HANDICAPPED WORKERS

All facilities shall be accessible to handicapped employees or clients.

Efforts will be made to recruit handicapped employees and they will be afforded a full opportunity to participate in agency-sponsored educational training, recreation and social activities.

Staff will be made aware through communication of the importance of understanding the handicapped AA program. Employees will be encouraged to refer candidates for agency openings.

Feb. 4, 2000

Hon. Brady Adams, Co-Chair
Hon. Lynn Snodgrass, Co-Chair
Members of the State Emergency Board
State Capitol
Salem, Ore. 97310

Re: State Public Defender request for funds.

Dear Senator Adams and Rep. Snodgrass:

The State Public Defender's Office is requesting an Emergency Fund Allocation of $101,800 in order to reduce the backlog of cases where the Public Defender has been denied any further extensions by the Court of Appeals. This request will allow the Public Defender to contract out these cases to private sector attorneys.

NATURE OF THE PROBLEM

In the 1999-2001 budget request, we identified our current backlog of appeals to be completed as the single biggest problem faced by the agency. Our caseload increased over the past decade by 25.2 %, although our number of FTE felony and misdemeanor attorney positions increased by only 9.5%. Thus, although we were still accepting every case referred to us for appeal, our staff was and is insufficient to absorb the increase.

The problem has continued and the Court of Appeals is requiring that the cases be processed more quickly. The Court has notified the agency that there will be no further extensions (NFE) of time allowed for 25 cases. By February 25 the court should order no further extensions in nine additional cases, for a 34-case total. In anticipation of this decision by the Court, the Public Defender has previously contracted out 18 cases to a private attorney at a cost of $27,000. Those 18 cases, plus the 34 others (costing approximately $74,800 to contract out), will cost at total of $101,800 to complete.

If money for the contracting is not provided to us, we will try to complete the NFE cases as they come due, but the likelihood is that one or more of the cases will be declared in default by the Court of Appeals and dismissed. Even if the appeal is dismissed, the defendant is still entitled to appellate review, so the case would be referred to the State Court Administrator for a post conviction hearing, after which the appeal would likely be re-instated. This would require the appointing of a new appellate attorney,

and both of these proceedings would be done at the expense of the indigent defense budget, which has no funds specified for these purposes.

To further complicate the problem, the Court of Appeals has told us that it is going to reduce the allowable time before the case reaches NFE status, from 400 days to 300 days. This will create an even larger backlog for the agency than exists at present, and the likelihood that any given case, once it reaches its NFE date, might go into default and be dismissed is also much greater. If that were presently true – that we had 300 rather than 400 days to complete the appeal – there would at this moment be an additional 109 cases on NFE status.

PROPOSED SOLUTION (SHORT TERM)

The agency needs to reduce the backlog cases by contracting with lawyers outside the office to finish processing the appeals. A recently posted request for information showed that attorneys in private practice are available to accept cases from the agency on either a per-case basis or a per-hour working arrangement. Figures provided by the SCA and other sources indicate that an appeal would cost about $2,200, on average, if this method were chosen by the Board. The agency would provide technical assistance in the form of training and limited supervision, to assure quality and efficiency.

We request the Board fund the immediate problem, and to assure that this method will be effective, provide $101,800, for the period between Feb. 25, 2000, and the next meeting of the Emergency Board on April 28. The Public Defender anticipates that as many as 59 more cases could fall into the NFE category by April 28, and that the Public Defender may have to make additional requests at that time.

It should be noted that, at the October, 1999, E-Board meeting, the Board set forth certain requirements of the agency, with compliance to be assessed by the Board at the April, 2000, E-Board meeting. We plan to report back to the Board on all of the issues raised in this letter. A long-term solution to this problem is highly desirable, both for maximum efficiency and the effective representation of the clients.

REQUEST

The State Public Defender requests an Emergency Fund Allocation of $101,800.00, to reduce the backlog of cases by contracting out the cases to private sector attorneys.

Very Truly Yours,

David E. Groom
State Public Defender

Dave Groom's copy

Oregon

John A. Kitzhaber, M.D., Governor

April 7, 2000

Public Defender
1320 Capitol Street, NE
Suite 200
Salem, OR 97303-6469
(503) 378-3349
FAX (503) 375-9701

The Honorable Brady Adams, Co-Chair
The Honorable Lynn Snodgrass, Co-Chair
Members of the State Emergency Board
State Capitol
Salem, Oregon 97310

Re: Report of the State Public Defender and Request for Emergency Fund Allocation

Dear Senator Adams and Representative Snodgrass:

This report, from the State Public Defender, responds to directives the Emergency Board gave the agency in October 1999.

In addition, the agency requests an Emergency Fund allocation of $132,524 for the following six items:

Case contracting	$ 52,800
Law clerks	41,181
Felony II unit	5,581
Computer programming	6,000
Chief deputy (operations)	6,962
Management consultant/training	20,000
Total	$132,524

Report on Management

At its October 1999 meeting the Emergency Board directed the State Public Defender to:

- Obtain training for the agency head and office manager on the state's automated budget system and fiscal management requirements;
- Develop and implement a supervisory and management training plan; and
- Obtain the services of a management consultant to identify workload problems and solutions.

In response, the State Public Defender has undertaken the following steps:

- Placed the agency budget on the automated budget system, with accurate budget projections for the current biennium (see attached spread sheet);

- Reconciled the budget forecast with Statewide Financial Management Systems;

- Hired a new office manager with qualifications and experience in modern budgeting and accounting methods;

- The agency head completed the Core Management program in November 1999 (the office manager will complete the same program in May 2000);

- Adjusted attorney staffing to increase productivity;

- Retained the services of a management consulting firm, with whom the agency has been working to identify internal and external changes for streamlining the agency and improving case processing;

- On February 24 identified 38 cases designated for no further extensions (NFE) by the Court of Appeals, and which, at its February 2000 meeting, the Emergency Board allocated $74,800 to help relieve this backlog by case contracting (this was in addition to $27,000 the Board allocated to cover costs the agency had previously incurred in contracting out backlog cases, for a $101,800 total);

- Contracted with 15 attorneys to process 33 backlog cases (see attached list of cases and attorneys);

- Began updating case tracking through computer programs so workload statistics and attorney performance can be accessed readily.

Thanks to the efforts of agency staff, the Department of Administrative Services, the Legislative Fiscal Office, and the Emergency Board, the agency now is in the best shape it has been in for many years. But there are still problems to be addressed. Although the Emergency Board's February 2000 allocation provided initial funding to reduce the agency's case backlog, additional funding is required for agency restructuring and further reducing the backlog. Moreover, we must find a way to process our large volume of non-merit appeals more efficiently, thereby allowing our attorneys more time to work on merit cases. This would reduce the need to seek outside counsel for our continuing backlog problem. Finally, we need to restructure the office in certain other respects, discussed later, to improve the agency's productivity.

Backlog of Cases

For the same reasons advanced to the Emergency Board in February, we are requesting an allocation of $52,800 for additional case contracting to continue our efforts to reduce and eventually eliminate our case backlog.

As previously explained, in February 2000 the Emergency Board allocated $74,800 for the agency's contracting of cases to private counsel to reduce the most critical portion of our case backlog—our NFE cases. By February 24 we had identified 38 cases the Court of Appeals had designated NFE. To allow our agency to process those cases while minimizing the growth of new NFE cases, we contracted out 33 cases. The due dates for these cases fell immediately or shortly after the group of current NFE cases. (The idea was that the agency attorneys would complete work on their current NFE cases and then, with their immediately subsequent cases contracted out, they would begin working on cases not on NFE.)

A list of contracted cases, and the attorneys to whom they have been contracted, is attached. For the most part those attorneys have not yet begun billing us for their work. However, relying on statistics for similar cases contracted by the Indigent Defense Services Division, we estimate the average cost per case will be $2,200.

On February 4 we estimated having 59 NFE cases at the time of the Emergency Board's April meeting. However, we currently have 11 cases on NFE, with another 13 likely to be on NFE by April 28, for an NFE total of 24 cases. This 35-case reduction in anticipated NFEs (from 59 to 24) resulted from a combination of the case contracting afforded us by the Board's February allocation, and a focused work effort by our attorneys.

In December 1999, the agency reported to the Emergency Board that there were an estimated 209 cases in our backlog. That figure has now been reduced to 122 cases—a drop of 87 cases. Thirty-three of those 87 cases were contracted out, so agency attorneys, through their own efforts, reduced the backlog by 54 cases over the four-month period.

We are continuing to work aggressively on further reducing our case backlog. However, the agency does request assistance from the Emergency Board for the 24 cases we presently estimate will be on NFE by April 28. At an estimated average cost per case of $2,200, the total amount requested for this item is $52,800.

Furthermore, the agency reported in February that the Court of Appeals notified us that on January 1, 2001 it will reduce the maximum time available for the agency's attorneys to file their appellate briefs. Presently the court

allows a maximum of 400 days from the date the record is complete within which to file the brief. Once a case becomes that old, the court notifies the attorney that it will grant no further extensions in the case (by issuing an order designating the case as an NFE). On January 1, 2001, the court will reduce the maximum number of days to file briefs to 300 days—the so-called 100-day rollback. A case 300 days old or older will be designated an NFE.

We now have 55 cases 300 days old or older (not counting the 24 NFE cases previously discussed). If the 100-day rollback were now in effect, those 55 cases would be on NFE, for an NFE total of 79 cases. If January 1 arrives with that many cases on NFE, a tremendous number would be in danger of being dismissed. They then would become the burden (through post-conviction relief) of the Indigent Defense Services Division.

The money necessary to contract out the 55 post-rollback NFE cases would be $111,000. However, recognizing the competing demands the Emergency Board currently faces, the agency is not requesting funds at this time to relieve this portion of our backlog. Nevertheless, it may become necessary later in the year for the agency to return to the Board with an additional request. Until then, it is our intention to do everything in our power to prevent our making any further requests. We will apprise the Legislative Fiscal Office of our progress in the meantime.

Office Reorganization

Working with the management consultant, the agency proposes to make the organizational and workload changes summarized in the attached organization chart, and staffing and workload chart. These changes will enable the agency to more efficiently manage its operations, including more quickly reducing its current case backlog. The changes are explained as follows:

- Adding three law clerk positions. These would be temporary positions at salary range 16. They would cost $41,181 this biennium, and $70,647 for a full biennium.

Although the agency has had law clerk positions in the past, it currently has none. Clerks would be invaluable in processing the agency's large volume of non-merit cases, and in doing legal research on more complex cases. If our attorneys were required to process fewer non-merit cases, they could work more efficiently on merit cases. This would reduce the number of cases at risk of being dismissed after January 1, 2001, when the NFE limit is reduced to 300 days.

As previously explained, we now estimate that 55 additional cases would be on NFE if the 300-day limit were in effect. However, we also estimate that

after a two-month training period, i.e., starting on or shortly after July 1, 2000, each of the three clerks could process 10 non-merit cases per month, for a 180-case total by December 31. We further estimate that relieving attorneys from having to do 180 non-merit cases would allow them to do 30 additional merit cases by December 31. The attorneys' doing 30 additional merit cases would reduce the number of anticipated, 300-day-limit NFE cases from 55 to 25. The attorneys' doing 30 more merit cases would obviate any possible need to contract out that many cases, thus realizing a potential savings of $66,000 (30 cases at $2,200 per case). Although this would be offset by the costs of the clerks through the end of the year—$23,532—there still would be a potential net savings of $42,648.

The law clerks would be part-time (approximately 1000 hours a year). Our office space is severely limited—we have no available offices—but the clerks would work in our library or at temporary stations around the office (including the workstation in our computer room).

- Creating a Felony II attorney unit. Presently, the agency has 14 attorneys processing all felony appeals. A Felony II unit would handle the most difficult felony cases (excluding death penalty cases). The Felony II unit would be staffed by our two most experienced felony deputies. To establish this unit, two positions at salary range 30 would be reclassified to salary range 32. Funding for this would require $5,581 for this biennium and $9,567 for a full biennium.

- The agency needs additional computer programming to modernize its case-management system. Currently the agency tracks cases manually. This arcane system impairs the agency's ability to track attorney performance efficiently. A chart of the agency's planned case-management programming is attached. The agency estimates the cost of the programming at $6,000.

- Reclassifying one deputy public defender as a Chief Deputy Public Defender. Funding for this would require $6,962 for the rest of this biennium, and $11,935 for a full biennium.

Currently, the agency has one Chief Deputy, at salary range 36. His duties, specified in the attached organization chart, pertain to the legal side of the agency. A second Chief Deputy, also at salary range 36, would be responsible for the operations side of the agency. The attorney who would be selected has qualifications and experience in public administration. His duties too are specified in the attached organization chart. They would include: tracking caseload statistics, overseeing the office manager and secretarial staff, coordinating budget preparations and accounting, supervising any law clerks that might authorized, and supervising all attorneys with respect to sentencing issues.

Management Consultant/Training

As noted, in October 1999 the Emergency Board directed the agency to seek the services of a management consultant and to undertake management training. We have done so and have benefited from doing so. These items were unbudgeted, however. Therefore, we request the sum of $20,000 to cover the cost of the management consultant and training.

Conclusion

The State Public Defender requests an Emergency Fund allocation of $132,524 for the above items.

Sincerely,

David E. Groom
Public Defender

PUBLIC DEFENDERS - AGENCY 182

SERVICES & SUPPLIES PROJECTION
99-01 BIENNIUM GENERAL FUNDS

			% OF BIENNIUM:	4%	8%	13%	17%	21%	25%	29%	33%			
TITLE	AGENCY OBJECT	FINANCIAL PLAN AMOUNT	PROJECTED FIN PLAN (Have DAS update)	ACTUALS Jul-99	ACTUALS Aug-99	ACTUALS Sep-99	ACTUALS Oct-99	ACTUALS Nov-99	ACTUALS Dec-99	ACTUALS Jan-00	ACTUALS Feb-00	TOTAL	% TO PROJECTED FIN PLAN	DIFFERENCE (Fin Plan-Actuals)
PERSONAL SERVICES		**4,730,869**	**4,592,980**	181,991	180,765	192,421	187,883	190,249	192,089	199,019	201,026	1,525,443		3,205,426
PERSONAL SERVICES SUBTOTAL		**4,730,869**	**4,592,980**	**181,991**	**180,765**	**192,421**	**187,883**	**190,249**	**192,089**	**199,019**	**201,026**	**1,525,443**	**33%**	**3,205,426**
* PS Projection - Last Update 3/9/00														
INSTATE TRAVEL	410x	4,747	4,747	191		(67)	66	30	274	44	58	597	13%	4,150
OUT-OF-STATE TRAVEL	4152	555	10,000								856	856	9%	(301)
PROFESSIONAL DEVELOPMENT - REGISTRATION FEES/TRAVEL	47xx+48xx +4960	20,000	30,000	2,690	377	(1,213)	430	2,209	520	465	807	6,286	21%	13,714
DUES & MEMBERSHIPS	4735	21,117	27,000	3,146						9,532		12,678	47%	8,439
OFFICE SUPPLIES	4200+5300	30,000	23,000	296	87	1,858	518	1,262	241	756	570	5,588	24%	24,412
SMALL EQUIPMENT	4201	5,000	12,000		309	2,021	745	306	0	54	70	3,504	29%	1,496
OFFICE SERVICES	4250	4,820	11,233	1,268	7	(65)	536	565	(91)	1,057	251	3,527	31%	1,293
POSTAGE	4251	33,822	25,890	2,177		(500)	1,129	1,157	2,431	1,157	0	7,551	29%	26,271
REPAIRS & MAINTENANCE	4260	35,000	43,661	7,068	346	3,369	173	4,211	(2,748)	316	254	12,989	30%	22,012
REFERENCE/LIBRARY	4261	23,000	35,000	620	71	329	1,580	4,176	535	1,873	1,859	11,042	32%	11,958
EQUIP RENTAL	4302	10,000	11,342	147	718	502	361		872	386	0	2,986	26%	7,014
DUES & SUBSCRIPTIONS	4351	3,000	6,624	330		1,214	154	214	20		80	2,012	30%	988
DAS PRINTING	5800	50,000	40,000	1,225		1,762	1,500	3,046	1,601		3,118	12,252	31%	37,748
STATE GOVT SVC CHARGES	5100+5107	66,866	70,000	2,146		4,575		26,029	101	10	90	32,952	47%	33,914
INSURANCE	5101	2,750	2,750						2,750		0	2,750	100%	0
AUDITING	5108	5,462	5,462			683		683		683	0	2,048	38%	3,414
TELECOMMUNICATIONS	4501	51,392	67,200	2,790		2,967		5,922	2,710	2,302	0	16,691	25%	34,701
BLDG RENTAL	5401	338,900	331,980	13,693	13,693	27,385	13,693	13,693	13,753	13,693	13,693	123,293	37%	215,607
PROFESSIONAL SERVICES	5000	9,449	9,500	1,874	1,328	972	231	814	(2,917)	767	116	3,186	34%	6,263
LAW CLERK SERVICES	5001	0	4,450						4,050	400	0	4,450	100%	(4,450)
GRANT CONSULTANT	5002	0	1,000							1,000	0	1,000	100%	(1,000)
MANAGEMENT CONSULTANT	5003	0	15,000							2,926	2,021	4,947	33%	(4,947)
MANAGEMENT TRAINING			5,000									0	0%	0
COMPUTER CONSULTANT	5004	0	20,000						4,721	2,025	0	6,746	34%	(6,746)
LEGAL CONSULTANT	5005	0	101,800	7,500	6,000	5,000		4,500	4,000		11,000	38,000	37%	(38,000)
AG COSTS	5050	0	1,000									0	0%	0
DATA PROCESSING (Westlaw Chrgs)	4555+4606	11,513	30,064	1,233	1,022	4,150	114	509	557	1,635	803	10,021	33%	1,492
DP HARDWARE (Exp Prop 250-5000)	5903	14,803	30,048	2,494		3,750		500		2,020		8,764	29%	6,039
DP SOFTWARE (Exp Prop 250-5000)	5904	0	2,500			438						438	18%	(438)
OFFICE FURN & EQUIP (Exp Prop 250-5000)	5901	20,255	3,000			260						260	9%	19,995
SERVICES & SUPPLIES SUBTOTAL		**762,451**	**981,251**	**50,887**	**23,956**	**59,390**	**21,229**	**69,826**	**33,378**	**43,100**	**35,645**	**337,412**	**34%**	**425,039**
TOTAL		**5,493,320**	**5,574,231**	**232,878**	**204,721**	**251,811**	**209,112**	**260,075**	**225,467**	**242,119**	**236,671**	**1,862,855**	**33%**	**3,630,465**
2/00 E-Board (Professional Svcs)		101,800												
" " (DAS Salary Comp Plan)		91,643												
TOTAL ADJUSTED BUDGET		**5,686,763**												

CONTRACTED CASE
Summary of Expenditures
Last Update: 4/7/00

TOTAL REC'D 2/00 E-BOARD:	**74,800.00**
TOTAL EXPENDITURES:	**8,500.00**
BALANCE REMAINING:	**66,300.00**

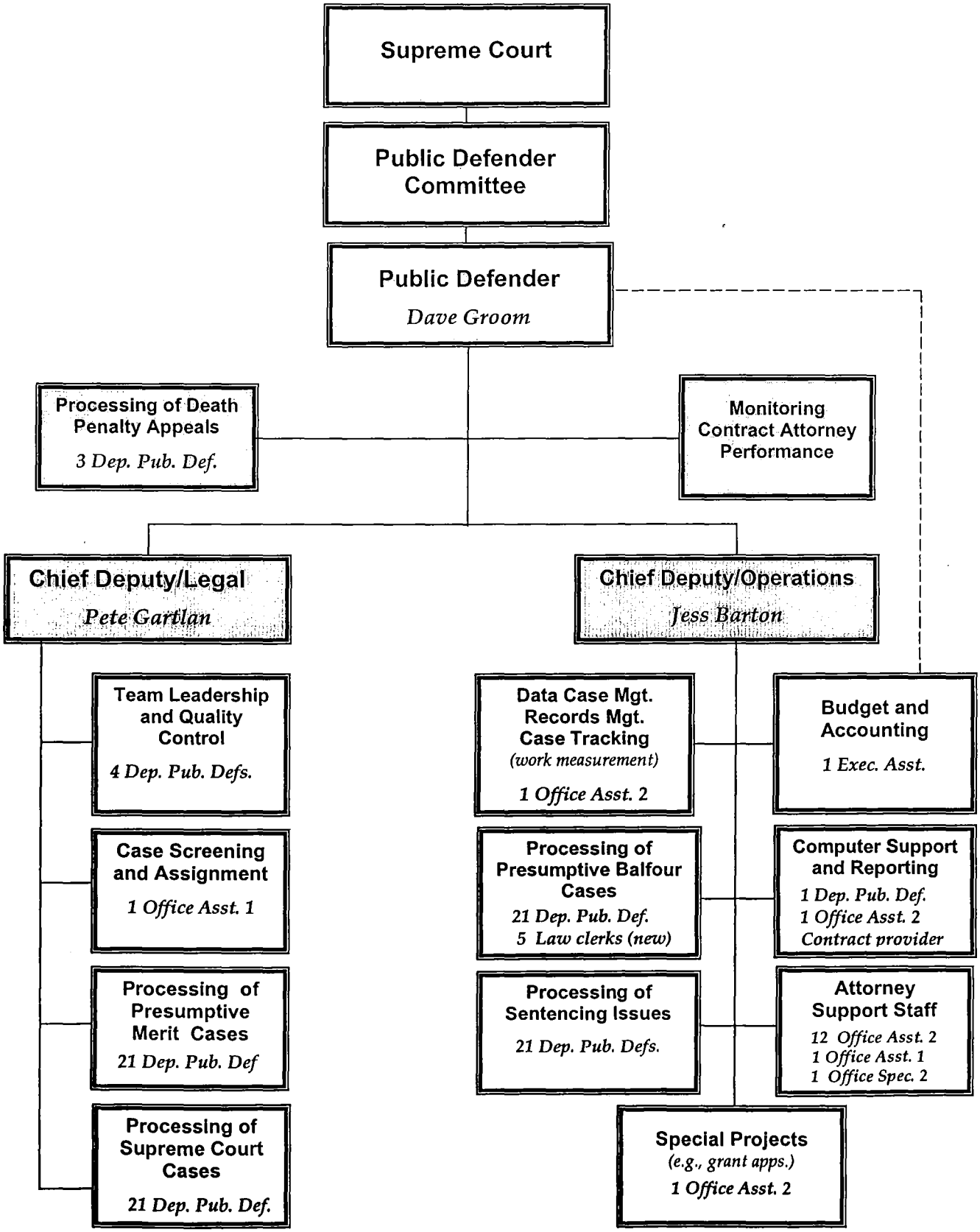
CONTRACTED ATTORNEY	CASE NAME	SIGNED K	SUB MOTION	TOTAL EXPENDITURES
Berger, Leland	1) Scott Eugene Horne (Dan Carroll #30660)			0.00
Black, Steven	1) Ben Franklin Savage (Monica Finch #31015)	x	x	0.00
Brook, Doris	1) James B. Hambleton (Walter Ledesma #31221)	x	x	0.00
Carter, Tomina	1) Terry Allen Irick (four cases) (Irene Taylor #30982-84+30963)	x	x	0.00
Celuch, David	1) Roman Avalos-Izquierdo (Irene Taylor #31623)	x	x	0.00
	2) Jay Michael Cates (Susan Drake #31607)	x	x	
	3) James Jensen (Peter Gartlan #30849)	x	x	
	4) Roy Johnson, Jr. (Walter Ledesma #31504)	x	x	
	5) William Reed (Irene Taylor #31424)	x	x	
	6) Daniel Allen Smith (Kimi Nam #31271)	x	x	
Chilton, Drew	1) Huckins (Dave Groom #31764)			0.00
	2) Vasile, Nichita (R. Jones #32227)			
	3) Sharp (Walter Ledesma #31685)			
Cross, Daniel	1) Allen Reed Holmes (Monica Finch #31741)	x	x	0.00
	2) James Olopai Tagabuel (Monica Finch #31530)	x	x	
Khalsa, Hari Nam	1) Meredith (Jennelle Hall #32454)			0.00
Kolen, Trina	1) Bruning (Monica Finch #31245)	x	x	0.00
Lisle, Charles	1) Miguel Anel Avila-Rivera (Walter Ledesma #31095)	x	x	0.00
	2) Gregory Lee Dixon (Drew Chilton #30662)	x	x	
	3) Abram Kashi Harmon (Kimi Nam #31126)	x	x	
	4) David Michael Lucero (Susan Drake #31782)	x	x	
	5) Juan Osuan-Antonio (Walter Ledesma #31466)	x	x	
Mackeson, Wayne	1) Samihe Zarif (Dan Carroll #31096)			0.00
Norton, Heather	1) Douglas Harris (Susan Drake #31376)	x	x	
	2) Gilman Johnson (Robin Jones #31391)	x		

CONTRACTED CASE
Summary of Expenditures
Last Update: 4/7/00

NTRACTED ATTORNEY	CASE NAME	SIGNED K	SUB MOTION	TOTAL EXPENDITURES
Perkins, John	1) Robert Dewayne Cook (Dan Carroll #31820-22)	x	x	0.00
	2) Joseph Henry Kindred, Jr. (Dan Carroll #31630)	x	x	
	3) Christopher Leon Olmsted (Dan Carroll #30715)	x	x	
Stone, Robert	1) Jason Webster Stockton (Kimi Nam #31126)	x	x	0.00
	2) Gregory Alan Wheelhouse (Irene Taylor #32100)	x	x	
Varner, Jim	1) Kotaniemi (four cases) (Monica Finch #30805-07+30030)	no contract		8,500.00
	2) Vasquez (Monica Finch #31875)	"		
	3) Butterfield (Monica Finch #32071)	"		

PUBLIC DEFENDER

Draft Realignment of Agency Duties and Reporting



Public Defender

Staffing and Workload Chart

Case Processing Unit	Current Staffing	Proposed Staffing	Per Person Monthly Performance Standard	Total Semi-Annual Performance Standard	Actual Case Counts, 4/3/00 to 10/3/00 (six months)
Entry Level • Presumptive merit misdemeanor and short/simple felony • Presumptive Balfour, misdemeanor and felony	6 @ SR 28 • Allen • Corbo • Duncan • Morrison • Munsey • Taylor	6 @ SR 28 • Same as current	• 5 presumptive merit misdemeanor and short/simple felony • 4 presumptive Balfour, misdemeanor and felony • 9 total cases	• 180 presumptive merit misdemeanor and short / simple felony • 144 presumptive Balfour, misdemeanor and felony • 324 total cases	• 140 presumptive merit misdemeanor and short/simple felony • 110 presumptive Balfour, misdemeanor and felony • 250 total cases
Felony 1 • Medium length/complexity presumptive merit felony • Presumptive Balfour felony	14 @ SR 30 • Carroll • Degner • Drake • Finch • Hall • Humber • Johnson • Jones • Ledesma • Maloney • Miles • Nam • O'Dell • Simrin	12 @ SR 30 • *[to be determined]*	• 3 medium length/complexity presumptive merit • 4 presumptive Balfour • 7 total cases	• 216 medium length/complexity presumptive merit • 288 presumptive Balfour • 504 total cases	• 318 presumptive merit *(includes complex cases; excludes 47 cases now assigned to two current felony deputies)* • 318 presumptive Balfour • 636 total cases
Felony 2 • Long/complex presumptive merit felony	**None**	2 @ SR 32 • *[to be determined]*	• 2 long/complex presumptive merit	• 24 long/complex presumptive merit	• N/A – Currently no positions
Death Penalty • Death penalty	3 @ SR 32 • Johansen • MacFarlane • Reese	3 @ SR 32 • Johansen • MacFarlane • Reese	• N/A	• 2.5 death penalty cases	• 4 death penalty cases
Law Clerks • Presumptive Balfour *(also would perform special projects and may handle short/-simple presumptive merit cases)*	0 @ SR 16	3 @ SR 16	• 10 presumptive Balfour	• 180 presumptive Balfour	• N/A – Currently no positions
Public Defender and Chief Deputies *(Legal and Operations)*	1 @ SR 37 • Groom 1 @ SR 36 • Gartlan 1 @ SR *30 (w/OC pay)* • Barton	1 @ SR 37 • Groom 2 @ SR 36 • Gartlan • Barton	• N/A –These positions take special cases and help even out agency workflow	• N/A –These positions take special cases and help even out agency workflow	• 24 presumptive merit felony *(including long/-complex cases)* • 20 presumptive Balfour • 44 total cases

Groupings of cases, by type

1. Jury trial	6. Guilty plea
2. Before court	7. No contest plea
3. Stipulated facts	8. Probation violation
4. Conditional plea	9. Resentencing
5. State's appeal	10. Parole appeal

A) True-trial cases	1. Jury trial 2. Before court	
B) Trial-type cases	1. Jury trial 2. Before court 3. Stipulated facts 4. Conditional plea	
C) Presumptive merit cases	1. Jury trial 2. Before court 3. Stipulated facts 4. Conditional plea 5. State's appeal	
D) Presumptive *Balfour* cases	6. Guilty plea 7. No-contest plea 8. Probation violation 9. Resentencing 10. Parole appeal	
E) All cases	1. Jury trial 2. Before court 3. Stipulated facts 4. Conditional plea 5. State's appeal	6. Guilty plea 7. No-contest plea 8. Probation violation 9. Resentencing 10. Parole appeal

Intake Report

- Need to add case assignments and reassignments to the database.
- By attorney and officewide (BA/O) summaries of assignments of each of 10 case types, and of Groups C and D.

Brief/Petition Completion Sheet

- BA/O summaries of each item in sheet **except** transcript pages and number of assignments of error (A/E). For transcript pages, averages for Group A. For number of A/E, average for Group E where merit briefs were filed.
- For Group B, average number of days to file brief.
- For Group B, number of cases where *Balfour* briefs or voluntary dismissals were filed.
- For Group D, number of cases where merit briefs were filed.

"Spread Sheet"

- Compares data from Intake Report and completion sheet to determine, BA/O, whether monthly completion numbers are less than or greater than monthly intake (assignment/reassignment) numbers. Do this for each of five groups. Do same comparisons between Intake Report data and database info. on number of appellate judgments issued.
- Ideally, bar or line graphs will be developed.

Boards

In addition to computerizing the boards themselves, develop summary report that covers the following:

- BA/O, total number of cases in each of five groups.
- BA/O, averages of days taken to file appellants' briefs.
- BA /O, number of cases under advisement (UA) in COA.
- BA/O, number of cases on review in OSC.
- BA/O, number of cases UA in OSC.

Tallies

In addition to computerizing the tallies themselves, develop summary report covering the following:

- BA/O, briefs due in Groups C and D in six-month period starting with current month (i.e., six-month reviews).
- BA/O, average *age* (number of days between record settlement and current brief due date) of Groups B, D, and E cases.
- BA/O, average age of state's appeal cases.
- BA/O, Groups B, D, and E cases aged greater than or equal to 300 days and 400 days. This would measure **both** cases that would be on no further extension (NFE) starting January 1, 2001, when 100-day roll-back is implemented; **and** cases on NFE before roll-back. The pre-roll-back measurement would be eliminated after the roll-back is implemented.

State Salaries
Page 8

COMPARATIVE STATE SALARIES

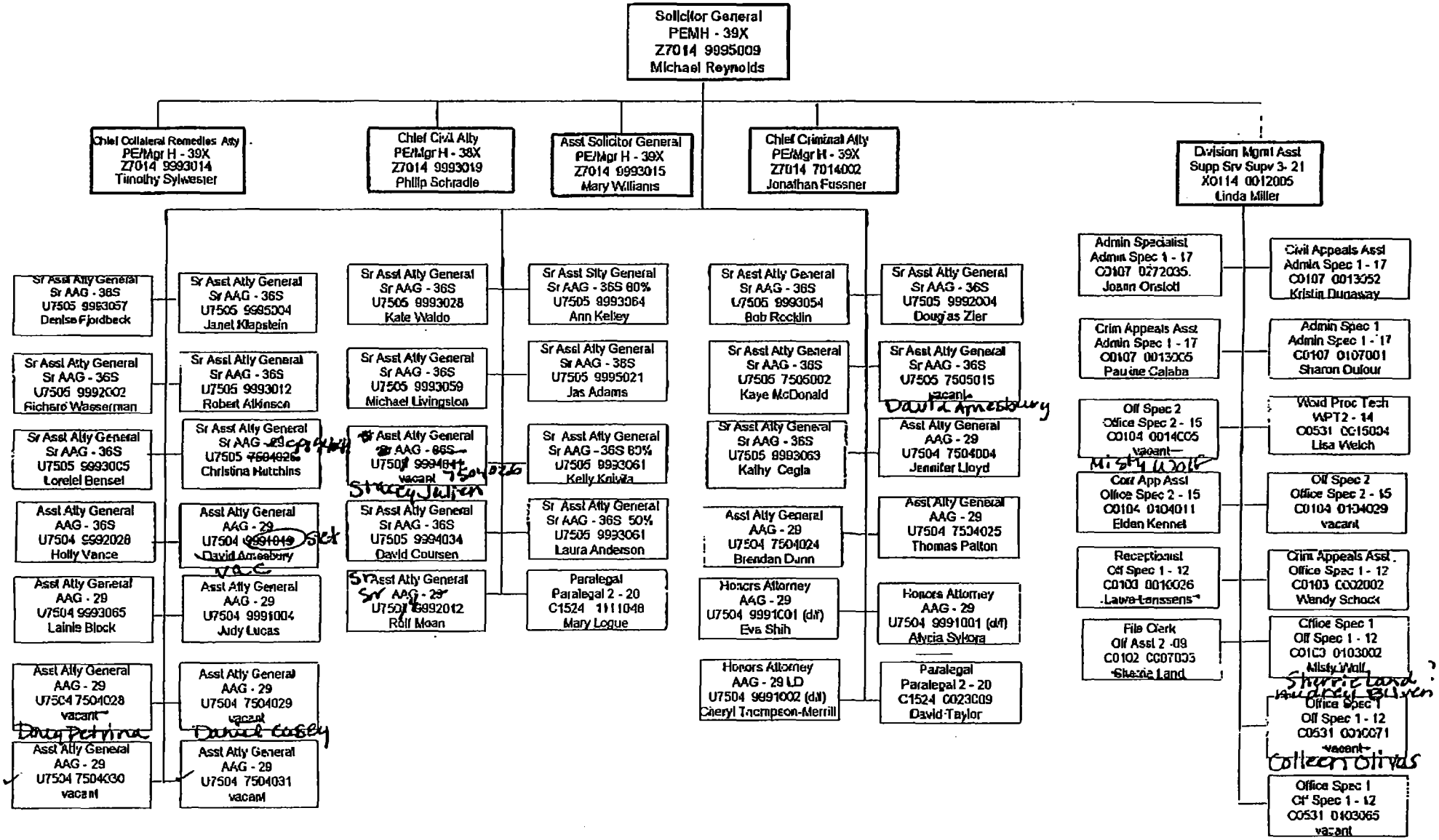
Judicial Branch - January 1, 1997- June 30, 1999

Classification	
Circuit Court Judges	$85,300
Tax Court Judge	88,000
Court of Appeals Judges	91,500
Chief Court of Appeals Judge	93,600
Supreme Court Justices	93,600
Chief Justice	95,800

Attorney General & Assistant Attorneys General
February 1, 1999

	MONTHLY SALARY STEPS							
Attorney Level	1	2	3	4	5	6	7	8
Attorney General								$72,800
Deputy A.G.	5551	5824	6116	6427	6749	7081	7435	7806
Sr. Asst. A.G.	4563	4794	5031	5288	5551	5824	6116	6427
Asst. A.G.	3240	3401	3570	3751	3945	4142	4348	

APPELLATE DIVISION



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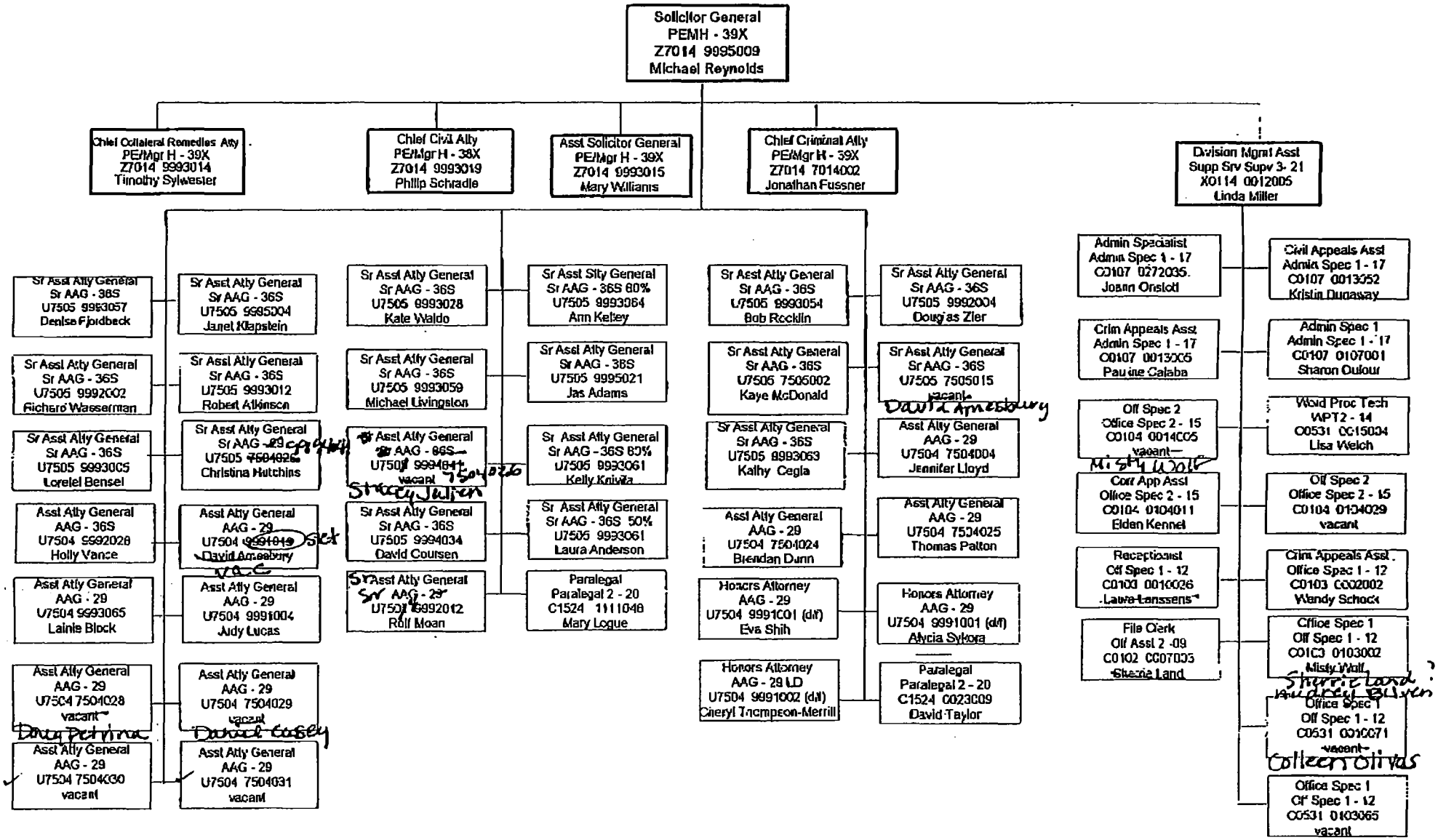
APPELLATE DIVISION



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MAY 19 1989

MANAGEMENT ASSESSMENT OF THE OREGON STATE PUBLIC DEFENDER'S OFFICE

Final Report

May 1989

Prepared for:

State Public Defender
Committee of Oregon

Prepared by:

The Spangenberg Group
West Newton, Massachusetts
William J. Rose
Robert L. Spangenberg
Richard J. Wilson
Susan Carpenter

INTRODUCTION

On February 9, 1988, Chief Judge Joseph of the Oregon Court of Appeals wrote as follows in a report to the legislature:

> The purpose, scope, functions, functioning and financing of the Public Defender's office should receive close legislative attention. The legislature created it and then virtually abandoned it.

Later that year, the Public Defender Committee contacted The Spangenberg Group concerning the possibility of conducting a full assessment of the Public Defender's office.

The Spangenberg Group, Inc. is a national law and justice research firm providing research, consulting and technical assistance in the delivery of legal services to the indigent in both civil and criminal matters. The Spangenberg Group has been recognized for its work in virtually every State, including a statewide assessment of the indigent defense system in Oregon conducted for the Office of the State Court Administrator and published in March 1989. The three principals in the firm--Attorney Robert L. Spangenberg, the firm's president; Patricia Smith, Vice President; and Attorney William Rose, Senior Associate--together have over 30 years experience conducting research and providing consulting services and technical assistance in the area of indigent defense.

It was agreed that any assessment of the Public Defender program would not include a financial audit, nor would it include an evaluation of the quality of representation by any individual attorney in a specific case. It was determined instead that the assessment should be a thorough management audit, evaluating the administration of the program and reviewing in a more general sense the workproduct and quality control of the organization.

A contract between the Public Defender Committee and The Spangenberg Group, Inc. was executed in December 1988 and work began on the evaluation in early January 1989.

The research methodology consisted of two principal phases. First was a review of available literature on other state appellate systems in the county to obtain information on their statutory authority, scope of services, policies and procedures, caseload/workload measures, funding, expenditures, etc. Also included in this review were the various sets of national standards developed by the American Bar Association, the National Legal Aid and Defender Association and the National Advisory Commission on Criminal Justice Standards and Goals relating to the operation of a defender office and providing defense services.

The second phase of the methodology involved gathering both subjective and objective data during a three day site visit to Oregon. Four research team members interviewed over 50 individuals during that period including all available attorneys in the Public Defender Program, other staff members, judges, legislators, the State Court Administrator and members of his staff, assistant attorneys general, corrections officials, members and staff of the Psychiatric Security Review Board, representatives of the state bar, and private practitioners.

In addition to Msrs. Spangenberg and Rose, the research team included Attorney Susan Carpenter and Professor Richard J. Wilson.

Ms. Carpenter has for the past seven years been the Public Defender of Indiana which is a state agency responsible for appellate services on behalf of indigent defendants in Indiana. Prior to that time, she served as a staff attorney in the same office. Ms. Carpenter, in addition to administering a state appellate defender agency, has had substantial experience handling appellate cases including capital cases both on direct appeal and in post conviction.

Professor Richard J. Wilson is a law professor at CUNY Law School in New York City and has a long background in appellate advocacy. He was for seven years an assistant appellate defender with the Office of the State Appellate Defender in Illinois and during portions of that time administered the regional office in

Springfield, Illinois. Following this period, Professor Wilson became the Director of Defender Services of the National Legal Aid and Defender Association in Washington, D.C. In this capacity he was primarily responsible for establishing state appellate defender offices in Arkansas, Iowa, North Carolina and New Hampshire. He also evaluated state appellate defender agencies in Oklahoma and Washington and assisted in the drafting of the NLADA Standards for Appellate Defender Offices. At the current time, he is the reporter for the ABA Standards for Criminal Justice revisions in matters relating to the role of defense services and the delivery of indigent defense services.

Mr. Spangenberg has also had experience assessing appellate defender work. He assisted the National Center on State Courts in their assessment of the Appellate Division of the State Public Defender in New Jersey; and he and Professor Wilson, again in association with NCSC, have just completed a Caseload/Workload study for the State Public Defender in California. Mr. Spangenberg has also conducted a Caseload/Workload Study for the Capital Collateral Representative in Florida, and he and Mr. Rose conducted an assessment of the time and expense of post-conviction capital cases in North Carolina.

This document constitutes the final report of our research effort. It is the workproduct of a team with demonstrated capability in evaluating indigent defense systems throughout the country, and with expertise in administering appellate defender offices, and providing representation at the appellate level. The following section provides some brief background information about the history, staffing, and funding of the Public Defender's office. That is in turn followed, first, by a series of findings; and, then by our recommendations.

We have chosen to set apart two major findings relating to (1) leadership and management of the program and (2) caseload and workload problems. It is our opinion that these two issues underscore virtually all of the problems facing the Public Defender

program today. This is not to suggest that the remaining findings are not important. They are extremely important and must be addressed. They are only narrower in scope than the major findings.

THE OFFICE OF THE PUBLIC DEFENDER: BACKGROUND

In 1963, the Oregon State legislature established the Office of the Public Defender by statute to provide representation to inmates in state post-conviction proceedings. In the same session, the legislature amended ORS 138.500(1), authorizing the Public Defender to represent inmates in direct appeals if the Public Defender was "able to serve."

The first Public Defender served until 1968 when he was replaced by Mr. Gary Babcock, the current Public Defender, who had already been working as an appellate attorney in the office for several years.

By 1971, the office began concentrating less on post-conviction matters and became more involved with direct criminal appeals. During the 1973-1975 session, the legislature added to the responsibilities of the Public Defender, enacting ORS 421.195 and ORS 144.335 which provided inmates the right of appeal to the Court of Appeals from adverse decisions of the Disciplinary Committee and the Parole Board. The Public Defender was given the responsibility of processing these appeals.

In 1980, the Public Defender withdrew entirely from state post-conviction cases focusing instead on direct appeals in felony cases, in guilty pleas and no contest proceedings before the trial court, probation and parole revocations, and inmate disciplinary proceedings. In 1987, the Public Defender resumed state post-conviction and habeas corpus representation for cases filed in Marion County under a specially funded pilot program. The pilot project also provided representation in all misdemeanor appeals filed in the court of appeals, and all mental commitment proceedings before the Psychiatric Review Board.

The Public Defender is appointed by a Public Defender

Committee for a term of four years renewable by the Committee. The Public Defender Committee consists of six members appointed by the Chief Justice of the Supreme Court for four year renewable terms. The Chairman is chosen by the Committee. The Committee is responsible for establishing policy and for overseeing the general functioning of the office. The day-to-day operation and management of the office is the responsibility of the Public Defender. As noted earlier, the current Public Defender has served in that position since 1968. His operation of the program has historically been with only minimal involvement or oversight by the Committee. In the past, the Committee has done little more than approve the budget requests prepared by the Public Defender for submission to the legislature.

In recent years, however, there has been a change in membership on the Committee. As a result, the Committee has expressed an interest in becoming more involved and in taking a more active role in overseeing the management of the program. This interest has been evidenced in part, by the retention by the Committee of The Spangenberg Group to conduct a full management assessment of the Public Defender program and to report its findings to the Committee. With the filing of this report, the assessment has been completed. Much remains to be done, however. More active oversight involvement by the Committee will be essential in both the immediate and longer term future, if the Oregon State Public Defender Office is to become an aggressive and vital operation, firmly committed to providing quality representation to their indigent clients.

Organization of the Office

The Public Defender is responsible for the day-to-day operation of the office. The current Public Defender has served in that capacity since 1968. His present term expires in 1992. The Public Defender's salary is $50,004. In addition to managing

the affairs of the office, the Public Defender also carries an extensive caseload. He does guilty plea appeals, no contests, probation revocations, and prison disciplinary matters. Mr. Babcock told us he disposes of over 80 cases per month personally. We believe this caseload is both excessive in itself, and, importantly, also symbolic of one of the most critical problems experienced by the program under its current management. A detailed discussion of these issues appears in the findings section on caseload.

The second in command in the office is the Chief Deputy Public Defender. He has been with the program for 23 years, having begun his term of service 11 months after the Public Defender. The Chief Deputy Public Defender's salary is $45,624 per year. He is responsible for assigning cases within the office and for administering the program in the absence of the Public Defender. The Deputy Public Defender also handles a full caseload. In addition, he serves as the affirmative action officer for the program, although it was acknowledged that there is neither a budget nor the time for this task.

There are five full-time staff attorneys with the office who are classified in the Deputy Public Defender II category. The salary for these attorneys is $37,548. The average experience level for attorneys on staff is five to seven years. Of these five attorneys, two handle death penalty appeals exclusively.

In addition to these staff attorneys, the Public Defender office also contracts with ten private attorneys to provide representation. Four attorneys are under contract to serve the general Public Defender program, and six contract with the special pilot project which was started in 1987. Each of these ten attorneys, although paid as an independent contractor, functions essentially as a full-time employee of the Public Defender program. They are paid a flat annual fee in monthly installments and are not eligible for any benefits including federal Social Security, state Worker's Compensation, unemployment insurance or Public Employees

Retirement System benefits. The Public Defender program, however, does pay each subcontractor's professional liability insurance which is estimated at approximately $2,500 per attorney per year. Although each contract attorney maintains a full caseload of an appellate defender attorney, they are also permitted to maintain a private practice. It is unclear whether the professional liability paid for by the Public Defender program is also intended to cover claims arising from a contracting attorney's private caseload.

The six contract attorneys in the pilot project were paid $28,000 in the first year of the project. This was increased to $ 33,000 in the project's second year.

In addition to the legal staff, the Public Defender program also employs two legal assistants who are responsible for "sufficiency of evidence" briefs filed by the office. These are referred to within the program as Anders briefs and are discussed in detail in Finding 7. The legal assistants are also responsible for calling trial attorneys to review issues of merit, filing death penalty papers and materials, and maintaining the library. The Public Defender program also employs an office manager who also serves as secretary to the Public Defender, eight full-time secretarial employees, and one secretary serving under contract. In addition, the pilot project employs three full-time clerical staff and two part-time law clerks.

Funding of the Public Defender Program

Funding for the Public Defender's office is provided by the state legislature on a biennial basis from the General Fund. Budget figures were made available to us from 1983 to the present. During the 1983-1985 biennium, the total actual state expenditure for the Public Defender office was $1,384,248. In the 1985-1987 period that figure rose by 10% to $1,521,670. During the biennium from 1987-1989, a base budget of $1,601,249 was adopted for the Public Defender Program to be paid from the general fund. Also during the 1987-1989 period the special pilot program, noted earlier, was created authorizing the Public Defender to provide representation in state post-conviction matters,. habeas corpus matters, direct appeals in misdemeanor cases, probation and parole reviews, and cases before the Psychiatric Review Board. The sum of $226,192 was allocated by the legislature for the project's first year, 1987-1988, and an additional $228,000 was appropriated to the Emergency Board for a second year release in 1988-1989. Also released during the second year of the biennium by the Emergency Board were (1) an additional $121,971 for the pilot project for another contract attorney and two clerical positions and to increase the contract attorneys compensation to $33,000 per year; (2) the sum of $86,122 for two additional contract attorneys and support services and supplies to handle an increased felony caseload; and (3) the sum of $90,000 to offset the cost of assigning to the program six death penalty direct appeals. Thus, total funding for work conducted by the Public Defender program and its pilot project during the 1987-1989 biennium was $2,353,534. Excluding $576,163 of this amount expended on the pilot project, the remaining funding figure of $1,777,731 represents an increase of 16.8% over the previous biennium.

In matters where the Public Defender is unable to serve due to conflict of interest or is unavailable for some other reason, a private attorney will be appointed to provide representation.

In such cases, the private attorney is compensated at the rate of $30.00 per hour with money from the State Indigent Defense Fund administered by the Office of the State Court Administrator. Lead counsel in death penalty cases are paid $45.00 per hour. Indigent Defense Fund expenditures have been substantial over the last several biennial periods. As the number of indigent cases at all levels of the judicial system grow, so have expenditures from the Indigent Defense Fund. According to a national survey conducted by The Spangenberg Group, between 1982 and 1986, total indigent defense costs in Oregon increased 77% from $12.6 million in 1982 to $22.4 million in 1986. This trend of increasing indigent defense expenditures is a nationwide phenomenon. State and county governments throughout the country have sought ways to reduce or at least control indigent defense costs. One way governing bodies have attempted to reduce costs is to increase the caseloads of attorneys representing the indigent, with too little concern for the impact this will have on the quality of representation.

The following section of this report presents our Findings. It will detail the specific problems we were able to identify from over 50 interviews conducted on site and from a large volume of printed material provided by the Public Defender's office, other organizations and individuals. Following this section will be a chapter detailing our recommendations in response to the findings.

Findings

This section of the report outlines the most important findings resulting from our evaluation and assessment of the Office of the Public Defender. We have chosen to present the findings in two subsections. The first subsection includes findings which are broader in nature. These findings, in our judgement, respond to the most significant overall issues in regard to the Public Defender's office. We have called these major findings. The second subsection contains findings directed at more specific

issues in the areas of administration of the office, work product and quality control. It is not our intent to minimize the significance of any single finding by separating them into two categories. However, unless the major findings are addressed first, effective implementation of any recommendations, in our judgement, will become substantially more difficult and, unfortunately, unlikely to result in a significant overall improvement in the quality of representation provided.

Major Findings

Finding #1: The State Public Defender does not provide the necessary leadership nor does he demonstrate the necessary management skills to effectively operate the State Public Defender program.

The failings of the State Public Defender in the area of program leadership and management are many and substantial. They are at the core of the problems suffered by the Public Defender program today; and, as such, underscore virtually every one of the subsequent findings in this report.

A. Leadership

It is axiomatic that defending the rights of convicted indigent defendants is perhaps the most unpopular occupation within the legal profession, at least, in the opinion of the general public, and often their elected officials as well. Yet, it is specifically for this reason that a Chief Appellate Public Defender must demonstrate strong leadership skills, skills that enable him to withstand public disapproval and legislative reticence to provide support. An Appellate Public Defender must be able to identify those who support the provision of quality representation - executive, judicial, and legislative officials, members of the private bar and others. He must seek support and he must nurture and develop support where he finds it, forging a coalition to help

fight the battles that commitment to quality appellate representation will inevitably produce.

The State Public Defender Program has little institutional impact in Oregon. The Public Defender does not communicate with the state bar, other defender offices, judges and court officials and legislators about improving the criminal justice system and the quality of appellate representation his program is able to provide. As a result, many changes have been imposed by the legislature with the tacit agreement of the Public Defender despite opposition, for example, from most of the defense bar. In contrast, we were told the Attorney General is constantly lobbying for the passage of legislation but the Public Defender is rarely seen in a similar role.

We find both the requisite leadership skills and the necessary commitment to fight for his clients and his office lacking in the current Public Defender.

What we find, instead, is a Public Defender who appears to provide little resistance regarding attempts to burden his program with increasing caseloads in an ongoing effort to reduce expenditures on public defense. We find a Public Defender who has neither identified, marshalled, or nurtured allies from other elements of the public and private sector in seeking support for his program. We find a Public Defender who presides over the decline in quality of service his office is able to provide and who justifies his inaction and lack of aggressive leadership with the rationalization that "it wouldn't work anyway, so what can I do" or words to that effect. We find a Public Defender who spends increasingly less time in his office tending to its efficient operation. We find a Public Defender once proud who, in the words of a number of people we interviewed, exhibits the classic signs of a "burnout case." Mr. Babcock himself described his office to us as a "Stone Age Office."

Leadership is a characteristic or attribute that is not easily quantified. However, its absence has an negative effect that can

permeate an entire organization from top to bottom. This appears to have occurred in the Public Defender office. We do not mean to suggest that the employees of the Public Defender office have been irreversibly tainted in some way by the lack of effective leadership and management in the office. Far from it. We found most of the employees to be hardworking, professional and committed to doing the best job possible under difficult circumstances. What we did find, however, were serious morale problems and confusion among many of the attorneys resulting from the absence of clear and effective leadership, management, and policy direction for the office. What we found is an office without a clear sense of its mission other than "to crank out whatever work comes our way"; without a clear sense of its priorities; and without a sense of direction for the future.

The situation is aptly summarized in the words of a judge of one of the appellate courts in Oregon. He said, "the whole office suffers from the 'Babcock syndrome'... Gary promises the legislature anything, never argues with them, the cost of the office goes down,. and there is no sensitivity to quality." But perhaps the best indicator of the current state of leadership came from the Public Defender himself who characterized his relationship with the legislature saying "we take whatever crumbs we get and do our best. The legislature could abolish our office overnight if they wanted to."

B. Management

During our many years consulting in the area of indigent defense we have seen programs that lack leadership but are administered and managed well. Conversely we have visited programs where the public defender is a poor administrator but has excellent leadership skills. The problem with the Oregon State Public Defender's office is the current lack of both leadership and administrative ability. When these two deficiencies converge a program is in crisis.

The current public defender program has no written policies for effective caseload control, no training program, no program for supervising its attorneys, no program for monitoring the quality of work it is producing, no written policy on conflict of interest cases, and no program for providing representation in post-conviction death penalty cases which it may well begin to handle in the near future. These issues are discussed in more detail in subsequent findings.

The State Public Defender Program also suffers gravely from underfunding. However, based upon the poor management of the office, the problems facing the office can not, in our view, be resolved by an increase in funding alone. We have identified the following problems which are directly related to the issues of inadequate funding:

(1) Non-competitive salary structure

One consequence of the underfunding of the Public Defender's office is that the salary structure for attorneys in the program is not competitive with other public sector attorney positions in Oregon, especially for experienced attorneys. The Public Defender is paid $50,004 per year. His first deputy receives $45,624. Below that the highest salary available is a Deputy Public Defender II position which pays $37,548. By comparison the Attorney General's Office has three grades of attorney positions higher than Attorney II (which pays the same as Deputy Public Defender II). An attorney III earns $45,624 per year, the same as the Chief Deputy Public Defender; an Attorney IV earns $52,824; and an Attorney V earns $58,224.

Salary discrepancies such as these make it difficult for the Public Defender Program to attract and retain the most qualified attorneys. Furthermore the lack of opportunity for experienced attorneys to advance beyond the grade of Deputy Public Defender II dampens morale, and increases the likelihood that the qualified lawyers the program has been able to attract will be unable to remain. As one public defender attorney explained, "I like the

work here. I believe in it and I'd like to remain. But it's becoming a personal sacrifice and I think it's unfair. Why should an attorney from the Attorney General's office make five or ten thousand more than I do for the same case. Their job is easier and they win more often. I could make a lot more money than I do here and sometimes I'm tempted."

(2) Use of part-time contract attorneys

Another consequence of the underfunding of the Public Defender's Office is the use of private attorneys serving under contract to perform the duties of staff attorneys but at a lower rate of compensation and without the standard benefits package. The ten contract attorneys now serving the program are permitted to maintain a private practice in addition to the full caseload they bear with the Public Defender office. This is a concession to their low level of compensation.

Several of the contract attorneys indicated that they do, in fact, have private clients. In our view, this can only detract from the commitment these attorneys are able to make to their public defender cases, but we are sympathetic to their need for additional income.

We have already discussed the noncompetitive salary schedule for staff attorneys. The use of contract attorneys, paid a substantially lower wage than staff attorneys, further undermines the ability of the Public Defender Program to attract and retain high quality attorneys who are willing to make a long term commitment the office. We are unaware of any other state appellate public defender office that operates on a contract public defender basis.

Most of those we interviewed indicated that the quality of work produced by the contract attorneys varied widely from one lawyer to another. However, one appellate judge indicated "at that price you're not going to get someone with experience who'll make a commitment to the program. You'll get inexperienced lawyers or lawyers looking for a base income while they build their practice.

In the long run it's not the smart thing to do."

We concur. As a matter of management policy, the use of a number of contract attorneys in lieu of staff employees in a full-time state defender office is inappropriate. It creates a class of marginal or fringe employees and diminishes the stability of the program.

(3) Lack of Computers

Computers are essential to the efficient operation of a modern law office, especially an appellate law office like the Public Defender Program which produces a large volume of written material. The Public Defender's office however does not have full word processing capabilities. Both attorneys and clerical staff informed us that they feel seriously hampered in producing briefs, motions and other written material without adequate computerization. Some attorneys had in fact brought their own personal computers into the office in order to achieve the word processing capability they required. The cost of equipping the Public Defender Program with these essential tools should not be passed on to its employees who are already underpaid.

(4) Inadequate staffing

Perhaps the most significant consequence of underfunding of the Public Defender Program is inadequate staffing. The high caseloads each attorney is required to handle seriously impedes the quality of service that can be provided. Over the years, it is very clear that the Public Defender Program has taken on higher and higher caseloads, without any corresponding commitment of attorney resources to handles those cases. Instead of adding sufficient full-time staff to handle the increase in caseload, at each legislative session, it seems that the office is further reduced by the use of part-time help, contract attorneys and legal assistants to perform work that should be performed by full-time staff attorneys and clerical staff.

The appropriate response to increasing the caseload of the office is a corresponding increase in staff. This has not happened

and it has resulted over time in a decline in the level of service the office is able to provide.

The specific effects of high caseload on performance are detailed in the next finding.

Finding #2: Public Defender attorneys are seriously overloaded with cases. This affects the attention they can give to any individual case and compromises the quality of representation they are able to provide.

The most significant consequence of the lack of effective leadership and management is that attorneys with the Public Defender's office are overburdened with cases. The effect of high caseload on quality of representation has been long recognized. The American Bar Association (ABA), the National Legal Aid and Defender Association (NLADA) and other national organizations have promulgated standards aimed at maintaining caseloads at a manageable level.

Standard 4-1.2(a) of Chapter 4 of The American Bar Association Standards Relating to the Administration of Criminal Justice, Prosecution and Defense Function (1979) deals with the issue of caseload and workload from an ethical perspective. It states:

> A lawyer should not accept more employment than the lawyer can discharge within the spirit of the constitutional mandate for speedy trial and the limits of the lawyer's capacity to give each client effective representation.

Chapter 5 provides a blueprint and set of standards for delivering defense services. It spells out in some detail the requirements for public defenders (and privately appointed counsel) in meeting their constitutional and ethical requirements. Standard 5-4.3 provides:

> Neither defender organizations nor assigned counsel should accept workloads which, by reason of their excessive size, interfere with the rendering of quality

representation or lead to the breach of professional obligations. Whenever defender organizations or assigned counsel determine, in the exercise of their best professional judgement, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or the breach of professional obligations, the defender organization or assigned counsel must take such steps as may be appropriate to reduce their pending or projected workload.

While these statements, guidelines, and standards are extremely important, they do not provide detailed guidance as to what is an excessive workload or what lawyers should do when they have reached the workload limit. More specific detail can be found by examining the work of two national bodies who have attempted to deal with the problem: the National Study Commission on Defense Services and the National Advisory Commission on Criminal Justice Standards and Goals.

Under a grant from the U.S. Department of Justice, a two-year study was undertaken by the National Legal Aid and Defender Association through the National Study Commission which resulted in the publication in 1976 of the Guidelines for Legal Defense Systems in the United States. Chapter 5 of that report addresses the maximum criminal caseload for a defense attorney. Section 5.1 states:

(a) In order to achieve the prime objective of effective assistance of counsel to all defender clients, which cannot be accomplished by even the ablest, most industrious attorneys in the face of excessive workloads, every defender system should establish maximum caseloads for individual attorneys in the system.

(b) Caseloads should reflect national standards and guidelines. The determination by the defender office as to whether or not the workloads of defenders in the office are excessive should take into consideration the following factors:

1. objective statistical data;

2. factors related to local practice; and

3. an evaluation and comparison of the workload of experienced, competent, private defense practitioners.[1]

Section 5.3 which deals with the elimination of excessive caseloads is also instructive. It states:

(a) Defender office caseloads and individual defender attorney workloads should be continuously monitored, assessed, and predicted so that, whenever possible, caseload problems can be anticipated in time for preventive action.

(b) Whenever the Defender Director, in light of the system's established workload standards, determines that the assumption of additional cases by the system might reasonably result in inadequate representation for some or all of the system's clients, the defender system should decline any additional cases until the situation is altered.

(c) When faced with an excessive caseload the defender system should diligently pursue all reasonable means of alleviating the problem including:

1. declining additional cases and, as appropriate, seeking leave of court to withdraw from cases already assigned;

2. actively seeking the support of the judiciary, the defender commission, the private bar, and the community in the resolution of the caseload problem;

3. seeking evaluative measures from the appropriate national organization as a means of independent documentation of the problem;

4. hiring assigned counsel to handle the additional cases; and

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[1]National Legal Aid and Defender Association, Guidelines for Legal Defense Systems in the United States, Report of the National Study Commission on Defense Services (Washington, D.C.: NLADA, 1976), p. 411.

5. initiating legal causes of action.

(d) An individual staff attorney has the duty not to accept more clients than he can effectively handle and should keep the Defender Director advised of his workload in order to prevent an excessive workload situation. If such a situation arises, the staff attorney should inform the court and his client of his resulting inability to render effective assistance of counsel.

The only national source that has attempted to quantify a maximum caseload is the National Advisory Commission, which published its standards in 1973. In that report standard 13.12 on Courts states:

> The caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.

The Oregon State Public Defender Office functions without an effective mechanism for limiting caseload and workload. On the contrary, we found evidence that producing a volume of work has been given, at least in some instances, a higher priority than producing work of quality.

This report does not claim to be an assessment of the quality of representation provided by individual attorneys in specific cases. Nor are we able to conclude on the basis of our research that the Public Defender's office provides ineffective assistance of counsel. We are nonetheless deeply concerned, based upon our observations, that the quality of representation the office is able to provide may fall below acceptable standards in too many instances. Our on-site research produced so much evidence of questionable or clearly inadequate practices and performances, that we are forced to conclude the quality of representation provided by the Public Defender's office in many cases has been seriously

compromised, despite the hard work and energy of most of the staff attorneys.

The following table shows the total number of cases and the average number of cases per month handled by the Public Defender program for each biennium from 1981-1989. Figures for the 1987-1989 biennium have been annualized based upon caseload data from July through September, 1987.

TOTALS AND OVERALL PERCENTAGES

PUBLIC DEFENDER WORKLOAD MEASURES

Type of Case	1981-1983 Total	1981-1983 Mon. Ave.	1983-1985 Total	1983-1985 Mon. Ave.	1985-1987 Total	1985-1987 Mon. Ave.	1987-1989 Total	1987-1989 Mon. Ave.	% Increase 1981-1983 to 1987-1989
Trial Appeals	992	41.3	1022	42.6	1173	48.9	1303	54.3	31.3%
Guilty Plea/No Contest Appeals	734	30.6	750	31.2	865	36.0	1073	44.7	42.6%
Probation Revocation Appeals	300	12.5	335	13.9	344	14.3	456	19.0	52.0%
Petitions for Review	190	7.9	442	18.4	522	21.7	432	18.0	127.4%
Petitions for Writ of Certiorari	4		1		-				
Disciplinary and Parole Appeals	300	12.5	362	15.1	662	27.6	809	33.7	169.7%
TOTAL CASELOAD	2520		2912		3566		4073		61.6%

This table reveals that the volume of cases has increased substantially in all principle categories from 1981-1983 to the present. Projected figures show Trial Appeals increasing by 31.3%; Guilty Plea/No Contest Appeals are up by 42.6%; Probation Revocations have increased 52%; and the number of Disciplinary and Parole Appeals have increased by 169.7%. Since 1981, the total number of cases has increased by 61.6%.

Over this entire period, however, the Public Defender Program has functioned without an effective mechanism for limiting the caseloads and workloads of its individual attorneys.

Recently, in February of 1988, the Public Defender committee, relying on the "ability to serve" provision of ORS 138.500, instituted a maximum caseload level for attorneys in the general program of four appellate briefs per month. Thus the first 40 cases assigned to the office are accepted and divided among ten attorneys. Thereafter intake is closed for the month. Although this represents a step in the right direction, this level is still nearly double the accepted maximum caseload levels for appellate defenders nationally. The NLADA recommends appellate briefs be limited to two per attorney per month, while the National Advisory Commission standard sets the maximum caseload for appellate attorneys at 25 per year. Both standards fall substantially below the caseload level of four per attorney per month, 48 per year, currently established by the Oregon Public Defender's office. Moreover, it appears that even the existing caseload workload limitations are often exceeded. As one attorney told us: "Our limit is supposed to be four new cases per month, but sometimes we have to accept more to keep up." The excessive caseloads handled by attorneys in the office is well known to Mr. Babcock. In fact, he recently had a survey conducted of caseload/workload in other appellate defender offices around the county which he gave to us. That document dramatically revealed the excessive caseloads in his office compared to virtually all other offices included in the survey.

There are no national or local standards that we are aware of which include recommended maximum caseload and workload levels for the full range of cases handled by the Public Defender Program, specifically for example, PSRB appeals, disciplinary matters and parole revocation hearings. In addition, the national standards that exist do not distinguish between misdemeanor and felony appeals, nor do they speak to guilty plea and no contest plea appeals.

For these reasons, the National Legal Aid and Defender Association devised caseload standards for Appellate Defender offices which recognize the need for each appellate program to establish its own caseload limits, in view of accepted national standards and levels of practice, which accurately reflect the types of cases actually handled by the program. NLADA Standard 1-F reads as follows:

1. In order to assure that effective representation is being provided by the appellate office and that adequate information is provided the funding source upon which to base an appropriate budget, it is essential that all appellate defender units develop caseload standards which accurately reflect the amount of casework which can be done by existing or contemplated staff.

2. The caseload for each particular jurisdiction should refer to national standards based on time records developed by each individual office based upon the specific nature of the cases handled by that unit.

3. It is essential that accurate records be kept for a period of time, to determine the actual time necessitated by a wide variety of cases handled by the appellate defender in each jurisdiction, including death penalty cases, lengthy or complex cases, cases which do not involve a formal appeal to the appellate court, and other types of varied cases.

4. The appellate defender shall have clearly-articulated policies to prevent the office from exceeding its caseload standards. Such policies should be discussed in advance with the funding authority and the appointing courts to ensure no misunderstanding regarding the obligations of the appellate defender. Such caseload standards and procedures should be reduced to writing regarding excessive caseload.

We were not provided with documented data quantifying the caseload levels currently being handled by the pilot project. Our information instead was anecdotal, derived from on-site interviews. The national standards have long recognized, however, that each attorney may provide the best indicator concerning whether he or she is overloaded at any given time. Accordingly, we are inclined to consider the anecdotal data we were able to gather as credible indicators of caseload and workload levels. The responses by attorneys we interviewed clearly suggest that the public defenders are in fact overburdened with extremely high caseloads and workloads.

In this regard, we were told by several people that high caseload was one of the most significant problems attorneys in the pilot project were facing. The remarks of one of the project staff are also instructive, not only concerning caseload but also with respect to case management: "The philosophy of this program is give 'em work until they squeal, then rotate [the high caseload to someone else]."

There is no checklist of procedures which when followed will guarantee that the assistance provided a client is effective or adequate. Every attorney must independently evaluate the facts of a case, investigate those facts, make appropriate motions to the court and proceed with whatever legal actions are in the client's best interest. High caseloads in the Oregon Public Defender's office make thorough preparation of individual cases virtually impossible. Furthermore, it is our view that the acceptance by the Public Defender of high caseloads has led to the institutionalization of the belief that it is both necessary and advisable to cut corners in preparing a case in order to keep up with the volume.

It is, therefore, our belief that many of the problems, in terms of the quality of representation the Public Defender is able to provide, result from the high caseload borne by the program.

There are other factors contributing to the problems and inadequacies we have been able to identify, but we feel that high caseloads directly affect both the quality of service provided and also in some instances how the office is managed.

The remainder of this section deals with our other findings and recommendations.

Other Findings

Finding #3. Public Defender attorneys rely too heavily on the judgement of trial counsel in determining meritorious issues for direct appeal.

Typically trial counsel will provide the public defender with a list of issues deemed worthy of appealing; or, an assistant public defender may talk with trial counsel by telephone before adopting his view of meritorious issues. Too often there is inadequate, independent investigation and analysis of issues for appeal.

The most obvious problem presented by this practice is that trial counsel is unlikely to identify his own ineffective assistance of counsel at trial as a meritorious issue for appeal.

The American Bar Association standards address the issue of effective assistance of counsel and state as follows:

Standard 4-8.6. Challenges to the effectiveness of counsel

> (a) If a lawyer, after investigation, is satisfied that another lawyer who served in an earlier phase of the case did not provide effective assistance, he or she should not hesitate to seek relief for the defendant on that ground.
> (b) If a lawyer, after investigation, is satisfied that another lawyer who served in an earlier phase of the case provided effective assistance, he or she should so advise the client and may decline to proceed further.
> (c) A lawyer whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation, even though this involves revealing matters which were given in confidence.

In our view the practices of the Public Defender Office fall far short of this standard in instances where an independent investigation of this issue is not conducted.

Another serious problem exists, however, in this practice. The Public Defender's office will order for review only these parts of the record that trial counsel has indicated might contain error. We assume this is done in large measure to reduce the workload of already overburdened appellate attorneys. The result is that significant portions of a record may never be reviewed. Standard 4-8.4. of the American Bar Association Standards relating to the conduct of an appeal states as follows:

Standard 4-8.4. Conduct of appeal

> (a) Appellate counsel should be diligent in perfecting an appeal and expediting its prompt submission to the appellate court.
> (b) Appellate counsel should be scrupulously accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument.
> (c) It is unprofessional conduct for a lawyer intentionally to refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

The practice of failing to read the full record appears in clear violation of this important standard. As a result of this practice, in some cases, meritorious issues may be missed. In the state of Oregon, the assignment of error is made for the first time in the appellate brief. It is the responsibility, therefore, of appellate counsel, not trial counsel, to identify meritorious issues for appeal. Issues not raised in a timely fashion may be forever lost. There is no way of knowing how many meritorious issues may never have been presented.

Finding #4. Public Defender attorneys routinely neglect to visit each client during the preparation of a case.

Accepted appellate practice requires that every client be

visited during the preparation of a case. The National Legal Aid and Defender Association has promulgated standards for appellate practice. Standard 1-I relates to the issue of client contact and provides as follows in relevant part:

> 1. All appellate defender clients shall be personally interviewed by the attorney who will actually be handling the case.
>
> a. Each appellate defender unit shall adopt written office policies which require each client to be seen by the attorney actually providing representation in that case. Such policy shall include at least one visit, and such additional visits as are required by the particular facts and circumstances of the case.

The Public Defenders often make little or no effort to comply with this standard. Rather, we were told that a client is visited only if he specifically requests to be seen, and even then, visits to the jail may not be made until a second request is made. There are four state correctional facilities within the county, yet one Public Defender attorney told us he visits less than 10% of all clients to whom he is appointed. The Public Defender acknowledged he was aware that clients were routinely not visited by his staff, but responded "we're too busy." Thus, the office typically deprives clients of input into their own cases. Several persons that we interviewed outside the office verified this point and told us that they had received letters of complaints from some clients.

Every client should be visited and given the opportunity to provide input particularly when it is not geographically difficult to do so. They are often valuable witnesses to what transpired at trial. Their observations may be useful on the issue of ineffective assistance of counsel. Thorough investigation is a requirement of competent appellate preparation.

Lastly, it should be noted that a few staff members appear to hold a negative view of clients generally. This was communicated

indirectly in such remarks as: "visiting clients is a waste of time. Most of them don't know anything anyway" and "it's difficult to gear up day after day for briefs when you realize that 95% of your clients are really guilty." We can appreciate the impact representing unpopular causes can have on an appellate defender over a number of years. However remarks like the above are not acceptable.

Finding #5: The Public Defender's office has no formal policy with respect to conflict of interest cases.

There is no presumption of conflict when the office is appointed to represent multiple defendants in an individual case. On the contrary, multiple defendant cases are routinely accepted. We were told by one interview subject that the Public Defender "has not declared a conflict of interest since he arrived here." This practice appears to violate national standards which suggest that appellate attorneys are held to the same standards as trial attorneys about the existence of conflicts in multiple defendant cases as enunciated in Holloway v. Arkansas 435 U.S. 475 (1978).

Finding #6: The briefs prepared by Public Defender attorneys frequently fall below an acceptable level of quality.

This finding results both from the observations of interview subjects, judges, clerks and attorneys who have appeared opposite the Public Defenders - and also from our own review of a randomly selected number of Public Defender briefs. For us to detect problems in brief preparation, the problems had to be apparent on the face of the brief itself, because we weren't familiar with the record. Nonetheless, we were disappointed with the quality of work we were presented with. Two examples are instructive: (1) The first brief, prepared in early 1989, includes assignments of error on the first page which go only to the sufficiency of the evidence. The actual arguements include a second issue about the invalid imposition of a fine. The insufficiency argument itself is cut off

in mid-sentence after several paragraphs had been cut and pasted from the transcript into the brief. The argument about the invalid fine stated in its entirety: "The fine imposed in this case is invalid." This was followed by a case citation. After the one sentence argument on the fine, the next goes back to the sufficiency of the evidence and refers to 12 pages of transcript from the hearing. The argument on the insufficiency states, in its entirety "Joint occupation of a cell eliminates [sic] a matter of law any chance that the state may carry its burden of proof." No authority is cited, no further argument is made, other than a description of the defendant's burden; (2) A second brief filed in 1988, argues that probation was improperly revoked. The summary of facts used by the defendant is the "official version" taken from the underlying offenses, probably from a probation officer's report. Any appellate advocate, indeed any defense lawyer, knows that the probation officer's report of the facts may be the least accurate source for information, particularly viewed in the light most favorable to the defendant.

It should be noted that the briefs in felony cases were generally better than those in other areas. Even so, we had the strong sense that the office was focused more on production of quantity than production of quality. There seemed to be little creativity in the brief writing and very little effort to break new ground.

The remarks of one attorney who indicated a desire to spend more time developing issues when preparing a case said:

> We were told to get the numbers up. Put the issues in and don't worry how good [the brief] is. In my opinion, this policy would make me sacrifice the quality of my presentation in a case. The atmosphere here is definitely put out the numbers and don't be concerned with quality.

Interviews we conducted with several judges and assistant attorneys general indicated that poorly crafted briefs were produced with enough frequency to attract notice.

We interviewed a number of judges from appellate level courts. One was especially candid in his assessment: "The quality of briefs was very high several years ago--1983 and 1984--but since then it has consistently gone down." The judge continued by saying he was very concerned about the performance of the Public Defender's office, and noted that the court has reversed on, or raised issues that had not been raised by the public defender. "In some briefs," the judge added, " the office forgets to change names and inserts old boilerplate from other cases." The judge also noted that the Supreme Court had on one occasion chastised the office for missing an applicable statute. The judge concluded that the Public Defender is "a second rate office doing scut work."

One assistant attorney general noted that the performance of the public defender's office created a dilemma for him, saying: "Technically I'm on the other side, but sometimes, in fairness to the defendant, you feel like mentioning that an issue has been missed. I've done that." Other assistant attorneys general we interviewed were less harsh in their view of the office. But one raised another problem with briefs submitted by the Public Defender's office. "There are a number of good lawyers in the office," we were told. "I've seen a couple of briefs that were bad, but I've also seen some good ones, too. My biggest criticism is not that they miss issues. It's that they don't drive the good issues home. When they have potentially winning issues they don't argue them forcefully. It's like they raise the issue for the record and move on to the next one. The briefs lack the quality of 'advocacy'...arguing forcefully on behalf of the client."

Another significant point needs emphasis. Mr. Babcock has established an informal office policy that briefs should contain "only one or two good issues." He told us personally that, "We don't put stuff in there that might make the judges mad." This policy is inexcusable. Every appellate attorney must raise all significant meritorious issues on appeal, regardless of how the court might react. There was no evidence to justify this policy

based upon all of our extensive interviews with appellate judges, opposing counsel and other outside the office. In fact, some appellate judges were critical of Mr. Babcock because in some cases important issues were not raised.

An additional factor that should be mentioned is that the Public Defender Office does not maintain a brief bank, a catalogue of previous successful cases, and briefs effectively arguing issues that are likely to reoccur.

Maintaining a brief bank is a standard practice in most appellate offices, and can be extremely useful in preparing effective briefs, especially when an attorney is operating under the pressure of a heavy workload.

Finding #7: The Public Defender's office appears to be operating in a way inconsistent with procedures for handling cases where appellate counsel has determined that there may be no meritorious issues on appeal.

The American Bar Association standards in Chapter 4, The Defense Function address the responsibility of appellate counsel. Standard 4-8.3 states that, "Appellate counsel should not seek to withdraw from a case solely on the basis of his or her own determination that the appeal lacks merit." The lengthy commentary, which will not be repeated here, addresses the issue of Anders v. California, 386 U.S. 738 (1967) regarding the role of appellate counsel in cases where they determine that there are no meritorious issues on appeal.

Anders requires that in a case where appellate counsel believes there may be no meritorious issues, he must submit a brief setting forth anything in the record that might arguably support the appeal. The Supreme Court explained in a recent case, McCoy v. Wisconsin 43 Crim. Law 3071 (June 6, 1988) that this requirement was designed to provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeals to the best of their

ability. The court explained further, "this is to provide that indigent defendants get the same benefit as wealthy defendants, that is, a diligent and thorough review of the record and an identification of any arguable issue revealed by that review." McCoy v. Wisconsin 43 Crim. Law 3071 (June 6, 1988)

The Oregon Public Defender does not appear to comply with the rule established by Anders. If after talking with trial counsel, the Public Defender's office determines there are no meritorious issues, they will submit a "sufficiency brief" stating simply that the evidence at trial was insufficient to support the conviction. This falls far short of the Anders requirement, and operates as little more than a red flag to the court, signaling that the Public Defender has determined no meritorious issues exist. This untenable circumstance is aggravated by two factors. First, the "no merit" decision has typically been made by the Public Defender without having conducted a full review of the record. Secondly, these cases are typically marked for oral argument all on the same day, known as "bucket day" which sends another unmistakable signal to the court concerning the lack of merit the public defender sees in each case.

Finally, there is also concern in the mind of at least one appellate judge that the Public Defender's office may be using the Anders-substitute sufficiency brief in cases where they are not appropriate, in cases where issues of merit may exist. We received no specific independent corroboration of this view. We were, however, informed by one Public Defender attorney that 50% of his cases are Anders cases. This appears to us to be an extraordinarily high percentage of cases. Given the cursory nature of review performed by the Public Defender's office in many cases, including over-reliance on trial counsel and incomplete reading of the record, we are inclined to believe that the possibility is substantial that issues have been missed and that there is an over-reliance on sufficiency briefs.

Finding #8: The quality of oral argument by Public Defender attorneys varies widely.

We did not have the opportunity to observe the staff presenting oral argument, with the exception of one death penalty case which we viewed as being competently argued. We were told by interview subjects who had observed the public defenders make presentations that the quality of oral arguments varied widely from one attorney to another. Some we were told were quite "strong and in command" of their material, while others seemed to be very unsure of themselves. It was suggested that these deficiencies may be related (1) to the fact that public defenders are overburdened with cases and (2) the lack of training in appellate trial skills. Another issue was raised by a member of the Attorney General's office who indicated that the Public Defender's office sometimes surprises them by not marking up for oral argument, potentially winning issues:

> They'd raise a potentially winning issue in a brief but not mark it up for argument at all. I've noticed that more than once.

Another issue concerning oral argument which deserves mention is the procedure for making all oral arguments on "bucket day", mentioned briefly earlier. It appeared to us that there were close to 100 cases from the appellate defender all marked for the same calendar day. It is our view that the demeaning terminology universally used for this day gives some idea of the respect with which indigent appellants are treated. It is said that their cases are put "in the bucket" for oral argument. In any given case, the attorney may waive or stand for questions only. One public defender attorney indicated that he actually argued very few of the cases that were presented.

It seems to us that these practices distort the role of the advocate. They give us very little sense of advocacy on behalf of indigent defendants and we are concerned that the same message may

be communicated to the courts and the clients themselves. We are concerned that indigent defendants are being isolated and stigmatized in a way which may verge on denial of due process.

Finding #9: The public defender program lacks standards or guidelines for requesting or assisting inmates seeking appellate bond.

Current procedures are inadequate for requesting or assisting inmates in seeking appellate bond. In fact, the Public Defender only on rare occasions will request appellate bond for its clients. Those clients who are eligible for bond should have the opportunity to make a presentation and there is currently no systematic procedure in the Public Defender's Office for ensuring that such presentations are made. Instead, we were told the practice of seeking bond is very haphazard. According to one attorney: "I'll have my secretary call the judge's secretary to see if he'll grant bond. If she says no, we don't file." Another lawyer indicated that "the reason we don't file is that 95% are denied." Clearly foregoing appeals bond requests is a concession to the heavy workload borne by defender attorneys. It is inappropriate in our view, however, not to seek release for an eligible client for this reason.

Finding #10: The Public Defender provides inadequate training and supervision for new attorneys, initially; and, for more experienced attorneys on a continuing basis.

Appellate practice is a highly specialized area of law, requiring a broad range of legal skills. Few of the attorneys with the Public Defender Program had any substantial experience in appellate work prior to beginning with the program. Nonetheless our interviews indicated that the amount of training and supervision provided during the initial period with the program was minimal. One attorney noted that, "I have been pretty much on my

own since I first got here. This program functions more like a private law firm, and I like it that way."

Another told us that upon joining the program "Gary looked over my first three or four briefs, but basically I've had to learn this stuff on my own." A third attorney offered: "The good thing about this job is that Gary and the other attorneys are always available to answer questions, but that's really the extent of the training and supervision I've received."

Another attorney characterized the initial training as follows: I was given two notebooks, one statute, copies of caselaw, a research notebook, and important telephone numbers. I was introduced around, taken to observe interviews and hearings and supervised during my first interview and hearing. Beyond that someone was always available to answer questions."

This attorney seems to have received more attention than the others in the office; but even then, much of what is characterized as "training" seems more like "orientation".

With respect to continuing legal education, attorneys in the office are permitted to take part in several programs and seminars sponsored by the Oregon Criminal Defense Lawyers Association. However, a measure of the Public Defender's commitment to providing continuing training for its attorneys is that the cost of outside training events must be paid out of pocket by each attorney.

The Public Defender himself indicated his awareness that more training might be beneficial for his attorneys. He indicated that he has been trying to provide training for years, but that he had never been able to secure sufficient funds to support the kind of training he would like to implement.

The lack of training received by public defender attorneys was apparent to several of the interview subjects outside the office with whom we spoke including judges and assistant attorneys general. One judge remarked that since the program couldn't afford to hire the best lawyers available, it should at least adequately train the ones that were hired, "but in some cases it's obvious

that it hasn't happened," the judge concluded.

Concerning supervision, a senior attorney in the office told us: "New attorneys receive no supervision. These briefs, after the first one or two, are not read. There also is no reading of the record by a second attorney."

We were told again and again by public defender attorneys that the office was run like a private law office with each lawyer responsible for his or her own caseload, and for seeking whatever assistance or supervision is necessary.

Whatever supervision exists for attorneys in the public defender office is provided purely on an ad hoc basis. Informal discussions, or small meetings may be held from time to time as attorneys encounter the need for assistance, but there are no formal provisions either for supervising, or for monitoring and evaluating the workproduct of attorneys in the public defender office

This may, in fact, be another concession to case overload. With all attorneys bearing overwhelming workloads there may seem to be little time for supervision, monitoring and evaluation . But without these control mechanisms, the quality of work an office produces over time cannot be assured. These are critical elements of a sound management program in a defender office, and cannot continue to be neglected.

Finding #12: The Public Defender has not formed an effective plan to handle post-conviction death penalty cases in either state or federal court.

There are now eighteen or more capital cases on appeal in the state court system of Oregon. The United States Supreme Court currently has a petition for certiorari before it on the constitutionality of the Oregon death penalty statute. It is expected that the Supreme Court will act on this case within the current term. If, in fact, the court does decide that the Oregon death penalty statute is constitutional, several cases will be ripe

for the state post-conviction process by the end of the year. This opinion was shared by a representative of the Oregon Attorney General's Office we interviewed during our site visit. Concern has been expressed about the question of whether or not the State Public Defender will be available to handle state post-conviction death penalty cases when they reach the state courts.

We were informed that the issue was raised with the Public Defender at least several months ago. As far as we could determine during our site visit, he had yet to begin considering the answer to this question, or to develop a plan for providing representation, if it is determined that the public defender will handle these cases.

It is clear and convincing to us, after having conducted numerous studies of the time and expense of providing representation in post-conviction death penalty cases, that these cases can take hundreds of hours to handle. It is absolutely clear that the public defender cannot handle these cases with existing staff. Yet there were no plans to seek additional funding during the next biennium.

It is important to note, in regard to the handling of death penalty cases on appeal, that all the individuals we interviewed outside the office were high in their praise of the two assistant public defenders who have handled those cases. They were termed, "outstanding" and "incredibly dedicated and competent." They deserve high praise for the enormous time and effort they have given to these important cases. However, even this dedication and competency is limited. They too are overworked and overwhelmed, and little effort has been undertaken by Mr. Babcock to address this problem other than to assume that they can handle even more cases.

Recommendations

The State Public Defender is the primary program providing representation to indigent defendants on appeal to the appellate courts in Oregon. Over the years the Office had a reputation for providing quality representation in appellate cases and had a dedicated and hard working staff. Mr. Babcock was a central figure in this effort and provided a measure of leadership that gave the program credibility, both within the courts and among the clients. He was also recognized nationally as one of the leaders in the field of appellate defense. It can truly be said that Gary Babcock has devoted virtually his entire career to the fulfillment of the constitutional requirements of effective assistance of counsel to indigent defendants on appeal. He deserves great credit and praise for these efforts. Even in those days, however, we were told that the office had few written policies and operated in a rather informal collegial manner.

Unfortunately, something happened in recent years that is difficult for us to pinpoint. At a time when caseloads were on the rise and the complexity of appellate practice became more extensive and demanding, Mr. Babcock either seemed to lose interest, attention or did not have the energy to pursue an aggressive approach to advocacy with the legislature, the courts or the bar. The Office slowly began to make compromises resulting from case overload, lack of adequate additional funds and the lack of support and direction from Mr. Babcock. At the beginning of this period (probably somewhere about five years ago), the Public Defender Committee was relatively inactive and basically accepted Mr. Babcock's continuous optimistic view of the future as re-assurance against what some felt were obvious danger signs.

As the lack of leadership became more severe, the inadequacies of office management and administration were unmasked. This period (the last two or three years) was also characterized by an indigent

defense system overall that was facing a crisis in funding in Oregon. Rather than accepting the challenge of advocating for the needs of the Office, Mr. Babcock acquiesced in the decisions that were made as characterized by his statement to us that, "We take whatever crumbs we can get and do out best. They could abolish our office if they wanted to."

Mr. Babcock's own words, at a time when we were assessing his stewardship, at his request, and that of the Committee, documents and verifies the views that we received from interviews outside the office . In fact, one of the most discouraging parts of our three day visit to Oregon was that, outside the office, there was virtually no support for Mr. Babcock and virtually uniformity of opinion that the office has already reached the crisis stage. We agree, as evidenced by the content of this report.

Finally, it is extremely important for us to point out, despite the numerous problems identified in this report, there are a number of able, dedicated staff within the State Public Defender's Office. The dedication is demonstrated by their willingness to continue to represent large numbers of clients under the most severe and depressing circumstances. To the extent that this report appears to be critical of the lack of leadership and administration of Mr. Babcock (which it clearly does) it should not reflect equally upon the staff members in the office.

The State Public Defender program, in our professional judgement, is currently in a state of crisis and immediate attention should be demanded of the Committee. What the future holds is largely unclear, but with proper leadership, direction and administrative skills we are convinced that the State Public Defender can return to or surpass the quality of work and advocacy that once was the hallmark of the program.

Having expressed these concerns, we set forth our final recommendations. First, the board must take immediate action to address the critical problems that currently beset the Public Defender program. The most critical obviously is the question of

leadership and management at the top. There appear to us to be two possible resolutions:

(1) Mr. Babcock must substantially alter his leadership and management of the office devoting his complete attention to addressing all the issue raised in this report under close supervision of the Committee; or 2) he must be replaced. This decision is one that only the Committee can make. We do feel, however, that based upon all that we have learned or observed during our research, it is unlikely that Mr. Babcock is capable of making the necessary changes.

Whatever decision is made regarding Mr. Babcock's position with the program, the Committee must take a more hands on approach in the future. Not only must it meet regularly and take on a major policymaking function, but it must also address directly the other issues set forth in the section on findings.

Specifically:

- The mission of the Public Defender program must be clearly defined, including a specific enumeration of its caseload priorities. These priorities must be enforced, and not expanded without a commensurate increase in funding support and staffing.
- A full case weighting study of the office should be conducted in order to determine specific staffing levels necessary to handle current caseload. This study should also be used once specific staffing needs have been determined in order to establish caseload and workload standards. The design of these standards should be undertaken with reference made to existing national standards and current caseloads and workloads borne by other appellate defender offices throughout the country. Once standards have been promulgated they must be maintained and enforced.

- The Public Defender's Office must have detailed, written personnel policies and standards, including specific job descriptions and hiring, firing and promotion procedures. In Finding 1(b)(2) we found that the use of contract attorneys, paid a substantially lower wage than staff attorneys and allowed to engage in the private practice of law is inappropriate. It creates a class of marginal or fringe employees and diminishes the stability of the program. The practice of employing private attorneys under contract should be eliminated. Attorneys employed by the public defender office should be full-time attorneys prohibited from engaging in the private practice of law.
- Attorneys in the public defender's office should receive salary parity with attorneys of similar standing and experience in the Attorney General's office. In Finding 1(b)(1) we indicated that the substantial discrepancy between salaries in the Public Defender's Office and other public sector attorney salaries makes it difficult for the program to attract and retain the most qualified attorneys. The highest staff attorney position Public Defender II pays only $37,548. An Assistant Attorney General can advance beyond the equivalent Attorney II level to levels III, IV and V paying as much as $58,224, over $8,000 more than the Public Defender himself.
- The Public Defender should design, implement and enforce performance standards detailing the tasks that are generally expected to be performed in each case. In Finding #3 we noted that public defender attorneys appeared to be relying too heavily on the trial attorney's assessment of meritorious issues for appeal, and in some cases foregoing complete review of the record; in Finding #4 we indicated that public defender attorneys routinely neglect to visit each client during

preparation of a case; in finding #5 we indicated that no policy exists concerning when representation must be declined due to conflict of interest; in Finding #6 and #7 we discussed problems relating to brief preparation; in Finding #8 we discussed the issue of oral presentation; and in Finding #9 we discussed the lack of procedures for regularly requesting or assisting inmates seeking appeal bonds. These are among the areas that must be addressed in a series of performance standards, detailing for each attorney the practices and procedures that must be followed at each stage of a proceeding. In designing these standards, reference should be made to standards promulgated by the American Bar Association, the National Legal Aid and Defender Association, and the National Advisory Commission on Standards and Goals.

- A plan for providing representation in post-conviction death penalty cases should be designed in the event representation will be provided by the Public Defender. In Finding #12 we indicated that the Public Defender has not formulated a plan for providing post-conviction representation in death penalty cases in the event the United State Supreme Court upholds the constitutionality of the Oregon Death Penalty Statute. These cases take hundreds of hours to handle. If the statute is upheld, there is a reasonable likelihood that the Public Defender will be expected to provide representation. This will require substantial additional funding. Contingency plans must be made.
- A formal program must be developed for providing initial training to new attorneys with the public defender's office, and for providing training in a continuing basis for more experienced attorneys. In Finding #10 we indicated that no such provisions currently exist in

the Public Defender's Office. In view of the number of questions we have raised concerning the work product of the Public Defender's Office we feel that the development of a formal training program is critical. It is standard practice in both trial and appellate defender programs for both initial and continuing training to be provided to staff. In some programs it is provided in house. In others, it is secured through national and/or state criminal defense training organizations. It is clearly an area which must be addressed immediately by the Public Defender Committee in Oregon.

- Formal provisions must be designed and implemented for supervising and monitoring the performance of all attorneys with the Public Defender Office. The lack of supervision and monitoring was discussed in Finding #11. We noted in particular that "new attorneys receive no formal supervision; and, that whatever supervision is provided for all attorneys is done purely on an "ad hoc" basis. Supervision and monitoring are essential elements of quality control in any successful organization. Without these mechanisms the quality of work the office produces over time cannot be assured.

These then are our major recommendations to improve the operations of the State Public Defender Program. This management audit was one of the most difficult assignments that we have undertaken in over 15 years addressing problems and concerns in the indigent defense field. It is an easy task to report on a public defender agency that is well managed and well funded. It is more difficult to lay out the facts, as they appear to us, in the Office of the State Public Defender, especially in view of the many years of dedicated service by Mr. Babcock.

REPORT ON CRIMINAL JUSTICE SYSTEM APPEALS

Presented to

Joint Interim Committee on the Judiciary

February 9, 1988

by

George M. Joseph
Chief Judge
Oregon Court of Appeals

RIGHT TO APPOINTED COUNSEL ON APPEAL

There are few federal or state cases which directly address the right to appointed counsel on appeal. The following paragraph from the recent decision in Pennsylvania v. Finley, 481 US ___, ___ 107 S Ct 1990, 95 L Ed 2d 539 (1987), gives the present position of the United States Supreme Court regarding the extent of federal constitutional requirements:

> "We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks to their convictions, see Johnson v. Avery, 393 US 483, 488 (1969), and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. Wainwright v. Torna, 455 US 586 (1982); Ross v. Moffitt, 417 US 600 (1974). We think that since a defendant has no constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, a fortiori, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process. See Boyd v. Dutton, 405 US 1, 7, n. 2 (1972) (Powell, J., dissenting)."

The Oregon Supreme Court has not determined the extent of the right to appointed counsel on appeal under the Oregon Constitution. Stevenson v. Holzman, 254 Or 94, 458 P2d 414 (1969), and Brown v. Multnomah County Dist. Ct., 280 Or 95, 570 P2d 52 (1977), discuss the right to counsel at trial. Chief Justice Peterson's dissent in State ex rel Russell v. Jones, 293 Or 312, 647 P2d 904 (1982), contains a detailed history of the development of the right to counsel and suggests that

corpus in the Supreme Court. The petition is denied. He then files a motion to suppress the evidence which the officer found in his car. The trial judge issues an order suppressing some, but not all, of the evidence. The state appeals from the order of suppression, and the defendant cross-appeals from the court's refusal to suppress all of the evidence. After the state wins the suppression appeal, a trial is held and the defendant is convicted. He is sentenced and placed on probation. He appeals his conviction and also challenges the lawfulness of the sentence, including the conditions of probation. Still later, his probation is revoked, and he appeals the revocation.

Having now actually been committed to prison, he is put in segregation for 15 days by the Disciplinary Review Board for a disciplinary rule violation. He petitions for review to the Court of Appeals and files a motion to stay the order placing him in segregation. The motion requires the filing of written arguments by his counsel and the state. He also files a new petition for a writ of habeas corpus, this time in circuit court, asserting that he is unlawfully restrained, because his underwear was not returned from the prison wash. The petition is denied in circuit court, and he appeals. The Parole Board then sets his release date, and he petitions for review of that decision to the Court of Appeals.

After he is released on parole, parole is revoked. He petitions to the Court of Appeals for review of the revocation. Ten years after completing his sentence, he files a post-conviction proceeding, alleging that he had ineffective assistance of counsel at the trials on the DUII and burglary charges and appeals on both. The circuit court denies his petition, and he appeals. On appeal, he is granted a new trial on the burglary charge and again convicted. The process begins again.

In this hypothetical, the defendant has had 11 proceedings before the Court of Appeals. (Except for habeas corpus, no reference has been made to the various possibilities for discretionary review by the Supreme Court.) Other hypotheticals could be drawn to illuminate more or fewer opportunities for appeal, and real individuals could be named who have had 10 or 15 appellate reviews at public expense.

The number of possible appeals demonstrated by the hypothetical reflects the haphazard growth of appellate access over the years. That access is sometimes required by the federal or state constitutions, as, for example, direct appeal; sometimes, as in post-conviction relief, access has been granted to try to funnel several possible routes of common law review into one or to relieve a branch of the court system; sometimes, as in disciplinary review, access seems to have been granted because of an apparent reluctance to make a decision

final unless a defendant has been offered an opportunity to appeal.

Coinciding with the growth in the number of determinations which can be appealed and in the scope of review of some appeals has been the legislative determination to provide counsel for almost every appeal. Even when there is no constitutional requirement for appointed counsel, the enabling legislation for the Oregon Public Defender system allows that office to "represent a defendant at any stage of a proceeding before any court."[1] That provision has been used as a basis for appointment of counsel, even if the furnishing of appellate counsel in a particular instance is not specifically mandated by a statute.

The haphazard evolution of appellate opportunities has also resulted in a system in which it is possible for a defendant to challenge the same decision through more than one appellate avenue. For example, even though post-conviction relief was not intended to give a defendant a second appeal from a conviction, a defendant may effectively receive a second review of his conviction by alleging in the post-conviction proceeding that he received ineffective assistance of counsel in his first appeal. By review from the setting of parole, a defendant can challenge essentially the same determination which he might have challenged on the original sentencing by direct appeal. Additionally, a defendant can challenge

confinement and segregation through a petition for a writ of habeas corpus, even though the order placing him in segregation has previously been before the Court of Appeals on disciplinary review.

The concern of this report is appeals. It is important to keep in mind that appellate constitutional rights are not identical to the trial rights of a defendant. For example, a person charged with committing a crime has a constitutional right to a jury trial. However, a person convicted of a crime does not have a corresponding constitutional right to appeal that conviction, at least not under the federal constitution. It is also important to keep in mind that the right to appointed counsel may differ at trial or on appeal under the federal, as opposed to the state, constitution.

This report presents an overview of these appellate areas: direct appeals from a jury trial and sentence on conviction; direct appeal from a sentence after a plea of guilty (or no contest); driving under the influence of intoxicants; post-conviction relief; habeas corpus; probation; parole; and disciplinary review. The questions which should be kept in mind are whether appellate review of the decisions should exist at all and, if so, whether the public should be required to pay for counsel to represent the appellant on the appeal.

DIRECT APPEALS

The right to appeal from a conviction in a criminal case is statutorily created;[2] it is not expressly provided for in the Oregon Constitution, although it may, in some instances, be constitutionally mandated by interpretation. The statute provides that a defendant may not appeal an adverse order until the trial has been completed. However, the state may appeal some orders made before trial[3] and, if it does, the defendant may then cross-appeal.

Within 30 days after judgment of conviction,[4] a defendant can appeal from (1) the conviction, (2) adverse orders made before or during the trial or (3) the sentence imposed on the conviction, including any conditions of probation.[5] If a defendant pleads guilty, he may directly appeal only from the sentence imposed and then only on the ground that the sentence is unconstitutional or exceeds the maximum allowed by law.[6]

There is no federal constitutional requirement that a state grant a defendant a right to appeal.[7] However, <u>if</u> a state grants the right to appeal, defendant's counsel <u>cannot</u> determine that an appeal is frivolous and discontinue it. The United States Supreme Court held in <u>Anders v. California</u>[8] that, even if appointed counsel finds no merit to an appeal, counsel cannot withdraw but must file a brief pointing out what <u>might</u> support an appeal, and the appellate court must then

consider the entire record and determine if the case should proceed. The practical result is to consume enormous amounts of appellate time and resources on wholly non-meritorious appeals. Consequently, the Oregon Court of Appeals has refused to follow the Anders procedure strictly. In State v. Horine,[9] the Court of Appeals held that due process rights of a defendant do not require appointed counsel to present frivolous appeals. If, after examination of the record, counsel determines that there exist no errors of merit, counsel notifies the court. The Court of Appeals does not search the record for error. The defendant is given an opportunity to respond and, if no response is forthcoming within 30 days, the appeal is dismissed.

The federal constitution requires appointed counsel in any trial (state or federal) for an offense in which imprisonment is not just authorized, but is actually imposed.[10] If a state grants the right to appeal to any defendant, the Equal Protection Clause requires appointment of counsel for indigent defendants on the first, direct appeal.[11] There is no federal constitutional right to appointed counsel for any appeal or review other than the first, direct appeal, the Supreme Court having specifically found no right to appointed counsel in discretionary appeals to state courts[12] or in post-conviction proceedings.[13]

DRIVING UNDER THE INFLUENCE OF INTOXICANTS

In 1975, the Oregon legislature attempted to decriminalize driving under the influence of intoxicants by making it an "infraction," instead of a crime, and excluded appointed counsel and trial by jury in a DUII proceeding.[14] The Supreme Court held that the classification change did not take away from DUII the characteristics of a criminal prosecution.[15] All the rights which adhere to a person charged in a criminal proceeding must be available to a DUII defendant. The legislature has never revisited the problem. Consequently, the right to appeal, and to have state-paid appointed counsel, is available after a DUII conviction.

(There are also civil appeals which may result from an arrest for DUII, although there is no right to appointed counsel. A person who refuses to take a breath test, or who fails it, will have his license suspended and may request a hearing on that suspension.[16] If he loses at the hearing, he may appeal to circuit court and after that to the Court of Appeals and the Supreme Court.[17])

POST-CONVICTION RELIEF

Post-conviction is the statutory procedure[18] to challenge the legality of a conviction or sentence after there is no longer a right to a direct appeal. Issues which could

have been, but were not, raised on direct appeal theoretically cannot be raised in a post-conviction proceeding. A defendant can challenge the jurisdiction of the trial court, the constitutionality or legality of his sentence, the constitutionality of the statute upon which his conviction was based or the denial of "due process" in the trial or on appeal.[19] One of the most frequent allegations in post-conviction cases is that the trial or appellate attorney was "ineffective."

The federal constitution requires that a state have some post-conviction procedure for a person to challenge a violation of federal rights, even if the procedure is only one of the traditional ones furnished by habeas corpus and coram nobis.[20] The original Oregon post-conviction provisions were passed in 1959 in an effort to meet federal requirements and also to bring within one procedure all common law post-conviction remedies except for the constitutionally mandated habeas corpus.[21]

The United States Supreme Court recently held that there is no federal requirement for a state to provide counsel for a post-conviction proceeding, which proceeding it says is civil in nature, not criminal.[22] By statute, Oregon provides appointed counsel for indigent persons.[23] This provision apparently was intended, in part at least, to avoid the burden on circuit courts of having to process

unintelligible post-conviction petitions filed by uneducated defendants.[24]

HABEAS CORPUS

Habeas corpus is the historic common law procedure to challenge confinement or restraints which go beyond confinement.[25] It cannot be used to challenge the illegality of a conviction; that must be done by a post-conviction proceeding.[26]

The state constitution[27] provides for habeas corpus. It gives the Supreme Court the discretion to take original jurisdiction in habeas corpus.[28] In 1862, the Oregon legislature first codified the procedures.[29] A person may petition in the Supreme Court or in circuit court, but not both. If a petition is filed in circuit court, that court must hear the case. If the petition is denied by the circuit court, the petitioner has a right to appeal.[30]

For there to be state-paid appointed counsel in a habeas corpus proceeding, there must be statutory authorization.[31] In 1979, the Oregon legislature provided that counsel may be appointed, both at circuit court and on appeal to the Court of Appeals and Supreme Court.[32]

Habeas corpus has been abused in the past[33] and continues to be abused. The example used at the beginning of

this report reflects an actual case which was recently before the Court of Appeals. A prisoner alleged that, in addition to incarceration, he was illegally being subjected to the "enhanced penalty of being denied adequate clothing" while incarcerated in OSP, because the institution did not return his clothing after he put it in the institution wash.[34] He pursued the case even though he could be (and probably was) issued new clothing at OSP.

PROBATION

When a defendant is sentenced after a conviction but is placed on probation instead of being incarcerated, he may appeal the conditions of probation, if he does so within the 30 days for taking an appeal from the judgment on conviction.[35] The conditions may be appealed, even by a defendant who has pleaded guilty. A defendant has a right to counsel for the appeal, even if only a condition of probation is challenged.

There is no specific statutory authorization for appealing a revocation of probation. However, a footnote by Chief Judge Schwab in State v. Martinez[36] implies that revocation can be directly appealed, and that is the existing practice. The statutory authority for appointing counsel on appeal is in the general provision which provides for counsel

in any proceeding concerning probation, including revocation.[37]

PAROLE

The federal constitution requires a hearing before a parole is revoked.[38] In Oregon, legislation provides for review of revocation of parole as well as the order of the Board of Parole setting a release date if the inmate is adversely affected by the order.[39] The inmate is represented by the Public Defender in a petition for review of either the order or the revocation.[40]

DISCIPLINARY REVIEW

When Oregon passed the Administrative Procedures Act, the Corrections Division was not exempted from following all of the procedures for rule-making and hearings. The Division did not want to be bound by all the requirements, and a compromise was reached which included judicial review of certain orders from the Division.[41] When an inmate, after a hearing, is placed in segregation or isolation for more than seven days or his statutory "good time" reduction is affected,[42] he may petition for review to the Court of Appeals.[43] The court's scope of review is as in a contested case under the APA, which

means that the court reviews the record only to see if there is substantial evidence to support the Board's conclusion. The inmate has a right to "assistance and representation under terms and conditions established by the department."[44] At present, that representation is usually provided on appeal by the Public Defender, although the original intent was to avoid automatic representation.[45] (A large number of inmates represent themselves by choice.)

In disciplinary review proceedings, if an inmate moves for a stay of the segregation or other order, the motion can require extensive preparation by both the Public Defender and the state in order for the court to determine whether a stay should be granted.[46]

FURTHER AVENUES

In 1975, the Oregon legislature removed the possibility of jail sentences for minor traffic offenses.[47] In decriminalizing the offenses, the legislature eliminated the need for appointed counsel; it did not, however, see fit to eliminate the right to appeal a conviction for an infraction. An appeal may be taken to the Court of Appeals, even if the fine for the infraction is less than the $250 which is required for an appeal from district court in a civil case.[48]

Because there has been no jury trial, the legislature made review of the conviction de novo.[49]

A glance at the situation in neighboring states shows that Oregon is unique in the number of avenues for appellate review of decisions in the criminal justice system. California statutes allow for appeals from certain search and seizure issues, from convictions and sentencing and from orders made after judgments, such as refusing to set aside the judgment. There is no provision for direct appeal of prison disciplinary review decisions, challenges being made only by habeas corpus. The California system provides for appointed counsel on appeal primarily by offices which are under contract with the appellate courts. Local bar associations provide start-up costs for those private law offices. The offices are paid by the appellate courts for services on an hourly fee basis.

In Idaho, all appeals go to the Supreme Court, which may then certify a case to the Court of Appeals. Idaho has a post-conviction act which counsel traditionally have been careful to use only for challenges to the legality of the proceedings. Idaho has no direct appeals from disciplinary review or parole proceedings. Challenges are made only by habeas corpus. Parole settings are almost never--if ever--

challenged in appellate courts. There is no state public appellate attorney system in Idaho. Rather, appeals are usually handled by either the appointed trial attorney or a local public defender trial attorney.[50]

As noted in my December report to the Committee, the Court of Appeals can no longer keep pace with the increasing number of appellate cases. From 1978, when the court assumed jurisdiction of all civil, as well as criminal appeals, through 1987, the number of filings of all cases has risen from 3,106 to over 4,500. Much of the increase can be traced to the criminal appeals listed above. From 1980 through 1987, the impact of those appeals can be seen:

	1980	1987	%
Criminal (direct appeals from convictions and sentences; probation revocations)	1474	1688	+ 14%
Habeas Corpus	19	137	+ 621%
Post-Conviction	50	118	+ 136%
Traffic	86	241	+ 180%
Disciplinary Review	123	203	+ 65%
Parole Review	43	354	+ 723%

The cost to the public is enormous. There is a need for an additional three-judge panel on the Court of Appeals to meet the increasing caseload. Costs for appointed counsel increase yearly. Not including any budget expenses incurred by the Public Defender or expenses, such as for transcripts,

appointed appellate counsel expenses were $560,610 during the 1985-87 biennium, which was an increase of 46 percent from the 1983-85 biennium.

The Court of Appeals is not alone in the commitment of resources to meet the number of appeals from the criminal justice system. The Solicitor General has estimated that 30,250 attorney hours will be required to handle criminal appeals at only the Court of Appeals level in this biennium. That will require 9.2 full-time attorneys. The Public Defender has recently submitted a request for additional funds from the Emergency Board. For the first six months of the biennium, nine attorneys handled 34.8 felony appeals each. The office needs to contract with additional attorneys, at a cost of over $60,000 for the remainder of the biennium, in order to process the caseload.

On an experimental basis, the Public Defender is now supposed to handle all misdemeanor, habeas corpus and post-conviction appeals. That office is contracting with attorneys to handle those at a rate of $15 per hour. What problems that may present in increased numbers of appeal or challenges to the representation received on appeal is not yet known.[51] In its request to the Emergency Board, the Public Defender's office noted that to handle the 31 appeals due in January and February, 837 attorney hours will be needed. That will require additional contract attorneys at a minimum cost of

$36,060 for 15 months. There is also a need for one additional contract attorney to process post-conviction and habeas corpus at a cost of $36,000 for 15 months.

Many appellate requirements in the criminal system are constitutional. Many rights of appeal result only from a sense of fairness. However, neither of those requires the public to pay for abuse of the system. Changes are needed, and the goals in those should be to eliminate duplication and to provide for early disposition of frivolous appeals. With these goals in mind, these statutory changes should be explored:

(1) Elimination or combination of avenues of appeal and restriction of the right to appointed counsel on some appeals.

(2) Early disposition of no merit appeals. ORS 138.660 allows the court to dismiss a frivolous appeal from a post-conviction proceeding before briefing and argument. That statutory authority should be expanded to allow early disposition, at least, of appeals from habeas corpus, disciplinary review and parole/probation revocation.

(3) The purpose, scope, functions, functioning and financing of the Public Defender's office should receive close legislative attention. The legislature created it and then virtually abandoned it.

(4) Legislation being discussed by the sentencing committee of the Oregon Criminal Justice Council would give

appellate review of sentences which are imposed according to guidelines. Early disposition of frivolous appeals from sentences should be provided for. Enactment of the appellate review proposal could essentially duplicate what may presently be appealed by an inmate from the setting of parole. Appellate review of parole should be restricted or eliminated if the proposed legislation is passed.

It is not a judicial function to solve the crisis. That is a legislative function. This report is intended to be informational--but it is also a cry of anguish. The legislature must do something. Determining what to do can be a cooperative endeavor. Let us begin.

FOOTNOTES

1

ORS 151.250.

2

ORS 138.040.

3

ORS 138.060.

4

ORS 138.071.

5

ORS 138.040; State v. Martin, 282 Or 583, 580 P2d 536 (1978).

6

ORS 138.050.

7

McKane v. Durston, 153 US 684, 14 S Ct 913, 38 L Ed 867 (1894).

8

386 US 738, 87 S Ct 1396, 18 L Ed 2d 493 (1967).

9

64 Or App 532, 669 P2d 797 (1983).

10

Scott v. Illinois, 440 US 367, 99 S Ct 1158, 59 L Ed 2d 383 (1979). Oregon requires appointed counsel whenever any incarceration is a possible penalty. See Brown v. Multnomah Co., 280 Or 95, 570 P2d 52 (1977); Stevenson v. Holzman, 254 Or 94, 458 P2d 414 (1969).

11

Douglas v. California, 372 US 353, 83 S Ct 814, 9 L Ed 2d 811 (1963).

12

Ross v. Moffitt, 417 US 600, 94 S Ct 2437, 41 L Ed 2d 341 (1974).

13

Pennsylvania v. Finley, 481 US ___, 107 S Ct ___, 95 L Ed 2d 539 (1987).

14

Oregon Laws 1975, chapter 451.

15

Brown v. Multnomah Co., 280 Or 95, 570 P2d 52 (1977).

16

ORS chapter 813.

17

ORS 813.450.

18

ORS 138.510, et seq.

19

ORS 138.530.

20

Young v. Ragen, 337 US 235, 69 S Ct 1073, 93 L Ed 1333 (1949).

21

ORS 138.540.

22

Pennsylvania v. Finley, 481 US ___, 107 S Ct ___, 95 L Ed 2d 539 (1987).

23

ORS 138.590; the provision does not specifically provide for appointment of appellate counsel.

24

Collins, J. and Neil, C., "The Oregon Post Conviction-Hearing Act," 39 OLR 351 (1960).

25

The use of habeas corpus to challenge prison conditions instead of only restrictions to liberty was allowed in Penrod/Brown v. Cupp, 283 Or 21, 581 P2d 934 (1978).

26

ORS 34.330(3); ORS 138.540(2).

27

Art I, § 23.

28

Art VII (amended), § 2; ORAP 3.05-3.25. In 1987, 19 original petitions were filed in the Supreme Court. Most challenged the amount of bail or alleged violations of the Interstate Detainer Act. Two petitions were accepted.

29

Now ORS 34.310, et seq.

30

ORS 34.710.

31

See Penrod v. Cupp, 284 Or 417, 587 P2d 96 (1978).

32

ORS 34.355.

33

See Comment, "Prisoners' Rights in Oregon," 14 Will L J 55 (1977).

34

Circuit court expenses, including fee waivers, but not including overhead, for this case were approximately $882. The

petition for attorney fees on appeal is for $240 and expenses of $26.

35

State v. Martin, 282 Or 583, 580 P2d 536 (1978).

36

35 Or App 381, 384 n 1, 581 P2d 955 (1978).

37

ORS 135.050(4)(d).

38

Gagnon v. Scarpelli, 411 US 778, 93 S Ct 1756, 36 L Ed 2d 656 (1973).

39

ORS 144.335.

40

ORS 144.337.

41

See Minutes, House Judiciary Committee, July 2-3, 1973.

42

See ORS 421.120.

43

ORS 421.195.

44

ORS 421.185.

45

Minutes, House Judiciary Committee, July 2, 1973.

46

The requirements for consideration of a motion to stay are set out in Evans v. OSP, 87 Or App 514, 743 P2d 168 (1987).

47

Oregon Laws 1975, chapter 451.

48

ORS 46.250.

49

ORS 153.240; ORS 46.340(4).

50

A request for information from Washington has apparently led to some study there, but no response.

51

It is constitutionally onerous that appointed trial and appellate counsel normally receive $30 per hour, whatever the kind of offense. Public Defenders are salaried. Under the new scheme respecting misdemeanors, habeas corpus and post-conviction counsel will receive $15 an hour.

Committee, shall be used by the Public Defender in carrying out the purposes of ORS 138.480 to 138.500, 138.590 and 151.210 to 151.290. [Formerly 138.790]

151.410 [1985 c.502 §2; repealed by 1987 c.803 §27]

151.420 [1985 c.502 §3; repealed by 1987 c.803 §27]

STATE INDIGENT DEFENSE PROGRAM

151.430 Duties of State Court Administrator. (1) The State Court Administrator shall conduct a continuing study and evaluation of various methods for the provision of appointed counsel compensated at state expense to represent persons in the state courts.

(2) The State Court Administrator shall develop, evaluate and modify as appropriate for each judicial district a plan for the provision of appointed counsel compensated by the state to represent persons in proceedings in the circuit court in the judicial district and in appeals therefrom. A plan may apply to one judicial district or two or more adjoining judicial districts.

(3) The State Court Administrator shall establish professional qualification standards for:

(a) Appointed counsel compensated at public expense to represent persons in the state courts; and

(b) Full-time not-for-profit public defender organizations whose attorney members serve as appointed counsel compensated at public expense to represent persons in the state courts.

(4) The State Court Administrator shall provide copies of professional qualification standards established under subsection (3) of this section to all judges or other entities who have the power to appoint counsel referred to in subsection (3) of this section.

(5) The State Court Administrator shall establish a schedule of fair compensation payable to appointed counsel compensated by the state to represent persons in the state courts. No compensation set forth in the schedule shall be less than $30 per hour if the compensation is paid on an hourly basis.

(6) The State Court Administrator shall establish policies and procedures including, but not limited to, cost guidelines and standards for the approval and payment of compensation and expenses incurred in the defense of persons whose legal counsel is required to be paid by the State Court Administrator pursuant to ORS 151.450.

(7) Subsections (2), (3) and (5) of this section do not apply to the Public Defender established by ORS 151.280 or deputies of the defender.

(8) The State Court Administrator shall establish standards and procedures for contracting for services of counsel under ORS 151.460.

(9) The State Court Administrator may delegate the administration of services required under ORS 135.055 to court employees and may contract for performance of the services when the administrator determines it is efficient and effective to do so. Any delegation or contract under this subsection must be in accordance with established written policies and procedures. Funds from the State Court Indigent Defense Account may be expended for purposes of contracts entered into under this subsection. [1985 c.502 §5; 1987 c.803 §10; 1995 c.677 §2]

Note: District courts in Oregon abolished January 15, 1998. Pursuant to section 130, chapter 658, Oregon Laws 1995, Legislative Counsel has substituted words designating "circuit courts" for words designating "district courts" or deleted references to "district courts," or both, in 151.430. See notes preceding 1.001 for further explanation.

151.440 [1985 c.502 §6; repealed by 1987 c.803 §27]

151.450 Additional duties and powers of administrator. The State Court Administrator shall:

(1) Pay the compensation for counsel, other than the Public Defender established by ORS 151.280, appointed to represent indigents in the state courts, and other costs and expenses of that representation that are required to be paid by the state under ORS 33.015 to 33.155, 34.355, 135.055, 138.490, 138.500, 138.590, 161.327, 161.365, 161.385, 419A.200, 419B.195, 419B.201, 419B.205, 419B.518, 419C.200, 419C.206, 426.100, 426.135, 426.275, 426.307, 427.265, 427.295, 436.265 or 436.315 or any other provisions of law that expressly provide for payment of such compensation costs or expenses by the State Court Administrator.

(2) Develop a system for conducting financial and performance audits of indigent defense contracts. [1985 c.502 §7; 1987 c.803 §11; 1991 c.724 §27; 1991 c.750 §9; 1993 c.33 §304]

151.460 Authority of administrator to provide counsel to indigents. (1) The State Court Administrator, on behalf of the state, may contract with an attorney, group of attorneys or full-time not-for-profit public defender organization for the provision by the attorney, group of attorneys or organization of services as counsel for indigents in proceedings in which a court or magistrate has the power to appoint counsel to represent an indigent and the state is required to pay compensation for that representation. If a contract is with an attorney or group of attorneys, each attorney who will provide services under the contract shall satisfy the professional qualification standards established under ORS 151.430 (3)(a). If a contract

is with a public defender organization, the organization shall satisfy the professional qualification standards established under ORS 151.430 (3)(b). A contract entered into under this subsection may be for the provision of services to indigents in appellate proceedings.

(2) A court or magistrate may appoint an attorney who is, or an attorney member of a public defender organization that is, under a contract with the state as provided in this section to represent an indigent in any proceeding in which the court or magistrate has the power to appoint counsel to represent an indigent and the state is required to pay compensation for that representation.

(3) This section does not apply to proceedings in which the Public Defender established by ORS 151.280 is authorized, able and appointed to provide services as counsel for indigents. [Formerly 151.150; 1987 c.803 §12; 1989 c.1053 §8; 1995 c.677 §3]

151.465 State Court Indigent Defense Account. (1) There is created a State Court Indigent Defense Account in the General Fund which is continuously appropriated to the State Court Administrator to pay compensation of counsel and other expenses in connection with the legal representation of indigent persons, for which the State Court Administrator is responsible by law. Such expenses shall be paid only from funds specifically appropriated therefor, and no other moneys appropriated to the Judicial Department or State Court Administrator shall be used for these purposes.

(2) All moneys appropriated to the Judicial Department or State Court Administrator to pay compensation of counsel and other expenses in connection with the legal representation of indigent persons for which the State Court Administrator is responsible by law shall be deposited in the State Court Indigent Defense Account.

(3) All money received by the Judicial Department under ORS 151.505 (3) or ORS 135.050 (7), 151.487 (1), 419A.200 (10), 419B.198 (1) and 419C.203 (1) shall be deposited in a separate subaccount created in the State Court Indigent Defense Account to be used by the State Court Administrator to reimburse the actual costs and expenses, including personnel expenses, incurred in administration and support of the indigent defense program under ORS 151.430 to 151.495. [1987 c.803 §9; 1997 c.761 §13]

Note: 151.465 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 151 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

151.470 [1985 c.502 §15; repealed by 1987 c.803 §27]

151.480 Appointment of counsel oth than Public Defender. When a court or magistrate has the power to appoint counsel to represent an indigent in a proceeding in a circuit, county, justice or municipal court or in an appeal therefrom and the state, a county or a city is required to pay compensation for that representation, and the court or magistrate does not appoint the Public Defender established by ORS 151.280 or counsel who is under contract to provide services for the proceeding or appeal pursuant to ORS 151.010 or 151.460, the court or magistrate shall appoint as counsel:

(1) An attorney who, in the opinion of the court or magistrate, satisfies the standards of eligibility established under ORS 151.430 (3)(a); or

(2) An attorney member of a full-time not-for-profit public defender organization that, in the opinion of the court or magistrate, satisfies the standards of eligibility established under ORS 151.430 (3)(b). [1985 c.502 §18]

Note: District courts in Oregon abolished January 15, 1998. Pursuant to section 130, chapter 658, Oregon Laws 1995, Legislative Counsel has substituted words designating "circuit courts" for words designating "district courts" or deleted references to "district courts," or both, in 151.480. See notes preceding 1.001 for further explanation.

DETERMINATION OF INDIGENCY

151.485 Indigency; determination; financial statement; termination of appointed counsel. (1) For purposes of determining the financial eligibility for court-appointed counsel of persons with a constitutional or statutory right to counsel in matters before the state courts and whose counsel is authorized to be paid by the State Court Administrator under ORS 151.450, a person is indigent if the person is determined to be financially unable to retain adequate counsel without substantial hardship in providing basic economic necessities to the person or the person's dependent family.

(2) A determination of indigence shall be made upon the basis of information contained in a detailed financial statement submitted by the person for whom counsel is requested or appointed or, in an appropriate case, by the person's parent, guardian or custodian. The financial statement shall be in the form prescribed by the State Court Administrator and approved by the Supreme Court. The form shall contain a full disclosure of all assets, liabilities, current income, dependents and other information required by ORS 135.050 (3) and, in addition, any information required by the State Court Administrator as necessary to determine eligibility. The [illegible] Court Administrator shall promulgate issue uniform statewide guidelines and pro-

cedures that have been approved by the Supreme Court and that prescribe how the form will be used in the state courts and how the eligibility for court-appointed counsel will be determined.

(3) If at any time after the appointment of counsel the court having jurisdiction of the case finds that the defendant is financially able to obtain counsel, the court may terminate the appointment of counsel. If at any time during criminal proceedings the court having jurisdiction of the case finds that the defendant is financially unable to pay counsel whom the defendant has retained, the court may appoint counsel as provided in this section.

(4) In addition to any criminal prosecution, a civil proceeding may be initiated by any public body that has expended moneys for the defendant's legal assistance within two years of judgment if the defendant was not qualified for legal assistance in accordance with subsections (1) and (2) of this section. As used in this subsection, "legal assistance" includes legal counsel, transcripts, witness fees and expenses and any other goods or services required by law to be provided to an indigent person at state expense under ORS 151.450.

(5) The civil proceeding shall be subject to the exemptions from execution as provided for by law. [1989 c.1053 §13; 1991 c.825 §6]

151.487 Ability to pay; effect. (1) If in determining that a person is eligible for court-appointed counsel after applying the guidelines and standards issued by the State Court Administrator under ORS 151.485, the court finds that the person has financial resources that enable the person to pay in full or in part the administrative costs of determining the eligibility of the person and the costs of the legal and other services to be provided at state expense that are related to the provision of appointed counsel, the court shall order the person to pay to the State Court Indigent Defense Account in the General Fund, through the clerk of the court, the amount that it finds the person is able to pay without creating substantial hardship in providing basic economic necessities to the person or the person's dependent family. The amount that a court may order the person to pay shall be subject to the guidelines and procedures issued by the State Court Administrator as provided in subsection (4) of this section.

(2) Failure to obey an order under this section shall not be grounds for contempt or grounds for withdrawal by the appointed attorney, but any part of the amount ordered under this section and not paid may be:

(a) Enforced against the person as if the order is a civil judgment; or

(b) Enforced as otherwise permitted by law.

(3) Except as authorized in this section, no person, organization or governmental agency may request or accept a payment or promise of payment for assisting in the representation of a person by court appointment.

(4) The State Court Administrator shall promulgate and issue guidelines and procedures that have been approved by the Supreme Court:

(a) For the determination of persons provided with court-appointed counsel who have some financial resources to pay in full or in part the administrative, legal and other costs under subsection (1) of this section; and

(b) Regarding the amounts persons may be required to pay by a court under subsection (1) of this section.

(5) The determination that a person is able to pay or partially able to pay, or that a person no longer has the ability to pay the amount ordered in subsection (1) of this section, shall be subject to review at any time by the court. [1989 c.1053 §14; 1993 c.33 §305; 1997 c.761 §3]

151.489 Personnel to verify indigency. For the purpose of aiding courts in implementing indigency eligibility determinations under ORS 151.485 and 151.487, the State Court Administrator may locate indigency verification and screening positions in the state trial and appellate courts and may prescribe the policies and procedures for their use. [1989 c.1053 §15]

151.491 Authority of person verifying indigency. (1) The State Court Administrator or authorized designee who conducts the verification of the financial statement submitted by a person seeking or having appointed counsel payable at state expense under ORS 151.450 shall have the authority to require the person to execute and deliver any written requests or authorizations as may be necessary under applicable law to provide the State Court Administrator or authorized designee with access to records of public or private source, otherwise confidential, as may be needed to evaluate eligibility.

(2) In performing the verification duties under subsection (1) of this section, the State Court Administrator or authorized designee is authorized to obtain information from any public record office of the state or of any subdivision or agency of the state upon request and without payment of any fees ordinarily required by law. [1989 c.1053 §16]

151.493 Release of information by state agency to State Court Administrator. (1) Notwithstanding any other provision of law, any state agency as defined in ORS 192.410 that receives a request for release of information from the State Court Administrator for the purpose of verifying the indigency of a person under ORS 151.430 to 151.495 shall release all requested information to the State Court Administrator. The administrator shall forward to the state agency a certification signed by the person about whom the requested information is sought that authorizes the release of the information.

(2) Upon motion of the State Court Administrator, a court that has appointed counsel for a person by reason of indigency may order the release of any information relating to the person's financial situation held by any other person. [1991 c.825 §4]

151.495 Confidentiality of information obtained by State Court Administrator; exceptions. (1) All information supplied by a person seeking court-appointed counsel and all information collected by the State Court Administrator for purposes of determining eligibility for court-appointed counsel under ORS 151.430 to 151.495 is confidential and shall not be used for any purpose other than determining eligibility.

(2) Notwithstanding subsection (1) of this section, information supplied by a person seeking court-appointed counsel and information collected by the State Court Administrator for purposes of determining eligibility may be:

(a) Introduced in a proceeding, criminal or civil, arising out of a determination that a person is not eligible for court-appointed counsel;

(b) Introduced in a proceeding, criminal or civil, arising as a result of an allegation that a person has supplied false information in seeking court-appointed counsel;

(c) Used by the court in a sentencing proceeding resulting from the defendant's conviction on the matter for which the information was provided or collected; and

(d) Used by the court, the Department of Revenue, or the assignees of the court or the Department of Revenue, for the purpose of collecting delinquent amounts owed to this state by the person. [1991 c.825 §5; 1997 c.761 §4]

MISCELLANEOUS

151.505 Authority of court to order repayment of costs related to provision of appointed counsel. (1) At the conclusion of a case or matter in which the first accusatory instrument or petition in the trial court was filed after January 1, 1998, and in which the court appointed counsel to represent a person, a trial or appellate court may include in its judgment an order that the person repay in full or in part the administrative costs of determining the eligibility of the person for appointed counsel and the costs of the legal and other services that are related to the provision of appointed counsel.

(2) Costs repayable under this section include a reasonable attorney fee for counsel appointed to represent the person and a reasonable amount for expenses authorized under ORS 135.055. A reasonable attorney fee is presumed to be a reasonable number of hours at the hourly rate authorized by the State Court Administrator under ORS 151.430.

(3) Costs repayable under this section do not include costs imposed and paid under a previous order under ORS 151.487, but may include costs imposed under an order under ORS 151.487 that are unpaid at the time the judgment is filed.

(4) The court may not order a person to pay costs under this section unless the person is or may be able to pay the costs. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the person and the nature of the burden that payment of costs will impose. The determination of the ability of a person to pay costs and the amount of costs to be paid shall be subject to the guidelines and procedures issued by the State Court Administrator under ORS 151.487.

(5) A person who has been ordered to pay costs under this section and who is not in contumacious default in the payment of the costs may at any time petition the court for remission of the payment of costs or any unpaid portion of the costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the person ordered to repay or on the immediate family of the person, the court may remit all or part of the amount due or modify the method of payment.

(6) Except for moneys payable under subsection (1) of this section pursuant to an order under ORS 151.487, all moneys collected or paid under this section shall be paid into the General Fund and credited to the Criminal Fine and Assessment Account.

(7) Any part of the costs ordered to be paid under this section that is not paid may be enforced against the person as provided in ORS 137.450 if the judgment is a judgment in a criminal action or in the same manner as unpaid costs may be enforced under ORS 151.487. [1997 c.761 §2]

I. Program Identification

A. **Decision Unit:** ***State Court Indigent Defense Account***

B. **Cost Center:** State Court Indigent Defense Account

C. **Program Administrator:** State Court Administrator and Indigent Defense Services Director

D. **Description:** The State Indigent Defense Program (ORS 151.430 - 151.480) and the State Court Indigent Defense Account (ORS 151.465) provide the statutory framework for the provision and payment of legal representation and related expenses by the State Court Administrator (SCA) for persons who are indigent and for whom the federal and state constitutions and Oregon statutes mandate representation.

1. **Scope of Indigent Defense Services:**

   a. **Types of Cases:** Both the United States and Oregon Constitutions guarantee the right to legal representation at state expense for persons facing criminal prosecutions. Constitutional and statutory provisions also mandate that counsel be appointed at state expense to represent indigent persons in probation violation proceedings, certain contempt proceedings, child abuse and neglect cases (including termination of parental rights proceedings), juvenile delinquency proceedings, and involuntary civil commitment proceedings. In addition, indigent persons seeking postconviction or habeas corpus relief or appellate representation in a case originally eligible for state-paid representation fall within the scope of mandated indigent defense services. Finally, indigent persons who are the subject of Psychiatric Security Review Board hearings are entitled to state-paid legal representation.

   b. **Types of Mandated Services:** Numerous constitutional and statutory provisions mandate the provision of state-paid attorneys to represent indigent persons. In addition, constitutional guarantees and statutory provisions require the provision of nonattorney services that are "reasonable and necessary" to the state-paid legal representation; such as interpreters, investigators, psychological and forensic services, and transcripts.

   c. **Determination of Eligibility for Indigent Defense Services:** The Oregon statutory standard for determining who is eligible to receive services paid from the Indigent Defense Account mirrors that established under the federal constitution. Specifically, ". . . a person is indigent if the person is determined to be financially unable to retain adequate counsel without substantial hardship in providing basic economic necessities to the person or the person's dependent family." ORS 135.050 and ORS 151.485.

   This standard is implemented statewide under a two-prong means test. An applicant for state-paid representation is required to provide a verified financial statement, listing detailed information regarding income, assets, debts, and dependents. Federal food stamp guidelines serve as the first determinant of eligibility. If the applicant's income is less than or equal to the eligibility level for food stamps, the applicant is presumed to be indigent, unless s/he has liquid assets that could be used to hire an attorney. If an applicant's income exceeds food stamp standards, that person is eligible for state-paid counsel only if his/her income and liquid assets are determined to be sufficient to hire an attorney. The guidelines used for this latter determinant are established by the SCA and are subject to the approval of the Supreme Court. The current guideline amount, for example, for the cost of hiring an attorney in a DUII prosecution is $750.

d. **Number of Cases:** Charts at the end of this narrative display the primary caseload for which the Indigent Defense Account is responsible (trial-level cases). Since Fiscal Year Ending (FYE) 1990 the nondeath penalty, trial-level caseload has increased 60 percent. The most significant increase in caseload numbers since 1990 has been in the contempt and juvenile court indigent defense caseloads which increased 224 percent and 149 percent, respectively. The most difficult cases in the juvenile caseload are Termination of Parental Rights (TPR) cases. TPR indigent defense cases have increased 222 percent since FYE 1990.

   Although "indigent defense" is most commonly associated with the state-paid defense of indigent criminal defendants, the fastest growing indigent defense caseload is for representation of parents and children in "abuse and neglect" cases.

e. **Expenditures:** Charts at the end of this narrative display the breakdown of Indigent Defense Account expenditures on an annual basis from FYE 1990 to FYE 1998.

   One of the difficulties that the Indigent Defense Services Division (IDSD) continues to encounter in its efforts to effectively and efficiently administer the Indigent Defense Program is ensuring that "apples are compared to apples" and that significant changes are taken into account when making comparisons of costs and workloads. The following factors, other than increases in caseload, have contributed significantly to the increase in indigent defense expenditures from 1990 to 1998.

   The expense to the Indigent Defense Account of providing representation to defendants facing the potential of a death sentence has increased 115 percent from FYE 1990 to FYE 1999. In addition, total expenditures for 1998 include approximately $2.5 million which was specifically appropriated by the 1991 Legislative Assembly to increase the hourly rate paid to private bar, hourly rate (noncontract) attorneys providing legal representation. This increase represented the first increase and last to-date increase in hourly rates since 1979. Finally, the portion of total indigent defense expenses that comprise nonattorney defense costs (investigators, interpreters, etc.) in nondeath penalty cases has increased 110 percent from FYE 1990 to FYE 1998.

   After adjusting for the increases in death penalty expenditures, the one-time increase in private bar hourly rate funding, nonattorney service expenditures, and costs attributable to indigent defense appellate cases, the cost of the "regular" indigent defense workload has increased 68 percent during the eight-year period (FYE 1990-1998). In "constant dollars" (adjusted for inflation), this represents a 35 percent increase in expenditures. This percent increase in constant dollar expenditures is less than the 60 percent increase in caseload that has occurred from FYE 1990 to FYE 1998.

The following chart displays the above comparison. Even this comparison is not a strictly "apples to apples" comparison, because of the fact that indigent defense caseloads since 1990 have increasingly been handled by contractors rather than private bar, hourly-rate attorneys. Many of the contracts include investigation and foreign language translation services which would otherwise be included within the category of nonattorney services.

Expenditure Amount	FYE 1990	FYE 1998	Increase
TOTALS	$31,621,222	$56,952,521	80%

ALL DEATH PENALTY EXPENSES, ALL NON-DEATH PENALTY APPELLATE EXPENSES AND NONATTORNEY SERVICES ("NONATTORNEY"), AND 1991 PRIVATE BAR HOURLY RATE INCREASE ("1991 PB INCREASE")

Expenditure Amount	FYE 1990	FYE 1998	Increase
Death Penalty	$ 1,859,505	$ 4,006,256	115%
Non-Death Penalty			
Appellate	1,008,803	1,338,355	33%
Nonattorney	1,840,747	3,865,744	110%
1991 PB Increase	N/A	2,500,000	N/A
SUBTOTAL	$ 4,709,045	$11,710,355	149%

"REGULAR" CASELOAD COSTS (NONDEATH PENALTY, TRIAL-LEVEL, ATTORNEY SERVICE COSTS)

Expenditure Amount	FYE 1990	FYE 1998	Increase
Regular Caseload Cost	$26,912,177	$45,242,166	68%

CONSUMER PRICE INDEX ("CPI")

Consumer Price Index	FYE 1990	FYE 1998	Increase
Portland	124.9	166.1	33%

PERCENT INCREASE IN REGULAR COSTS/CONSTANT DOLLARS 35%
PERCENT INCREASE IN REGULAR CASES 60%

NOTE: Total expenditures for ALL types of cases and ALL types of indigent defense expenditures have increased 80 percent from FYE 1990 to FYE 1998. Adjusted for constant dollars, based upon the consumer price index increases since 1990, the increase in total expenditures represents a 47 percent increase.

The following chart displays the annual expenditures from the Indigent Defense Account as evidence that the IDSD's efforts to contain the **total** cost of indigent defense services have been increasingly successful, in spite of significant increases in death penalty and nonattorney service expenses and caseload increases.

YEAR	TOTAL ANNUAL EXPENDITURES	$ INCREASE PRIOR YEAR	% INCREASE PRIOR YEAR	% INCREASE IN CASELOAD
1990	$31,621,222	N/A	N/A	N/A
1991	$34,804,091	$3,182,869	10.1	5.1
1992	$39,102,882	$4,298,791	12.4	6.5
1993	$42,387,732	$3,284,850	8.4	0.3
1994	$43,002,231	$ 614,499	1.4	5.5
1995	$47,138,520	$4,136,289	9.6	11.7
1996	$51,219,456	$4,080,936	8.7	6.6
1997	$52,957,948	$1,739,492	3.4	3.0
1998	$56,952,521	$3,994,573	7.5	10.1

2. **Current Methods of Providing Indigent Defense Services:**

   a. **State Public Defender:** ORS 151.210 *et. seq.* establishes a Public Defender Committee and Public Defender. This provision is separate from and completely independent of the "State Indigent Defense Program" (ORS 151.430 *et. seq.*), for which the SCA is responsible and for which funding is through the Indigent Defense Account. The Public Defender primarily provides legal representation to indigents in criminal appeals. All appellate criminal cases for indigent persons that the Public Defender does not handle are provided representation under the State Indigent Defense Program, as are all juvenile, contempt, civil commitment, postconviction relief, and habeas corpus appeals for indigent persons. Any decrease in the Public Defender's appropriation and service level will create a corresponding increase and demand in the State Indigent Defense Program.

   b. **State Indigent Defense Program:** The delivery method of non-State Public Defender indigent defense services varies by county or judicial district. Generally, legal services are provided by private bar appointed counsel (compensated on an hourly basis), pursuant to contracts entered into between the SCA and nonprofit public defenders, law firms, consortia, or individual attorneys (compensation on a per-case basis), or a combination thereof. Services by investigators, interpreters, expert witnesses and other nonattorneys which have been determined necessary and reasonable primarily are provided on an individual-appointed basis.

      As of June 30, 1998, legal representation was provided in approximately 92 percent of all trial-level, nondeath penalty indigent defense cases pursuant to contracts entered into between the SCA and nonprofit public defenders, law firms, consortia of attorneys, and sole practitioners. The cost of this contractual method of providing indigent defense services represents 89.5 percent of the total cost of providing attorney services in these cases. Unlike indigent defense cases in which an attorney is appointed on a case-by-case, hourly-rate paid basis, a number of the independent contractors also provide investigation, interpreter, and other nonattorney services.

As of June 30, 1998, there were 79 contracts in 34 counties for the provision of indigent defense representation. These contracts cover all counties except Tillamook and Yamhill Counties. The contracts vary with respect to the types and number of cases covered. The contracts range from "specialty contracts" (limited to specific case types such as death penalty, habeas corpus, postconviction relief, juvenile, or civil commitment) to contracts that include representation in virtually all case types for which state-paid counsel is mandated. The SCA also has two contracts for forensic services and one contract for death penalty investigation services.

3. **Administration of the State Indigent Defense Program and Account:** The primary responsibility for administering the State Indigent Defense Program and Account is that of the SCA's Indigent Defense Services Division (IDSD). The SCA's Budget & Finance and Internal Auditing Divisions, judges, and state court employees provide additional support and services in the administration of the program and account. (Please reference the section of this Fiscal Plan that details the IDSD for more detailed information on the division's responsibilities, staffing and budget levels, accomplishments, and goals.) The cost of the IDSD represents less than 1 percent of the amount of the Indigent Defense Account.

II. Budget Summary

Indigent Defense Budget

	1995-97 Actual	1997-99 Approved	1997-99 Estimated	1999-01 Recommended
TOTAL	$103,694,731	$116,955,501[a]	$116,942,731	$137,766,331

[a] Includes September 1998 Emergency Board release of $2 million reserve for the Indigent Defense Account.

III. Program Objectives

A. Accomplishments:

Many of the accomplishments of the State Indigent Defense Program and Account are the same as those set forth in the 24 accomplishments listed in the section of this Fiscal Plan that addresses the IDSD. (Please reference those accomplishments.)

In addition to those accomplishments, the following relate directly to the Indigent Defense Program and Account:

1. Provided no inflationary increases in the hourly rates paid indigent defense, private-bar counsel, and nonattorney providers. The hourly rates for attorneys have remained unchanged since 1991. The hourly rate for investigators has remained unchanged since the state assumption of responsibility for the indigent defense program in 1983.

2 Provided additional monies to indigent defense contractors primarily on the basis of contractors accepting more cases or more serious cases or contractors absorbing nonattorney service costs. Provided modest (less than 1 percent to a maximum of less than 5 percent over the entire biennium) inflationary increases to some contractors.

3. Established more uniform cost measures for indigent defense contractors.

4. Improved the administrative (versus judicial) program for the review of requests for nonattorney services in the most serious of indigent defense cases, resulting in greater uniformity and cost-effectiveness. Expenditures for nondeath penalty, nonattorney expenses for the most recent two-year period (FYEs 1997-1998) represent less than a 1 percent increase over the same type of expenditures for the prior two-year period (FYEs 1995-1996).
5. Established greater uniformity in indigent defense contractors' salary, benefit, and staffing levels statewide.
6. Developed and implemented an upfront recovery program for indigent defense administrative costs (verification program) and contribution amounts toward the anticipated cost of indigent defense costs.
7. Assisted various research groups and one Oregon State Bar task force in reviews of the State Indigent Defense Program.
8. Continued assistance to the Chief Justice's State Criminal Justice Advisory Committee whose mission includes the identification and implementation of changes in the justice system that benefit the Indigent Defense Account as well as other system components.

B. Goals and Objectives for 1999-01 Biennium:

Many of the 15 goals and objectives set forth in the section of this Fiscal Plan that lists the goals and objectives of the IDSD directly relate to goals and objectives for the Indigent Defense Program and Account during the 1999-01 biennium. (Please reference those goals and objectives.)

In addition to those goals and objectives, the following relate directly to the Indigent Defense Program and Account:

1. Enhance and improve the indigence verification program to provide verification court-employee services in additional indigent defense cases, such as juvenile cases.
2. Enhance and improve systems to identify and provide one attorney to individuals with multiple cases in different subsystems of the justice system (for example, juvenile, criminal, and civil commitment) where cost-effective.
3. Continue work with other components of the justice system to develop and implement more cost-effective methods (for all components) of resolving indigent defense cases; e.g., diversion, mediation, early disposition, and drug court programs.
4. Establish better methods of more quickly identifying changes in staffing and resource levels of other justice system components that will likely impact the Indigent Defense Program and Account.
5. Develop and institute an indigent defense peer review panel (volunteers) to assist the SCA and courts with increasing "quality of service" concerns and issues.
6. Pursue statutory changes that will effect greater centralized control over indigent billings submitted by hourly-rate paid counsel and nonattorney providers.
7. Enhance the utilization of technology by indigent defense providers, courts, and the SCA's office to improve the cost-effectiveness and quality of services related to indigent defense.
8. Continue to study the advantages and disadvantages, in terms of cost-effectiveness and quality, of different methods of delivering indigent defense services.

9. Continue efforts to develop and institute better cost- and quality-control measurement tools.

10. Work with and encourage indigent defense providers to establish regional and statewide "resource banks" (for example, substance abuse treatment and domestic violence programs) as well as "legal banks" (such as memoranda on common, statewide legal issues) to reduce duplication of efforts and enhance the quality of services.

IV. Support for Recommended Budget

A. **Budget Analysis:** The 1999-01 Indigent Defense Account recommended budget of $137,766,331 is a 17.8 percent increase over what is projected to be spent in the 1997-99 biennium. This is a "Current Service Level" budget request that is based solely on caseload growth realized in the 1997-99 biennium, modest (4 percent per year) projected caseload increases for the 1999-01 biennium, and the standard biennial inflationary increases (3.7 percent for contract personal service expenses and 2.8 percent for nonpersonal service contract expenses) authorized for "current service" calculations. The recommended budget amount does not include any amounts to increase the hourly rates paid private bar, hourly-rate attorneys or nonattorney providers, or increase contractor staff salaries/benefits beyond that allowed with the 3.7 percent increase.

B. **Justification for Recommended Budget:** The Oregon Judicial Department (OJD) continues to develop better indicators and systems for forecasting Indigent Defense Account budgetary requirements.

The SCA and the IDSD have undertaken other efforts to better ensure the cost-effectiveness of indigent defense services. These and other efforts, some of which are listed under the "Goals and Objectives" section of the budget summary for the IDSD, will continue through the 1999-01 biennium.

The Indigent Defense Account, however, remains unusually susceptible to influences of significant magnitude and effect, over which the OJD has no direct control. Participation in local and state Criminal Justice Advisory Committees and juvenile justice committees has provided a better awareness on the part of other justice participants of how changes in their policies and resources impact the State Indigent Defense Program. The projected caseload growth of only 4 percent per year during the 1999-01 biennium are conservative based upon historical caseload growth. For six years prior to the 1997-99 biennium, no inflationary increases or capital funding (other than for emergency, critical needs) were funded for the indigent defense contractors who provide representation in the vast majority of cases.

C. **Policy Packages:** The new policy packages for the indigent defense appropriation are twofold: (1) a reservation to the Emergency Board if the annual caseload increase is 6 percent instead of the projected 4 percent increase, and (2) funding to implement several legislative proposals. The legislative proposals include administrative review of billings (LC 1108-1), limited right to counsel in guardianship cases (LC 1111), creation of Public Defense Services Commission (LC 1105), and increase of the hourly rate for private contractors and improved salary parity for public defenders (LC not yet known).

I. Program Identification

A. **Decision Unit:** Appellate Courts and Administration

B. **Division:** ***Indigent Defense Services***

C. **Cost Center:** Indigent Defense Services Program Administration

D. **Program Administrator:** Indigent Defense Services Director

E. **Description:** The Indigent Defense Services Division (IDSD) is responsible for the managerial administration of Oregon's Indigent Defense Program, the Indigent Defense Account, and the Indigence Verification Program.

The Indigent Defense Account provides the funds necessary to compensate counsel and pay the associated reasonable and necessary expenses where the provision of counsel at state expense is constitutionally or statutorily mandated; i.e., indigent persons summoned into state court on criminal (including death penalty prosecutions), juvenile (including "abuse and neglect" cases representing parents and children), civil commitment, or probation violation proceedings; or indigent persons seeking relief in state courts in habeas corpus, postconviction, or appellate proceedings.

The IDSD is comprised of 7.1 FTE employees. Its administrative budget is less than 1 percent of the Indigent Defense Account appropriation. The division develops and monitors compliance with State Court Administrator (SCA) and Supreme Court policies and procedures to ensure cost-effective and proper provision of services payable from the Indigent Defense Account. Examples of these policies and procedures are:

- eligibility and verification standards for determining whether or not counsel at state-expense will be appointed to individuals;
- payment guidelines for attorneys and nonattorney indigent defense providers (for example, investigators, interpreters, and expert witnesses);
- qualification standards for attorneys; and
- preauthorization of nonattorney services.

One of the primary responsibilities of the division is to negotiate contracts with independent (nonstate employee) law firms, public defenders, and others to provide indigent defense representation. Attorney services for approximately 92 percent of the annual indigent defense caseload (exceeding 147,000 cases) are provided pursuant to generally, two-year contracts negotiated by the division. The division currently is responsible for 79 attorney contracts (involving 572 attorneys) which cover 34 of Oregon's 36 counties. Since the 1987 legislative return of responsibility for the Indigent Defense Program to the SCA, the number of indigent defense contracts has increased 163 percent. Because of the number of contracts and division staffing levels, contract negotiations are conducted on a staggered, rotational basis with approximately one-third of the contract caseload being the subject of contract negotiations every six months, except during the legislative session.

State-paid counsel in the remainder of indigent defense cases (8 percent) is appointed on a case-by-case basis. Since 1991 counsel in these cases are compensated at the rates of $40 per hour for nondeath penalty representation and $55 per hour for death penalty representation.

The IDSD is responsible for the administration of the statewide Indigence Verification Program. This program originally was implemented in 1989. Indigence verification specialists located in each judicial district are responsible for obtaining, screening, and verifying the financial status of persons applying for appointment of state-paid counsel and making recommendations to judges whether or not counsel should be appointed. In addition, verification specialists are responsible for assisting the courts in determining whether persons applying for state-paid counsel will be ordered to pay an application fee and/or a contribution amount toward the costs of anticipated indigent defense costs.

IDSD staff responsibilities include:

1. Reviewing over 100 indigent defense contract bids per biennium and negotiating indigent defense contracts.
2. Monitoring compliance with contracts.
3. Data entry, reconciliation, and analysis of monthly reports submitted by the courts and indigent defense contractors (over 125 reports per month).
4. Data retrieval and generation of caseload and financial reports.
5. Monitoring, analyzing, and reporting on appointment trends.
6. Managing the statewide indigence verification and upfront indigent defense recovery programs.
7. Monitoring the quality of indigent defense services.
8. Assisting judges and court staff in developing, implementing, and enforcing policies and procedures locally.
9. Assisting judges in locating counsel when needed; i.e., death penalty cases.
10. Answering inquiries from courts, contractors, other indigent defense providers, the press, the public, and others.
11. Reviewing legislative bills that may favorably or adversely impact the Indigent Defense Account and/or program, providing testimony to the Legislative Assembly, and preparing in excess of 150 Fiscal Impact Statements per legislative session.
12. Reviewing and making determinations in almost 3,100 administrative requests for preauthorization of nonattorney provider expenses per year.

II. Resource Summary

A. **Staffing Summary:**

Title	FTE
Director	1.00
Court Operations Specialist III	.98
Court Operations Specialist II	1.00
Indigent Defense Analyst	4.10
TOTAL	7.08

B. **Budget Summary:**

Indigent Defense Services Division:

	1995-97 Actual	1997-99 Approved	1997-99 Estimated	1999-01 Recommended
Personal Services	$742,375	$756,210	$756,210	$840,331
Services & Supplies and Capital Outlay	83,333	74,480	74,480	76,565
SUBTOTALS	$825,708	$830,690	$830,690	$916,896

Indigence Verification Program:[1]

	1995-97 Actual	1997-99 Approved	1997-99 Estimated	1999-01 Recommended
Personal Services	$ 0	$ 0	$ 0	$ 0
Services & Supplies and Capital Outlay	22,000	22,664	22,664	23,299
SUBTOTALS	$ 22,000	$ 22,664	$ 22,664	$ 23,299
TOTAL	$847,708	$853,354	$853,354	$940,195

[1] Most of the Indigence Verification Program budget was decentralized to individual trial courts in the 1993-95 biennium.

III. Program Objectives

A. **Accomplishments:**

In addition to performing its "core responsibilities" without additional requested resources and, by necessity, enhancing the IDSD's performance thereof (through technological improvements, for example), the division's accomplishments in 1997-99 include the following.

1. Expanded and improved the administrative (versus judicial) system (developed in 1996) for reviewing indigent defense attorney requests for preauthorization of nonattorney services in the most serious of indigent defense cases. Centralized administrative review has enhanced accountability and uniformity with respect to the use and payment of extraordinary expenses. Over 3,100 requests per year are processed by the IDSD. No additional personnel, services and supplies, or capital resources have been added to IDSD for this additional responsibility/program.
2. Continued efforts to establish parity among indigent defense contractors (which has included reducing compensation and benefit levels of some contractors and increasing the same for other contractors) while continuing to recognize local differences that impact contractor services and costs.
3. Assisted a subcommittee of the Chief Justice's State Criminal Justice Advisory Committee in its review of salary and benefit levels between public defender contractors, prosecutors, and other government-paid attorneys.
4. Limited increases in amounts paid indigent defense contractors to increases in the number of cases, the seriousness of cases covered by individual contractors, the types of services provided, and modest cost-of-living adjustments.
5. Developed and implemented a new statewide "upfront indigent defense recovery program" that provides for persons who apply for state-paid counsel to pay a $20 application fee and contribute toward the anticipated cost of providing appointed counsel, provided there is a determination the individual is able to pay such amounts.
6. Pursuant to a survey of defense counsel in Oregon, prepared for the Supreme Court proposed revisions in "retainer rates" used for the purpose of courts determining who is eligible for state-paid counsel. The proposed revisions were adopted by the Supreme Court in November 1997.
7. Conducted a "Peer Information Exchange" (PIE) between the four IDSD's analysts and indigent defense contractors' staff who are responsible for contract compliance. This "PIE" resulted in identifying barriers to both entities' ability to efficiently perform their responsibilities and in making modifications that eliminate the barriers.
8. In conjunction with a core group of indigence verification specialists, revised and simplified the policies and procedures governing the statewide indigence verification program (last revision was 1991).
9. Played a critical role in the development and implementation of three new Early Disposition Programs in Multnomah County.
10. Assisted in the establishment and implementation of the first "community court" in Oregon (Multnomah County).
11. Assisted in the establishment and implementation of a pilot program in Multnomah County, designed to resolve "holds" from counties outside Multnomah County.

12. Actively participated in statewide indigent defense management conferences which have resulted in greater contractor compliance and better working relationships between contractor staff and division staff.

13. Increased the number of indigent defense contractors who have direct access to the Oregon Judicial Information Network (OJIN) and successfully participated in a pilot program to provide access to OJIN by all employees (versus one dedicated terminal) of one public defender contractor.

14. Improved systems to monitor, analyze, and forecast indigent defense caseloads and expenditures.

15. In spite of contract negotiations remaining protracted due to IDSD staff limitations and Indigent Defense Account restrictions, avoided any lapses in providing services to the courts and indigent persons. Reviewed over 100 bids for indigent defense contracts. Negotiated over 79 indigent defense contracts.

16. Enhanced computer access (compared to written requests and hard copy responses) to employment, welfare, and credit bureau records required for indigence verification. This has resulted in more efficient records retrieval and cost reductions.

17. With the assistance of Marion County contract personnel, completed the implementation of a time-billing system for indigent defense attorneys that electronically compiles detailed time-billing information for payment, monitoring, and auditing purposes.

18. Continued to enhance the efficiency of IDSD by optimizing the technology available to the division. For example, IDSD created and implemented a contractor, private bar, county-to-county statewide spreadsheet that is linked to more than 100 individual spreadsheets. Completion of this project provides up-to-the minute caseload statistics and projections.

19. Developed an improved computer program that enhances contractors' capability to provide accurate monthly case inventory reports in a more timely and uniform manner.

20. Improved e-mail capabilities between IDSD and indigent defense providers.

21. Continued a pilot program to set standard payment rates for a discreet indigent defense caseload and to assign cases to multiple providers on a rotation basis. This program decreases the courts' and IDSD's current workload in negotiating contracts and assigning cases and increases the ability to efficiently monitor and adjust for fluctuations in caseloads.

22. Established an electronic access system for IDSD's policies and procedures, correspondence, Questions & Answers, and other IDSD documentation.

23. Assisted in the establishment of a pilot program in Multnomah County that provides"video contact" capabilities between two indigent defense contractors' offices and clients housed in the county's jails.

24. Participated in state, national, and international programs and research efforts relating to indigent defense.

B. **Goals and Objectives for 1999-01 Biennium:**

1. If not complete by the beginning of the 1999-01 biennium, complete development and testing of hourly rate-paid attorney billing and auditing systems and implement systems statewide for attorney and nonattorney indigent defense providers who are compensated for services other than under a contract.
2. Expand verification and contribution programs to noncriminal indigent defense applicants; e.g., parents and children in juvenile court.
3. In cooperation with the Oregon State Bar, establish a pilot program between indigence verification and the bar's modest means program
4. Revise existing policies and procedures on indigent defense attorney qualifications and payment standards. Establish a workgroup with the charge to develop qualification standards for nonattorney indigent defense providers.
5. Implement a statewide schedule and system for recovering nonattorney indigent defense costs.
6. Enhance the automation of the existing system for the administrative (versus judicial) review of requests for nonattorney indigent defense services. Develop and implement an expenditure monitoring component of this system.
7. Enhance abilities to forecast changes in indigent defense caseloads and expenditures.
8. Establish a peer review council, comprised of volunteer attorneys, investigators, and experts, to better ensure quality of services and appropriate use of limited resources.
9. Continue to actively participate in the development and implementation of enhanced indigent defense, court, and other criminal and juvenile justice "players" management systems that are compatible and reduce duplicative data entry.
10. Work with judges, prosecutors, and indigent defense attorneys to expand early disposition, diversion, and drug court programs which benefit all criminal and juvenile justice players.
11. Continue efforts to establish parity among indigent defense contractors and parity between attorney contractors, prosecutors, and other government -paid attorneys.
12. Study and report to the SCA on the cost-effectiveness of establishing an indigent defense counterpart to the Department of Justice's "District Attorney Assistance Program" to provide assistance to indigent defense providers in death penalty and other complex cases, as well as to centralize certain defense functions and research.
13. If not accomplished during the current biennium, assist contractors in securing access to juvenile court OJIN information and expand e-mail capabilities between IDSD and indigent defense providers.
14. In cooperation with state and local corrections, expand "video contact" capabilities between contractors' offices and clients housed in county jails and state correctional facilities.
15. Establish performance review criteria, policies, and procedures for indigent defense contractors and other indigent defense providers.

IV. Support for Recommended Budget

A. **Budget Analysis:** The IDSD 1999-01 recommended budget is approximately 10.4 percent higher than the 1997-99 estimate. The IDSD budget reflects continued operation at the present level through the 1999-01 biennium.

B. **Justification for Recommended Budget:** The IDSD manages a highly complex yet efficient program of the OJD. Despite a history of rapidly rising caseload, the division has effectively managed a program of almost 260,000 cases involving more than $116 million dollars. In addition to reducing the cost of indigent defense services, as a result of the indigence verification program, the division has enhanced the credibility of the appointment process by better ensuring that court-appointed counsel is provided only to those eligible. The division has implemented a data analysis and projection system which effectively has identified trends and changes which affect legal services or monies. The advances and accomplishment of the division over the last biennium and the substantial goals and objectives identified for the 1999-01 biennium cannot continue and be realized unless resources are appropriated at the requested level and policy packages for the division and program are substantially funded.

STATE CRIMINAL JUSTICE ADVISORY COMMITTEE

AND

OREGON'S INDIGENT DEFENSE PROGRAM

Joint Committee of Ways and Means
Subcommittee on Public Safety/Regulation

Oregon Judicial Department
1999-01 Biennial Budget

SB 5517

April 14, 1999

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THE CHIEF JUSTICE'S
STATE CRIMINAL JUSTICE ADVISORY COMMITTEE

The Chief Justice's State Criminal Justice Advisory Committee

Senator Neil Bryant has played a significant role in encouraging prosecutors and criminal defense attorneys to work together to identify efficiencies that can be realized in the criminal justice system and more particularly the indigent defense system. During the 1995-97 legislative interim, Senator Bryant convened two meetings for this purpose. Those meetings, among many things, suggested that a forum needed to be established for statewide discussions and that judges needed to be a part of that forum.

In November 1996, Chief Justice Wallace P. Carson, Jr. established the State Criminal Justice Advisory Committee ("CJAC"). The Chief Justice took an existing committee of prosecutors and defense attorneys that had been meeting since The Honorable Edwin J. Peterson was the Chief Justice and expanded its membership to include four judges, a trial court administrator, and a representative of the Oregon State Bar's Board of Governors.

The mission of the committee is:

> "... to achieve the greatest utility in the expenditure of state and local criminal justice and indigent defense resources commensurate with the sound practices of criminal and juvenile prosecution, defense, adjudication and case management, and
>
> to provide a process, through the appointed members of the Committee, for the identification and discussion of statewide issues of concern to prosecutors, defense attorneys, citizens and judges regarding policy and programs for the improvement of these systems."

The committee is a forum for the identification of problems of statewide significance which arise in our system of prosecuting, defending and adjudicating criminal and juvenile cases, including our system for providing constitutionally mandated legal services to the indigent, for the analysis of those problems, and the development and implementation of solutions for those problems. The role of the committee is to provide a mechanism for what the Chief Justice calls the "Three 'C's" -- "Communication, Cooperation and Coordination." The committee operates on a consensus basis.

The committee is structured with three subcommittees which undertake review of certain issues and present recommendation for full committee action thereon. Each subcommittee is chaired by one of the three co-chairs of the CJAC -- one judge, one district attorney and one representative of the defense attorneys. The subcommittees have responsibility for one of the following three subject areas: "Improvements to the Current Systems"; "Alternatives to Existing Systems"; and "Long Range Planning Improvements".

Technological improvements between the three system components to accomplish greater efficiencies have received significant emphasis by the committee. Identification, review and support of alternative programs, such as drug courts, early disposition programs and mediation, that have resulted in resource enhancement for all components also is a significant subject area for the committee's work.

The current members of the committee are listed on the next page.

Judiciary
Timothy P. Alexander (Washington County)
James R. Ellis (Multnomah County)
Robert J. Huckleberry (Lincoln County)
Joan G. Seitz (Douglas County)

Oregon Criminal Defense Lawyer's Association
John Potter (Director)
Ross Shepard (Lane County)
David Terry (Douglas County)
David Groom (Deputy State P.D.)

Trial Court Administrator
Jim Murchison (Marion County)

Ex-Officio Members
Bill Taylor (Legislative Counsel Office)
Robin LaMonte (Legislative Fiscal Office)
Susan Grabe (Oregon State Bar)

Oregon State Bar Board of Governors
Michael Phillips

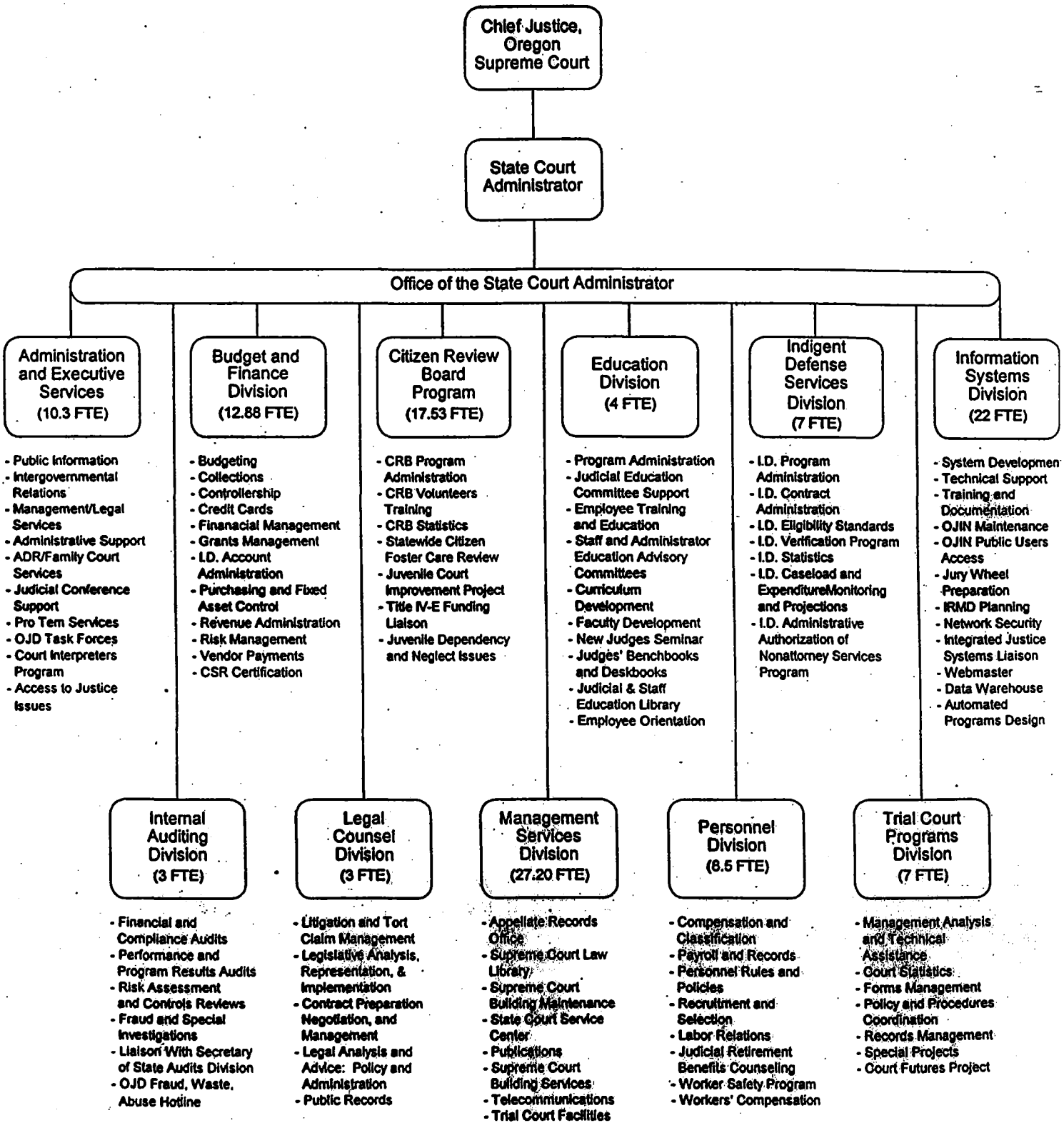
Oregon State Bar Criminal Law Section
Richard Mullen (Lane County Defense)
Timothy Sylwester (Ass't. Attorney General)

Oregon District Attorneys' Association
Jason Carlile (Linn County)
Mike Dugan (Deschutes County)
Dale Penn (Marion County)

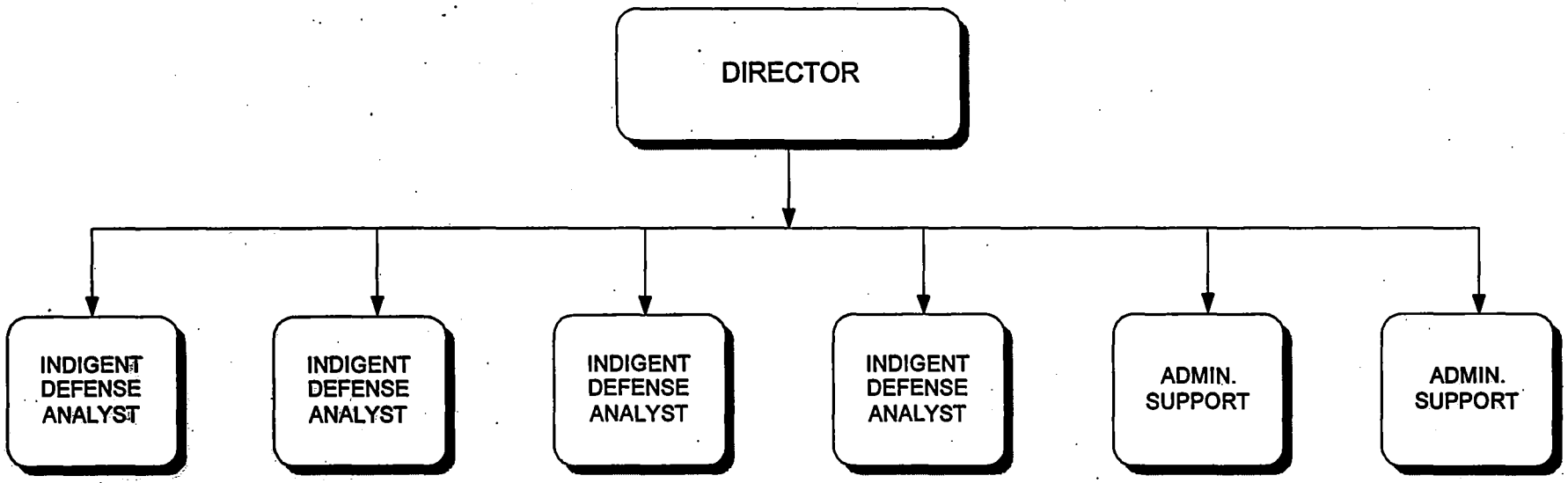
Office of the State Court Administrator
Kingsley Click, State Court Administrator

OVERVIEW
OF
OREGON'S INDIGENT DEFENSE PROGRAM

Oregon Judicial Department
OFFICE OF THE STATE COURT ADMINISTRATOR
Administrative Organization
January 1999



ORGANIZATIONAL CHART
INDIGENT DEFENSE SERVICES DIVISION (IDSD)



Arneson, James
Barker & Petersen
Burris, Christopher
Crabtree & Rahmsdorff
Cremer, Richard
Crook County Defenders
Dekalb & Alexander
Deschutes Court Defenders
Eastern Oreg. Def. Consort.
Faber, Glenn
Hachler, Dennis
Hadley, Ken
Hazarabedian, Greg
Hendershott, Mark
Madison, Aller, Smith & Hill
Madras Consortium
Matarazzo, Harris S.
Metro. Pub. Defender
Monson, Ralph
Rader & Rader
Steinke, Griffith C.
Umpqua Valley Def. Serv.
(22 Contracts)

Aaron, Brian
Bergland, Kathleen
Bettis, Wade
Carlson, David
Coughlin, Leuenberger & Moon
Cramer, Mallon & Lamborn
Cronin, Daniel
Intermountain Pub. Def. Inc.
Juv. Advocacy Consortium
Klamath Defender Services
Lillegard, Chris
Lincoln Def. Consortium
Marion Co. Assn. Defenders
Morris, Bofferding & Spinhirne
NECO Consortium
Nickel, Nancy
Ositis, Andrew
Penz, Beverly Long
Rader & Rader
Union/Wallowa Def. Assn.
Wasco Sherman Indig. Def.
(21 Contracts)

Benton Co. Legal Defense
Clackamas Indigent Defense
Coos County Consortium
Harris & Tracey
Independent Defenders, Inc.
Jackson Juvenile Consortium
Josephine Co. Def. Lawyer
Karpstein & Verhulst
LLW, Inc
Lane Juvenile Lawyers
Linn Co. Legal Def. Corp.
Los Abogados
McKeown & Brindle - Mult.
McKeown & Brindle - Wash.
Pub. Def. Services Lane Co
Ramirez, Linda Friedman
SW Oreg. Pub. Def.
So. Oreg. Pub. Defender
Squires & Lopez
Tennyson & Winemiller
Vess, Steven
Vogt - Hispanic
Washington Co. Indig. Def.
(23 Contracts)

Bakker, Bender & Karpinski
Bertoni & Todd
Clatsop County Defenders
Columbia Co. Consortium
East County Def. Consort.
Juvenile Rights Project
Moe, Warren
Mult. Co. Ind. Def.Cons.
Mult. Defenders, Inc.
Olsen, Huffman & Horn
Oregon Legal Serv. Corp
Rieke & Savage
Vogt - Clatsop
Vogt - Mult.
Walker, Warren & Assoc.
(15 Contracts)

Process payments and orders
Provide legislative support
Maintain central filing
Process contractor payments
Prepare annual certification of attorneys
Manage archived files
Prepare bid proposal and contract files
Maintain contractor logs
Prepare correspondence
Provide support for verification manual revision
Maintain numerous lists

Answer incoming calls
Process mail
Maintain vendor lists
Office copy requests
Process contractor payments
Log and file extraordinary expense requests
Maintain chron file
Maintain verification stats
Generate form letters
Maintain numerous logs and lists
Retrieve files and documents
Maintain appellate case cost database

1997-99 Indigent Defense Program Administration:

Funding: $830,690

Staffing: Director of Indigent Defense Services Division (IDSD) and 6.1 FTE employees -- status quo staffing since 1987 (organizational chart attached)
(assistance from judges, court staff and other State Court Administrator staff)

1997-99 Indigent Defense Account Appropriation and Emergency Board Reserve Allocation: $116,955,501

Program Structure -- Privatized:

Attorneys: Contracts (81) with non-profit public defenders, law firms and consortia of attorneys (572 attorneys). Representation provided in 92 percent of the indigent defense caseload. Compensation based on flat per case cost basis, except one contract which is hourly-based.

Private, non-contract attorneys (505 attorneys, estimated at fewer than 75 FTEs). Representation provided in 8 percent of the indigent defense caseload. Compensation based on number of hours of service at hourly rates (see below).

Non-Attorneys: Contracts with Portland Police Bureau (records), fingerprint expert, forensics laboratory and one investigator. Private, non-contract, hourly-paid professionals (for example, investigators, interpreters, and psychologists).

Hourly Rates of Payment for Primary Non-Contract Providers:

Attorneys:	$40.00 (non-death penalty) and $55.00 (death penalty)
Interpreters:	$32.50 (certified) and $25.00 (qualified, non-certified)
Investigators:	$25.00
Forensics:	$75.00
Other Experts:	$60.00 to $150.00

Primary Caseload/Workload:

Appeals: All juvenile dependency, termination of parental rights and delinquency; civil commitment; postconviction relief; habeas corpus; contempt; Psychiatric Security Review Board; and criminal and probation violation cases for a limited number of appeals in which the State Public Defender has a conflict of interest. 515 appeals in FYE 1998.

Trial-Level: Criminal, including aggravated murder/death penalty; juvenile dependency, termination of parental rights and delinquency; civil commitment; postconviction relief; habeas corpus; contempt; extradition; Psychiatric Security Review Board; and probation violations. 147,038 non-death penalty cases and 26 new death penalty cases in FYE 1998.

Expenditures (FYE 1998): $56,952,521

Appellate:

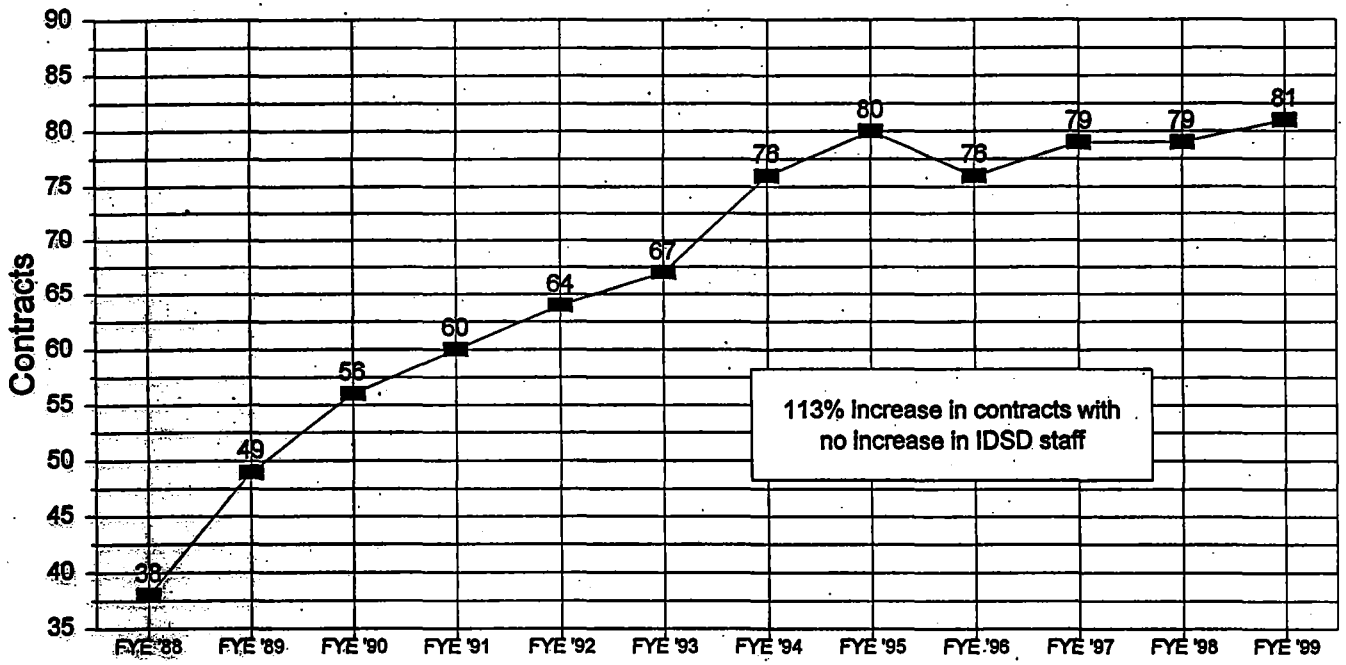
Death Penalty:	$ 172,040
Non-Death Penalty:	$ 1,338,355
	$ 1,510,395

Trial-level:

Death Penalty:	$ 3,834,216
Non-Death Penalty:	
Attorney Contracts (K):	$ 42,729,264
Non-K Attorney Fees:	$ 5,012,902
Non-Attorney Costs:	$ 3,865,744
	$ 51,607,910

asc:97/99program4/11/99

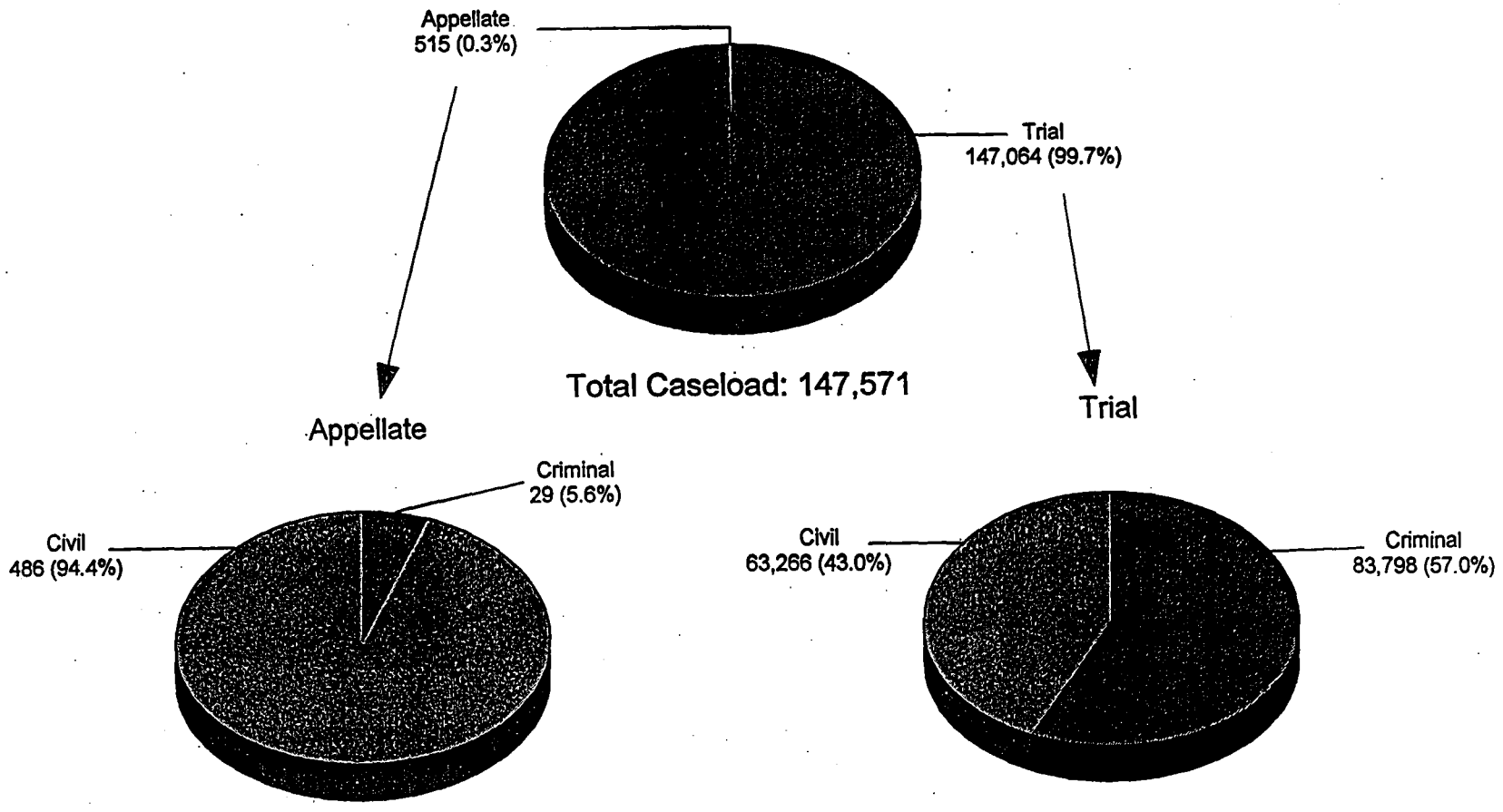
Growth in the Number of Indigent Defense Contracts*



* Non-attorney ID contracts are not included; for example, Portland Police Bureau and forensics.

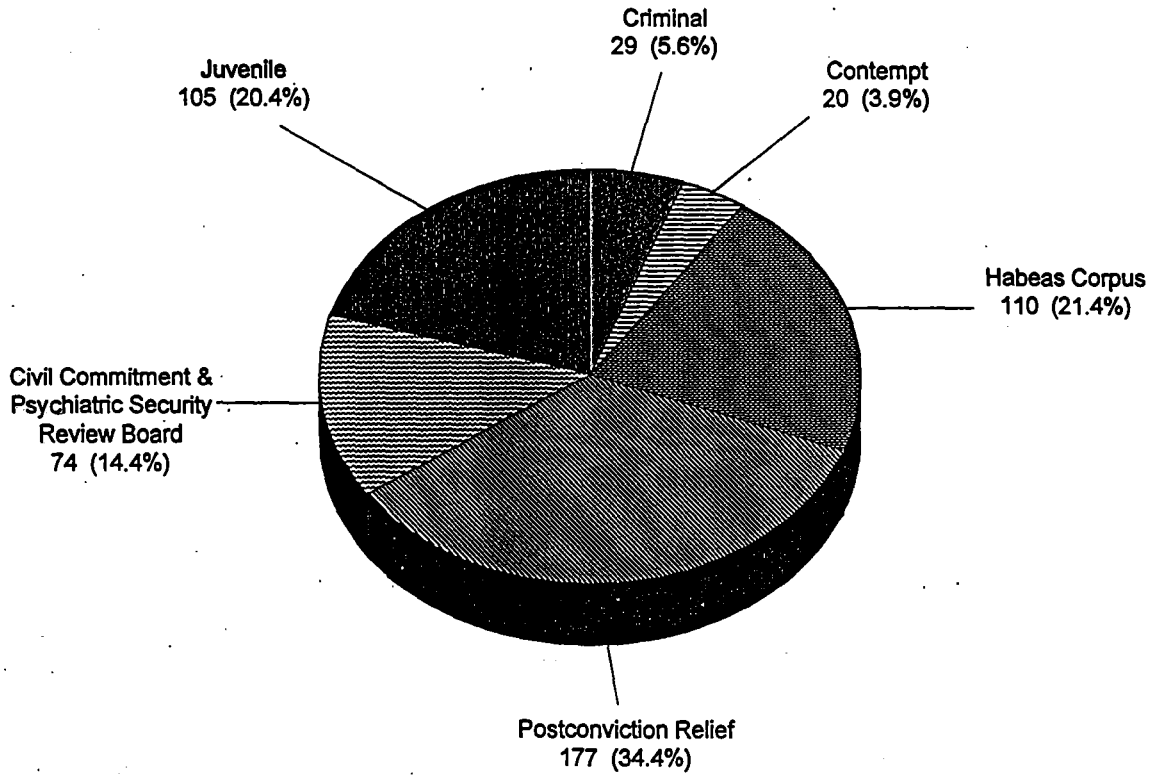
INDIGENT DEFENSE CASELOADS

INDIGENT DEFENSE CASELOAD
FYE 1998



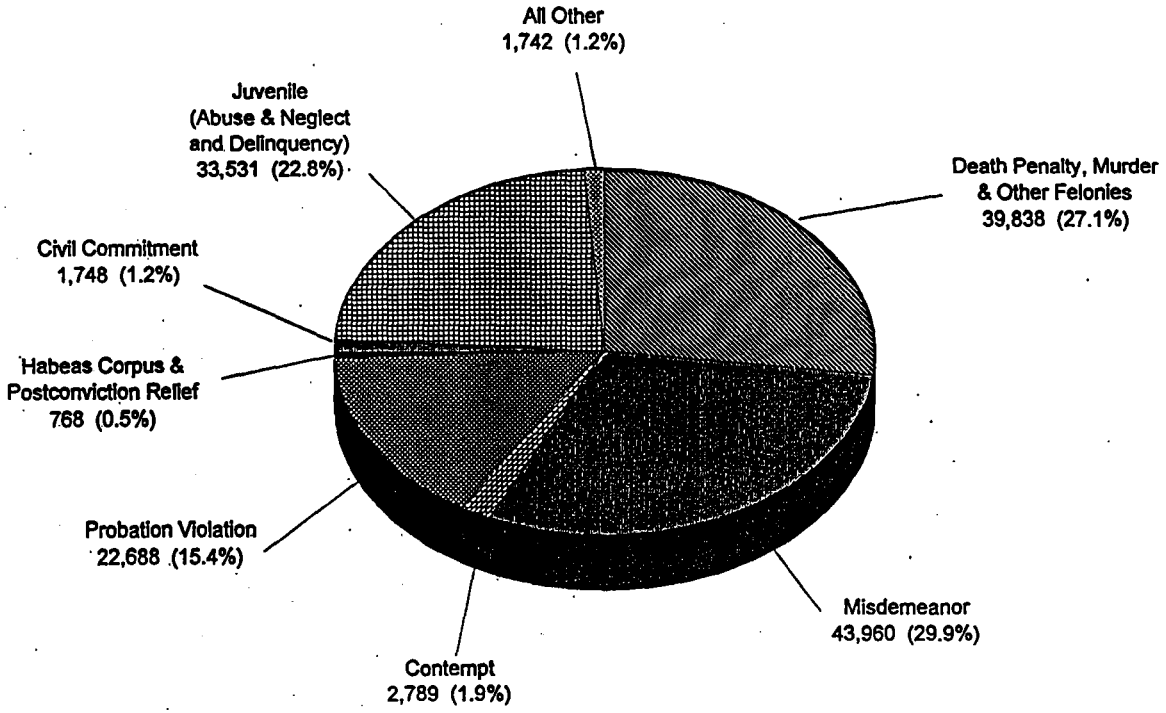
"Criminal" = Death Penalty, Murder, Felonies and Misdemeanors
"Civil" (or *sui generis*) = Juvenile, Contempt, Civil Commitment, Probation Violation, Extradition, Postconviction Relief, Habeas Corpus, Psychiatric Review Board

INDIGENT DEFENSE CASELOAD
APPELLATE LEVEL
By Case Type Categories
FYE 1998



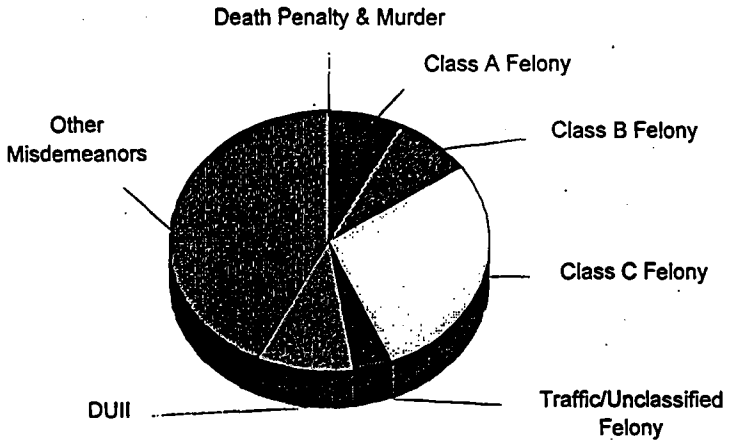
Total Appellate Caseload: 515

INDIGENT DEFENSE CASELOAD
TRIAL LEVEL
By Case Type Categories
FYE 1998

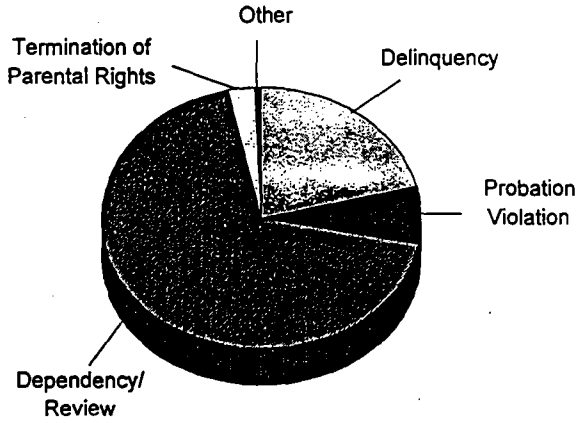


Total Trial Caseload: 147,064

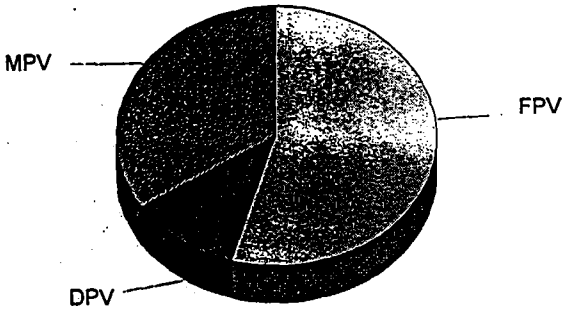
INDIGENT DEFENSE CASELOAD
TRIAL LEVEL
Breakout of Criminal, Juvenile, Probation Violation and Contempt
FYE 1998



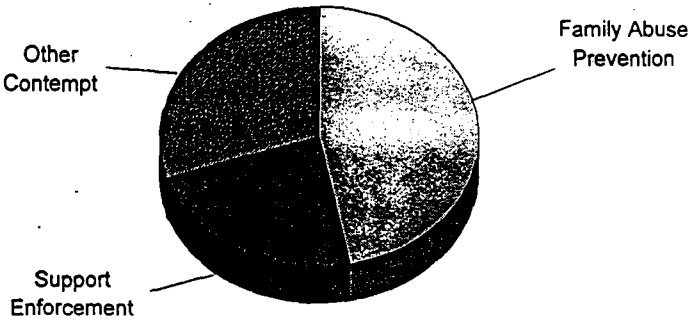
Criminal: 83,798
(57.0% of total trial caseload)



Juvenile: 33,531
(22.8% of total trial caseload)

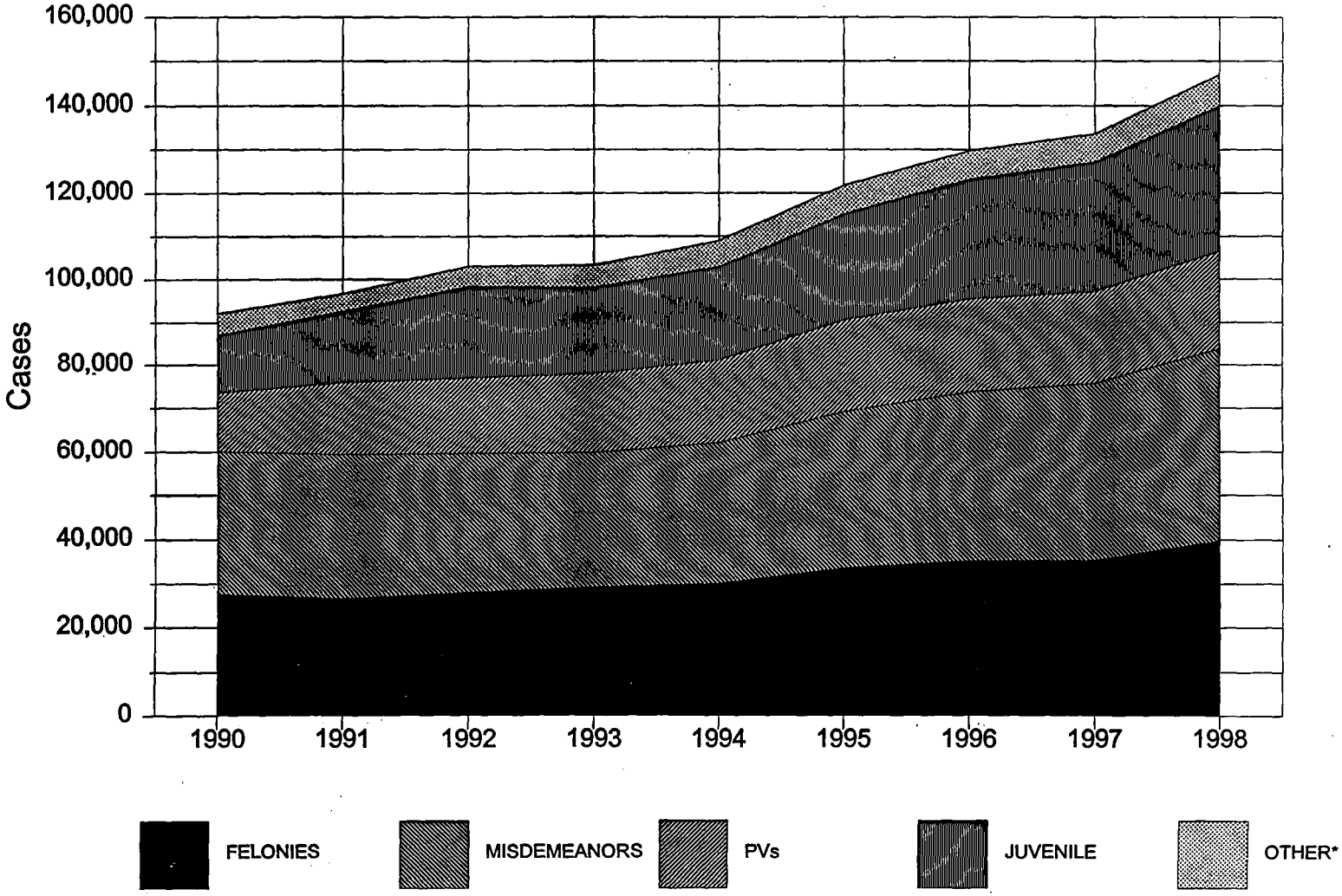


Probation Violation: 22,688
(15.4% of total trial caseload)



Contempt: 2,789
(1.9% of total trial caseload)

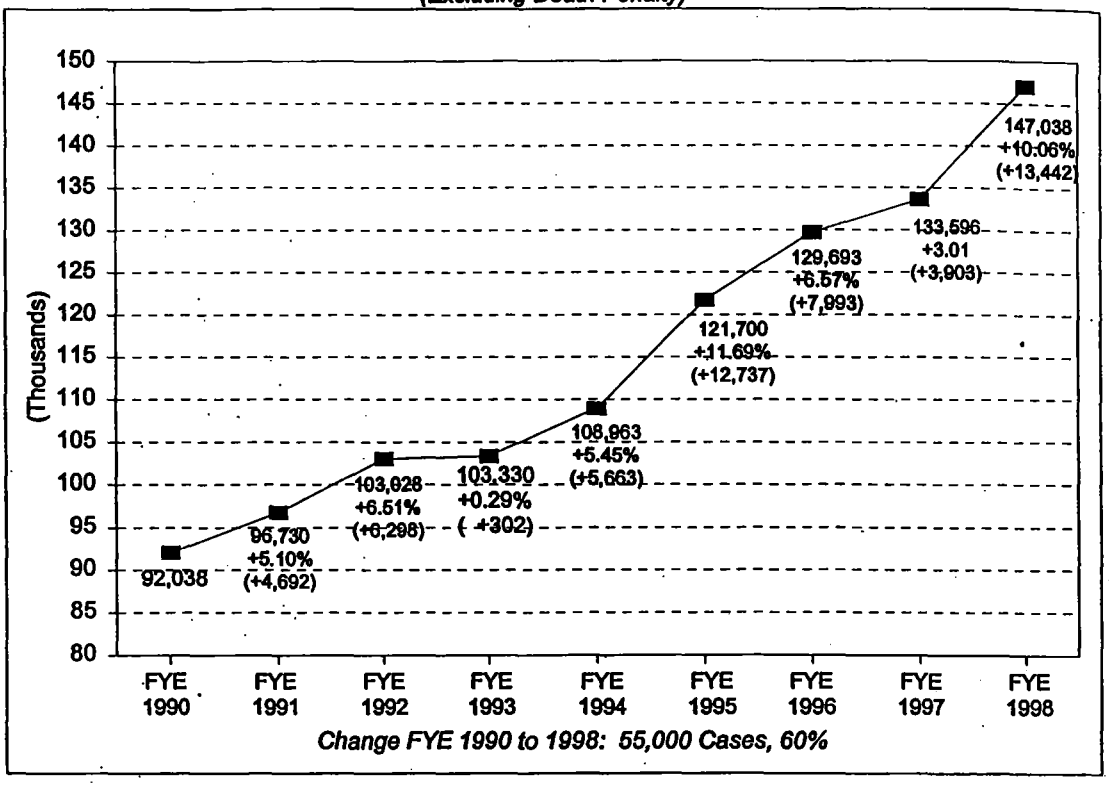
Overall Indigent Defense Caseload



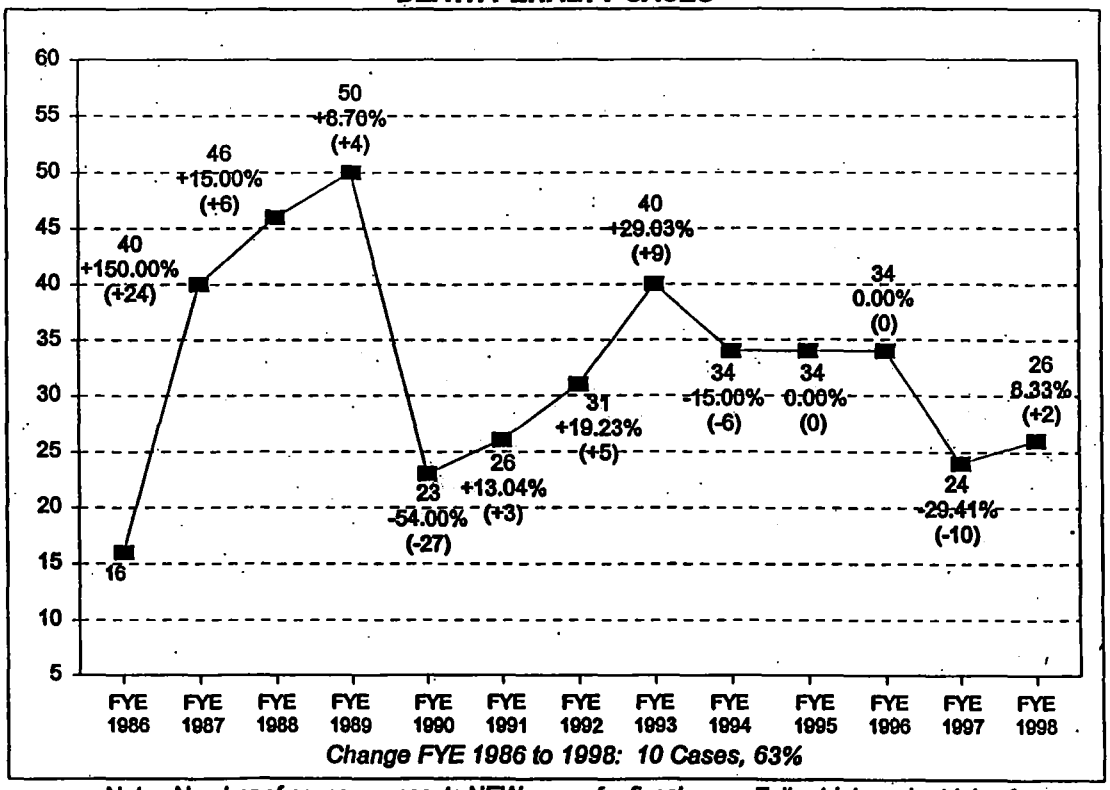
* Other = Civil commitment, contempt, PCR, HC and other caseloads.

ALL CASES

(Excluding Death Penalty)



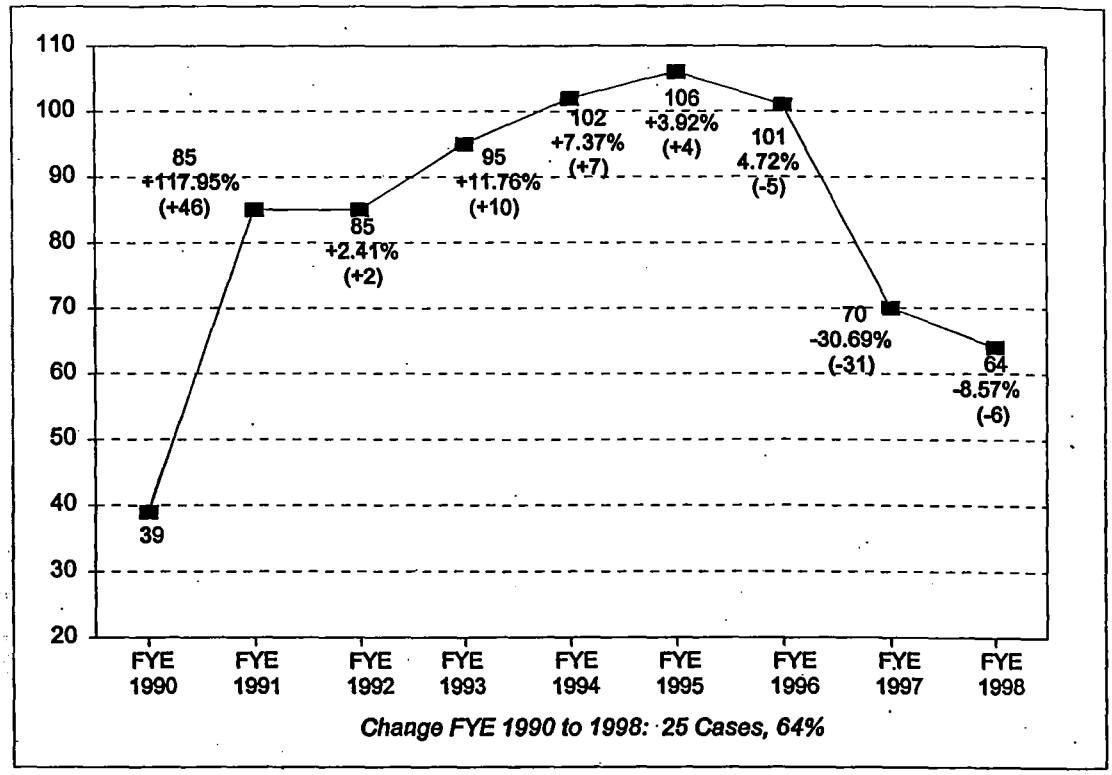
DEATH PENALTY CASES



Note: Number of cases represents NEW cases for fiscal year. Full retrials and retrials of penalty phase resulting from appellate court decisions are NOT included.

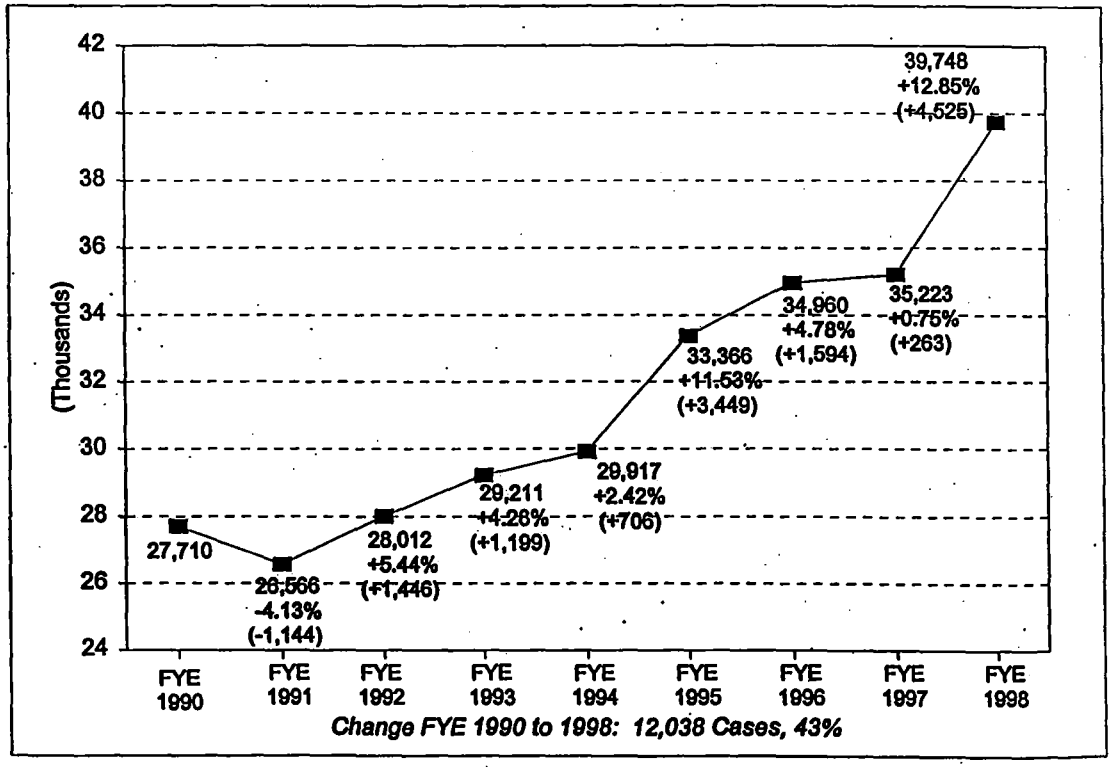
INDIGENT DEFENSE STATEWIDE TRIAL LEVEL CASELOAD COMPARISON

MURDER CASES



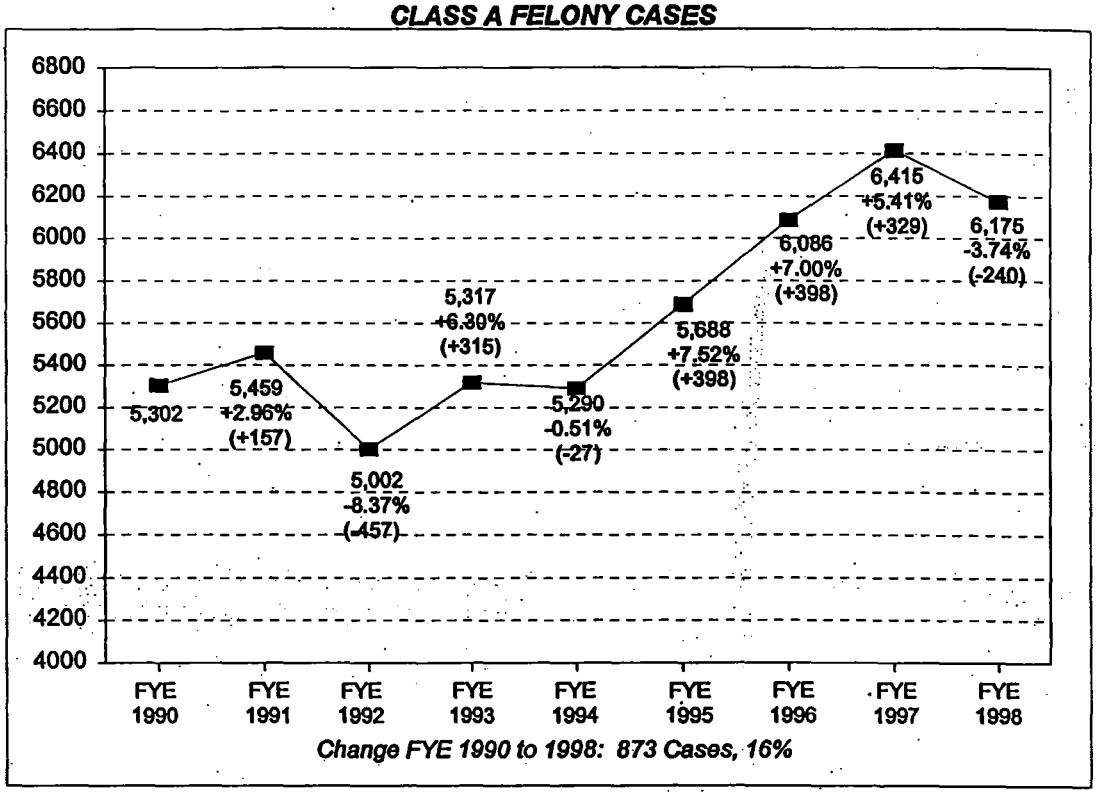
Change FYE 1990 to 1998: 25 Cases, 64%

FELONY CASES

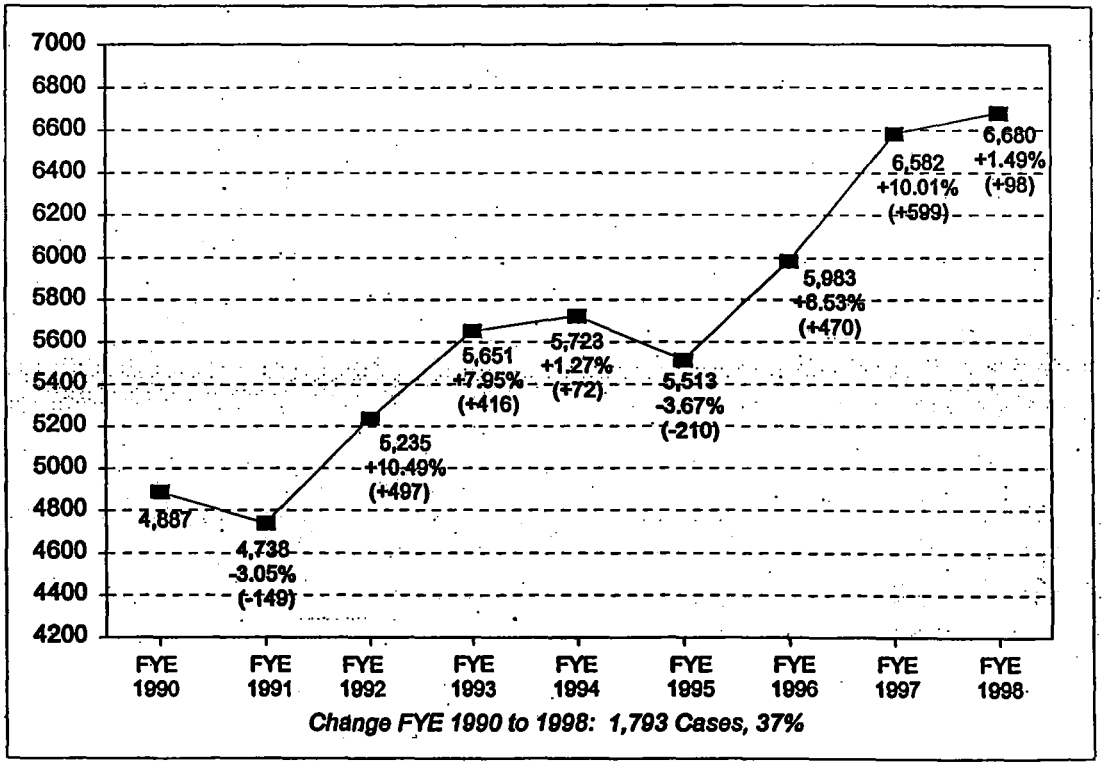


Change FYE 1990 to 1998: 12,038 Cases, 43%

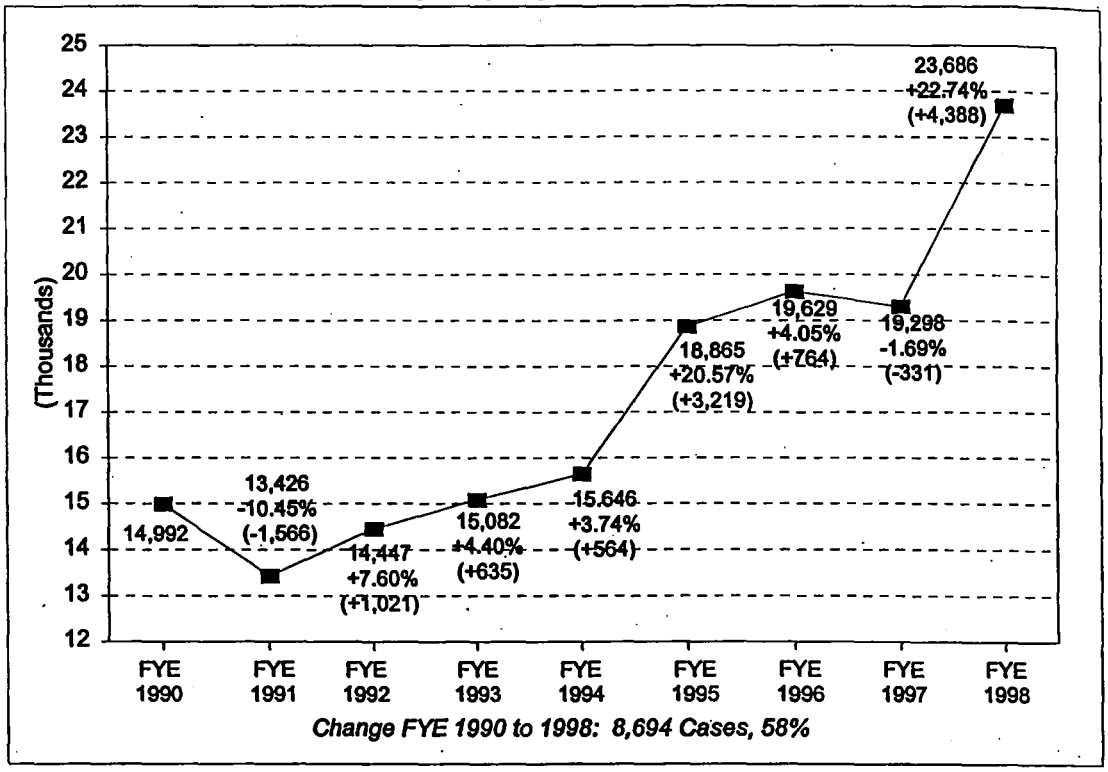
CLASS A FELONY CASES



CLASS B FELONY CASES

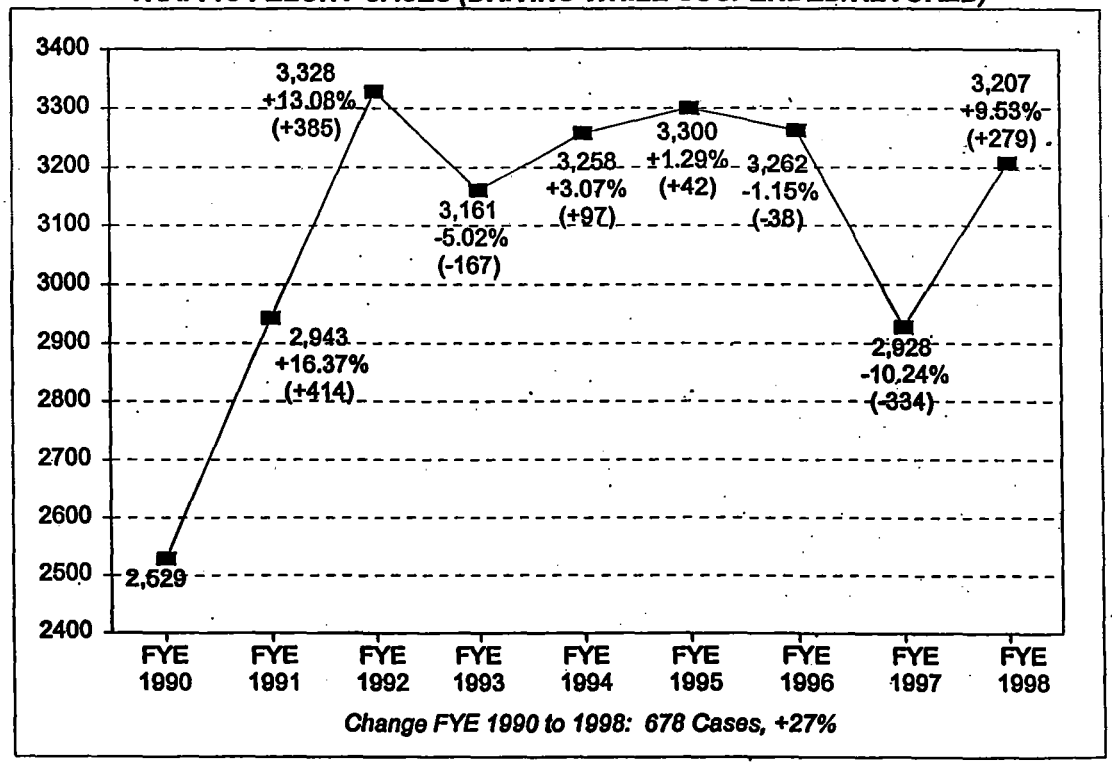


CLASS C AND UNCLASSIFIED FELONY CASES



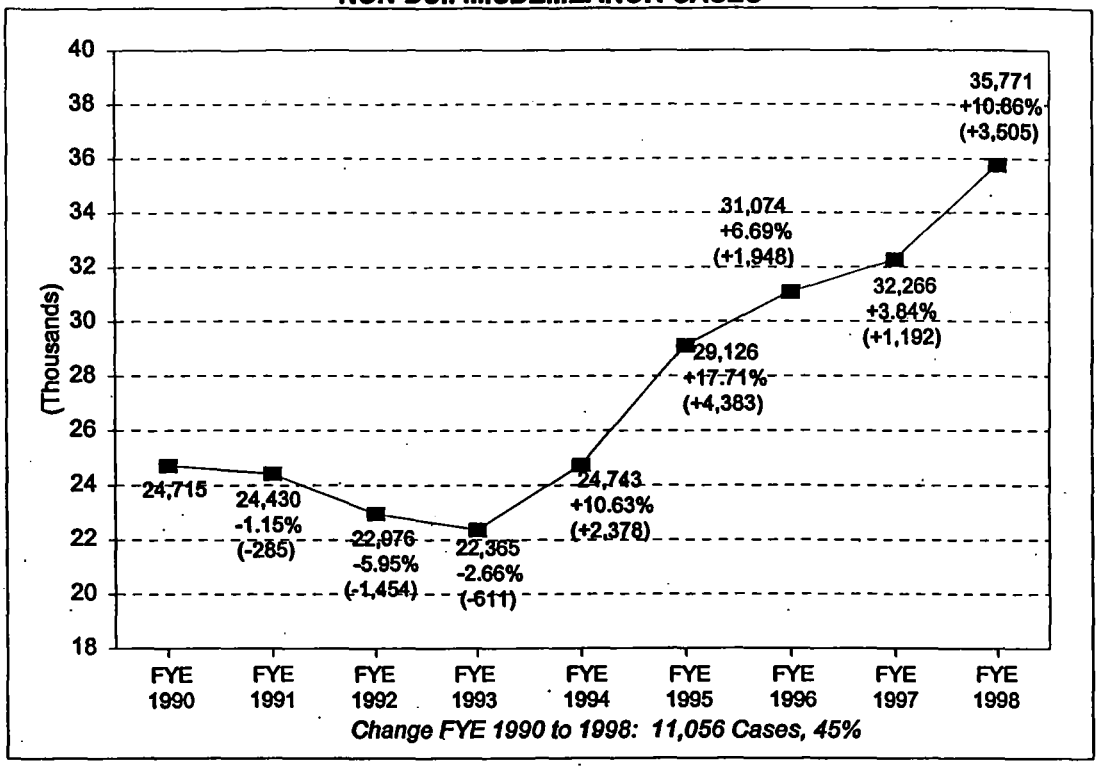
Change FYE 1990 to 1998: 8,694 Cases, 58%

TRAFFIC FELONY CASES (DRIVING WHILE SUSPENDED/REVOKED)



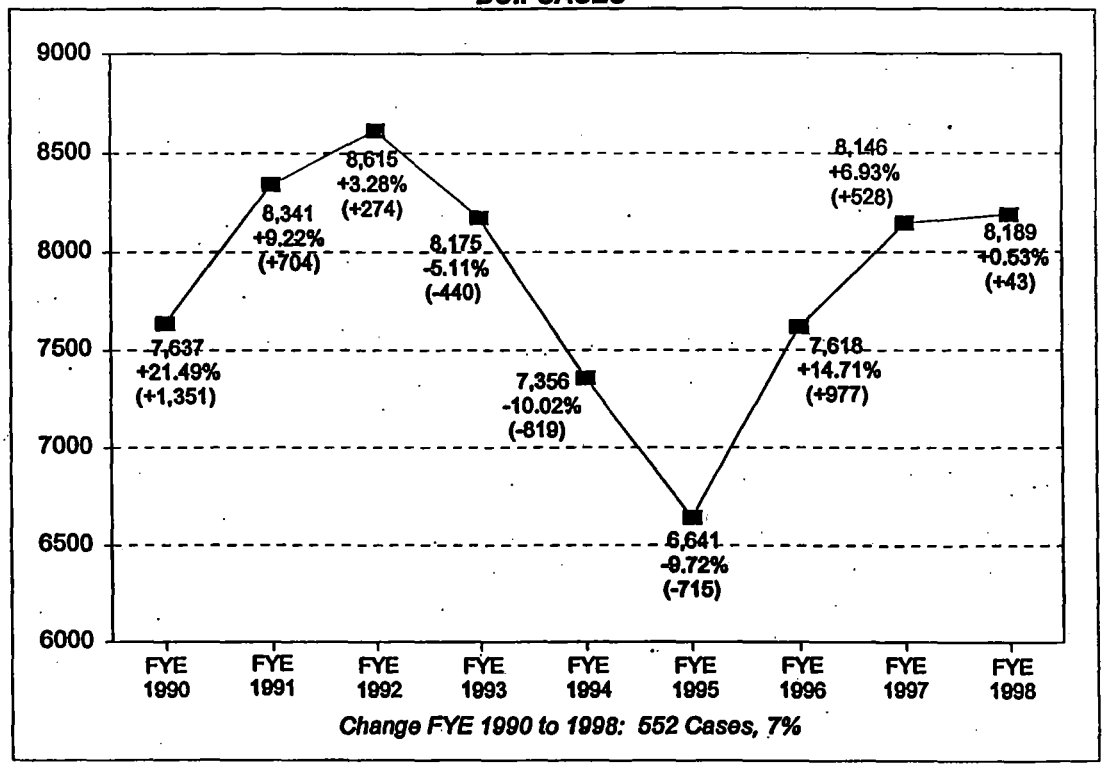
Change FYE 1990 to 1998: 678 Cases, +27%

NON-DUII MISDEMEANOR CASES



Change FYE 1990 to 1998: 11,056 Cases, 45%

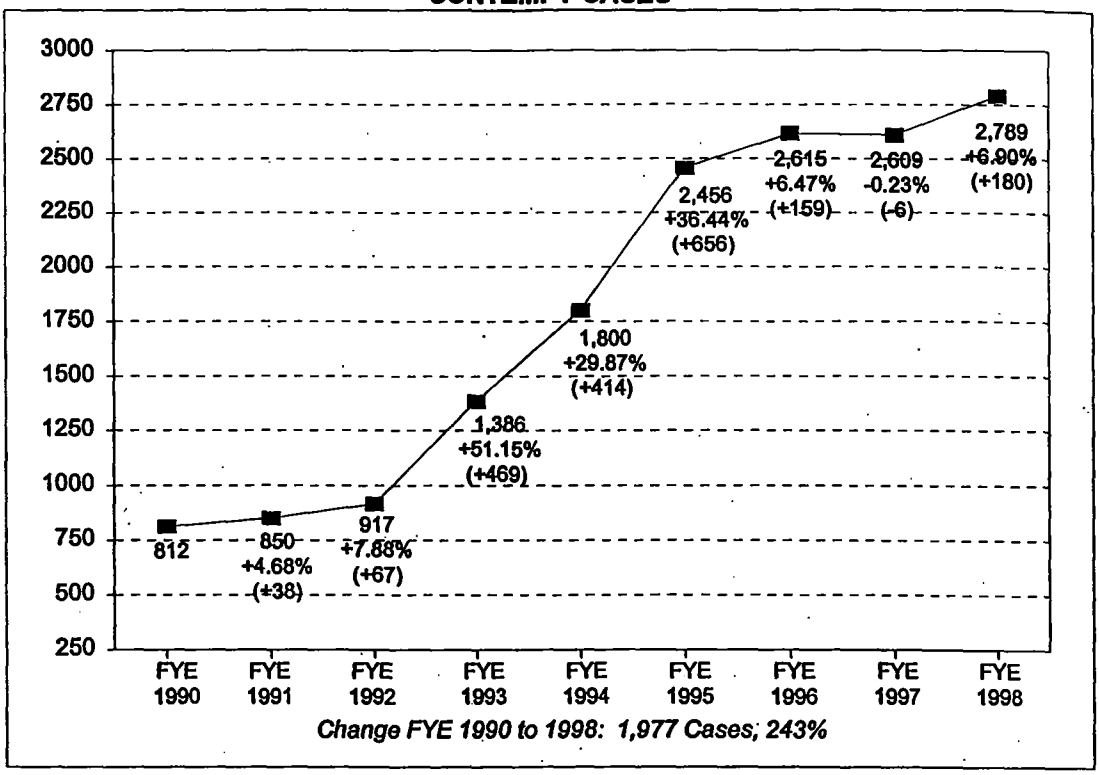
DUII CASES



Change FYE 1990 to 1998: 552 Cases, 7%

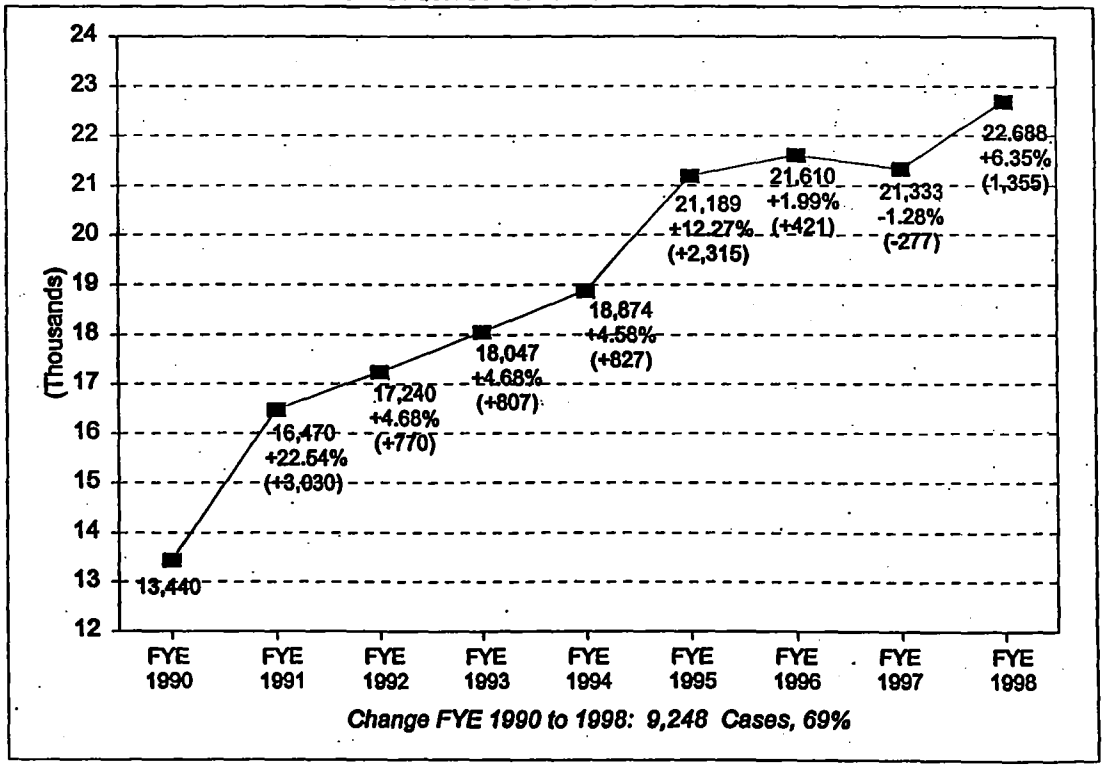
INDIGENT DEFENSE STATEWIDE TRIAL LEVEL CASELOAD COMPARISON

CONTEMPT CASES



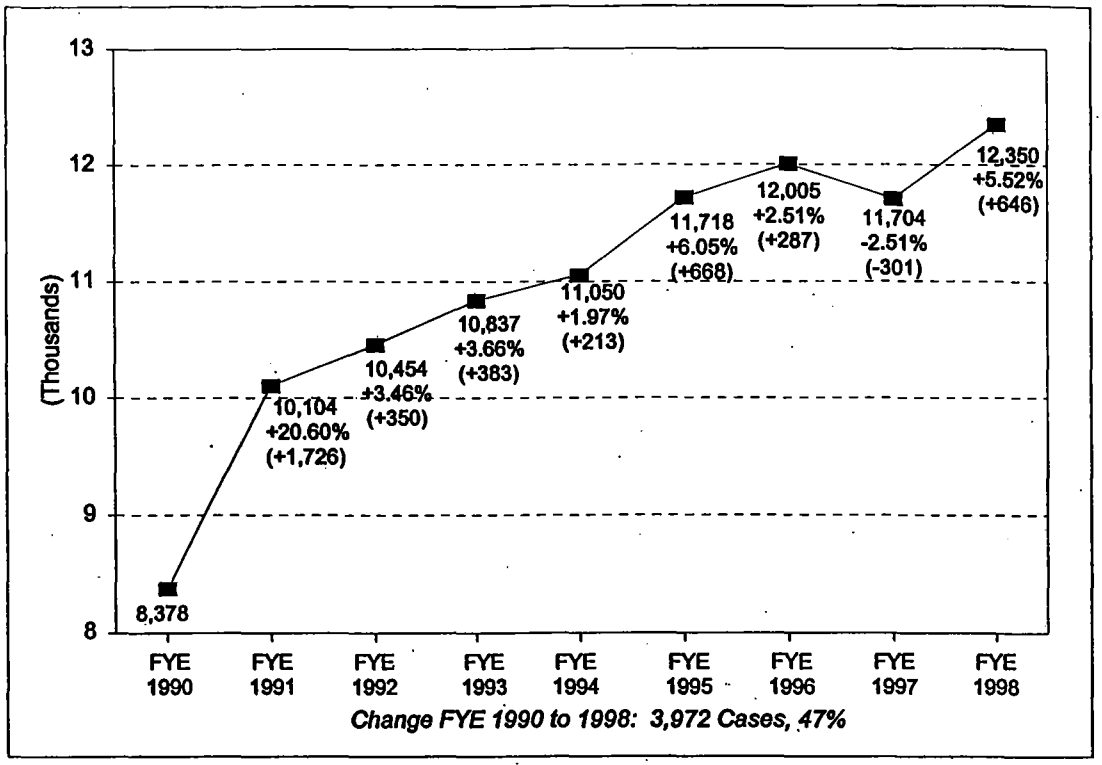
Change FYE 1990 to 1998: 1,977 Cases; 243%

PROBATION VIOLATION CASES

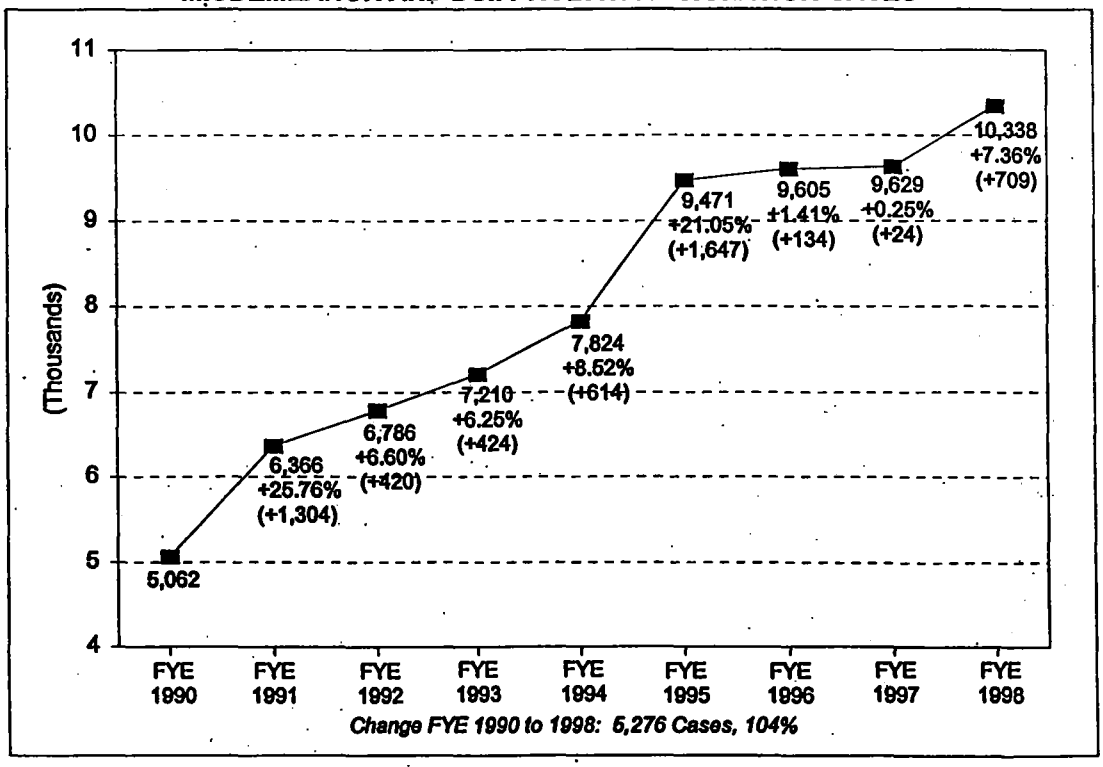


Change FYE 1990 to 1998: 9,248 Cases, 69%

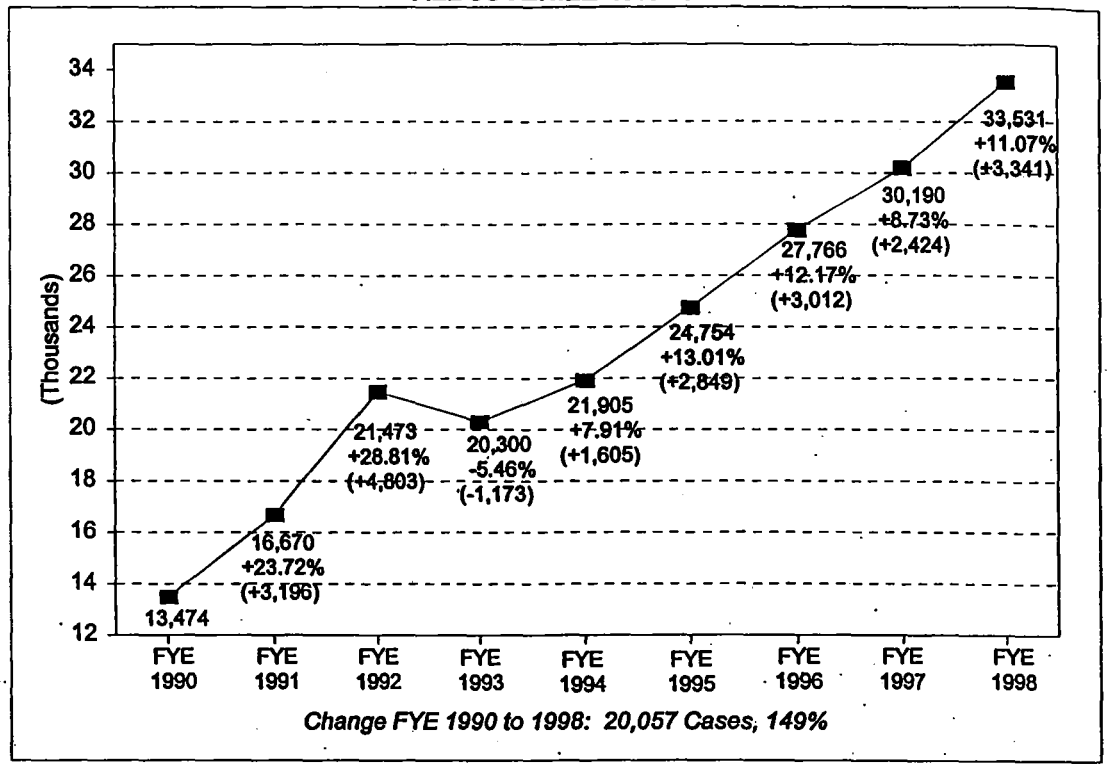
FELONY PROBATION VIOLATIONS CASES



MISDEMEANOR AND DUII PROBATION VIOLATION CASES

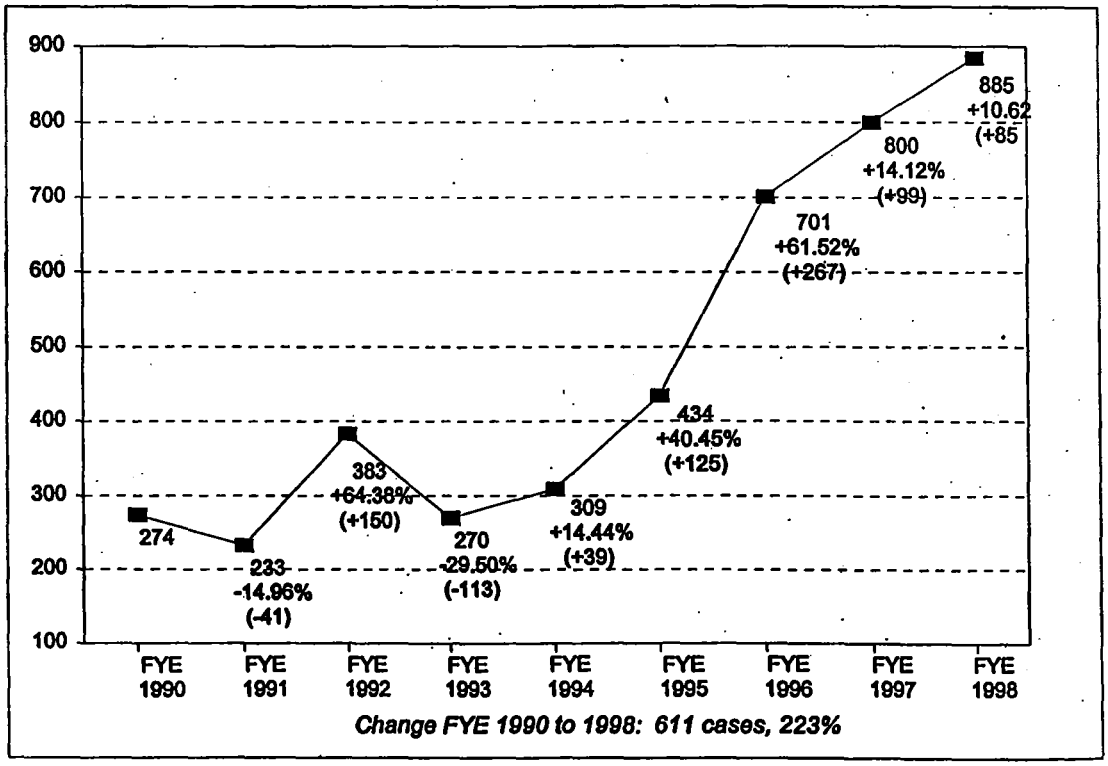


ALL JUVENILE CASES



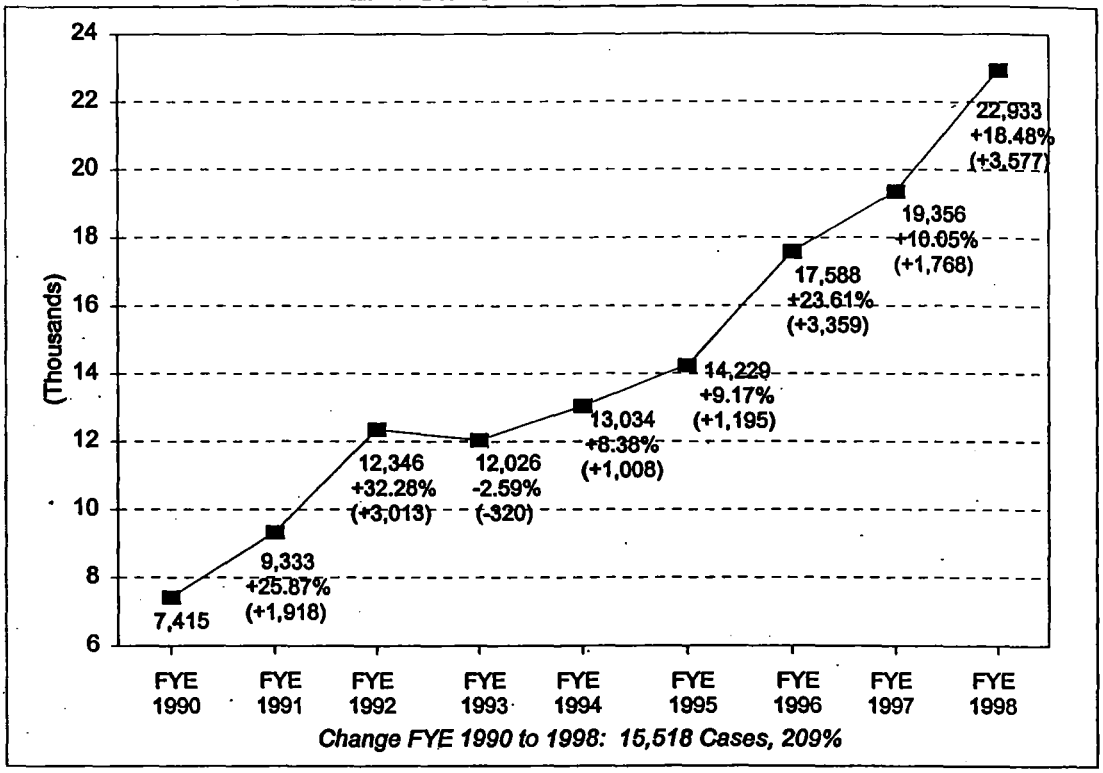
Change FYE 1990 to 1998: 20,057 Cases, 149%

TERMINATION OF PARENTAL RIGHTS CASES



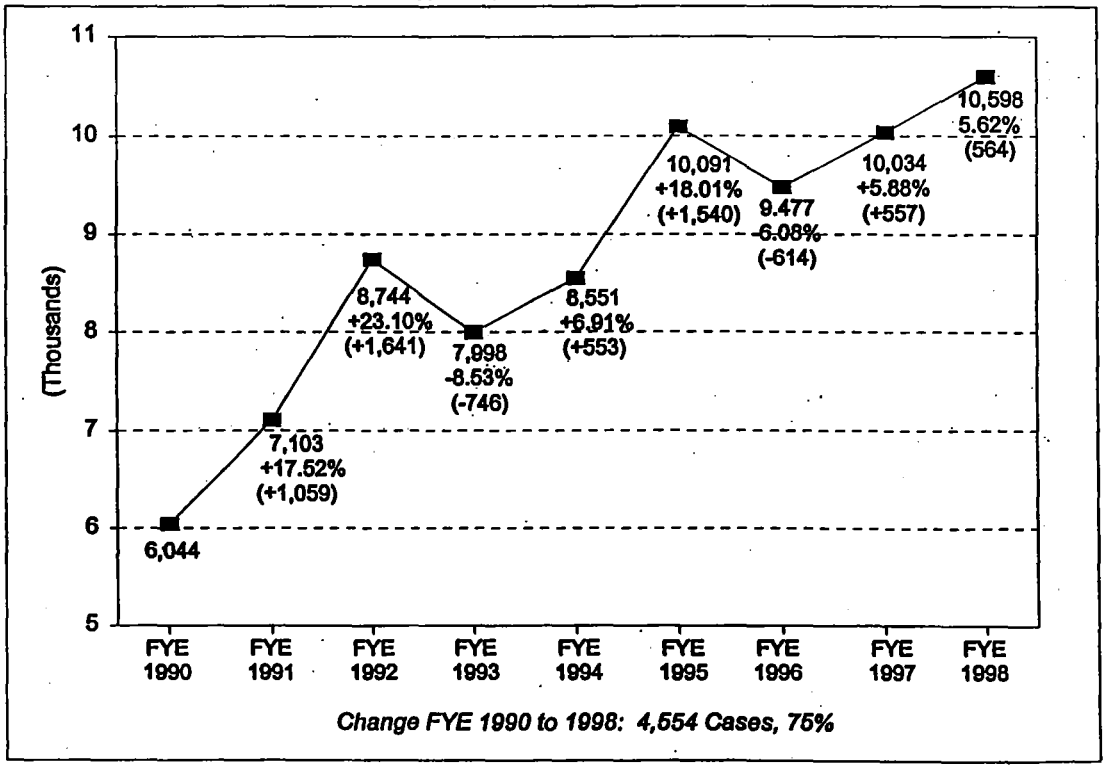
Change FYE 1990 to 1998: 611 cases, 223%

JUVENILE DEPENDENCY AND REVIEW HEARING CASES



Change FYE 1990 to 1998: 15,518 Cases, 209%

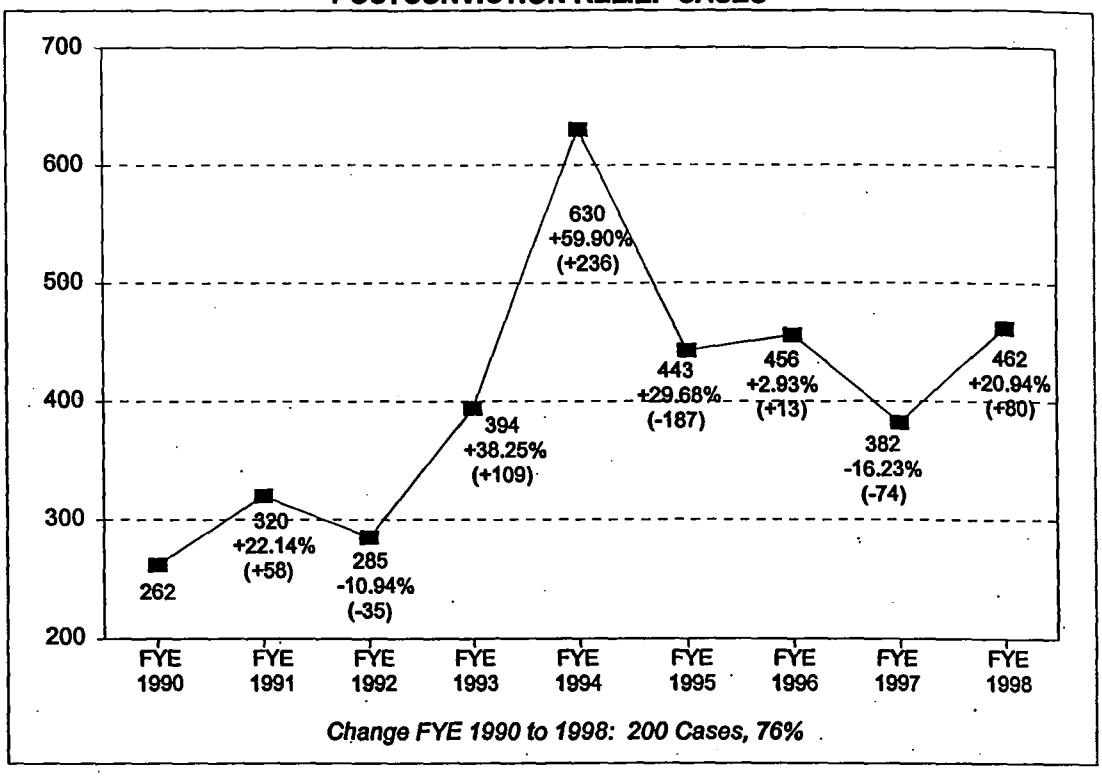
OTHER JUVENILE CASES



Change FYE 1990 to 1998: 4,554 Cases, 75%

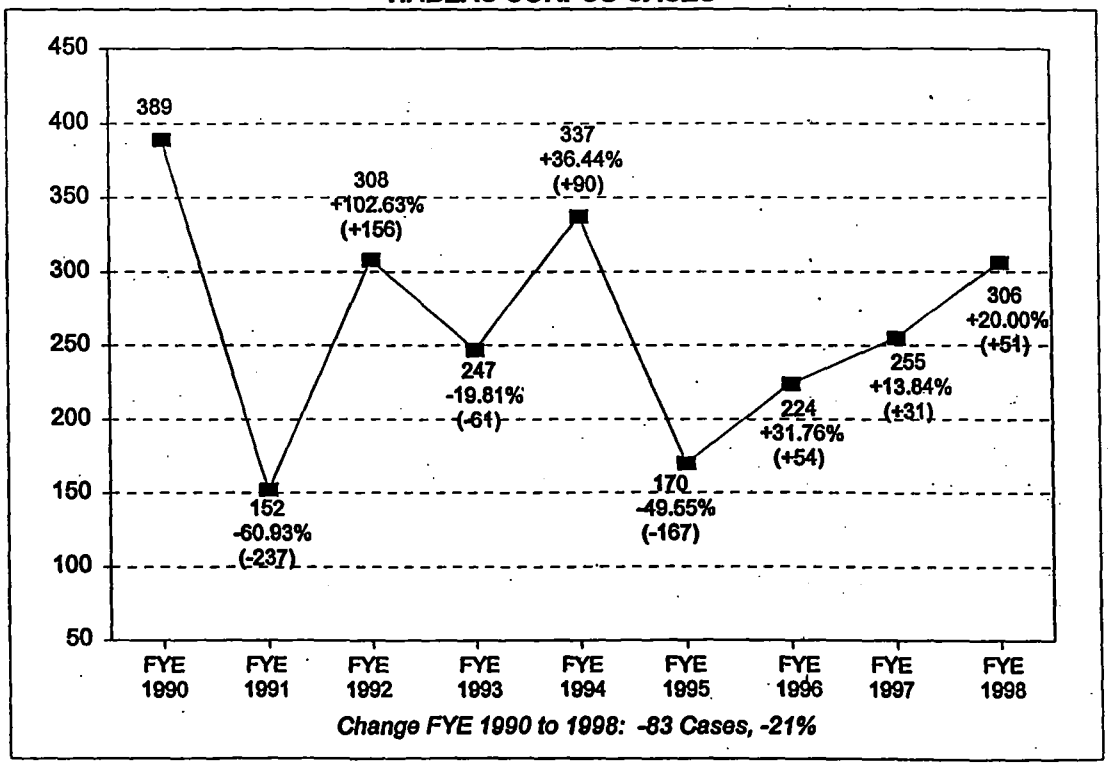
INDIGENT DEFENSE STATEWIDE TRIAL LEVEL CASELOAD COMPARISON

POSTCONVICTION RELIEF CASES



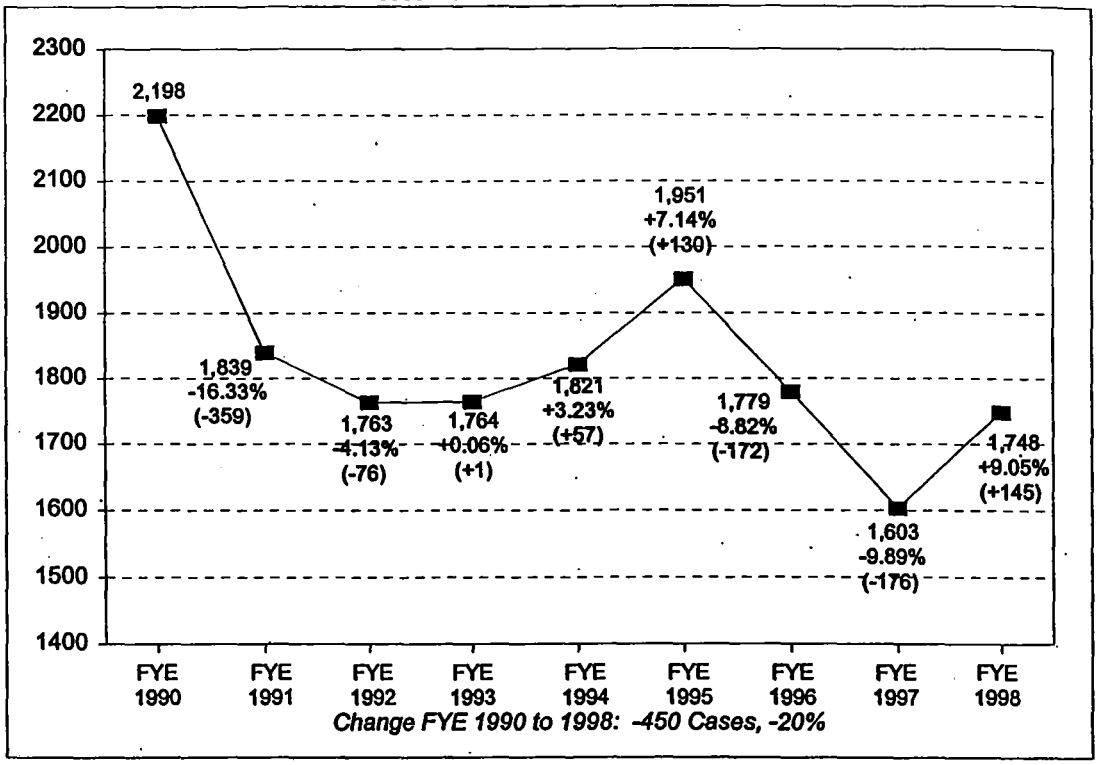
Change FYE 1990 to 1998: 200 Cases, 76%

HABEAS CORPUS CASES



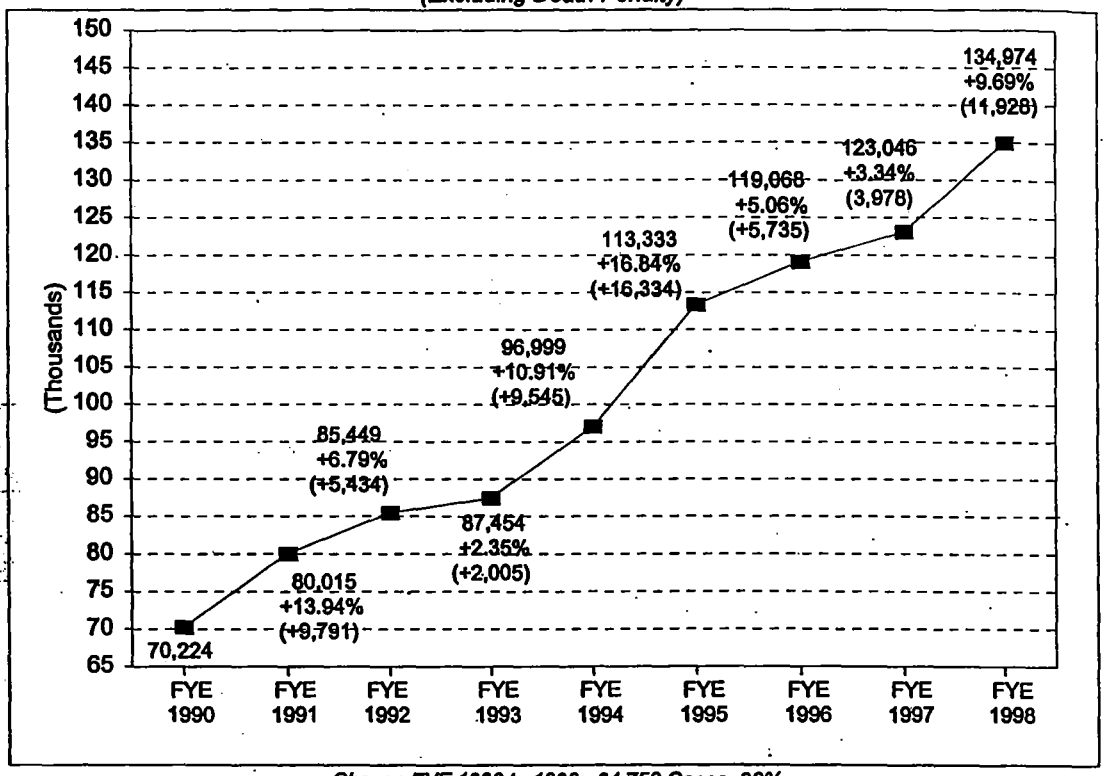
Change FYE 1990 to 1998: -83 Cases, -21%

CIVIL COMMITMENT CASES



CONTRACT CASES

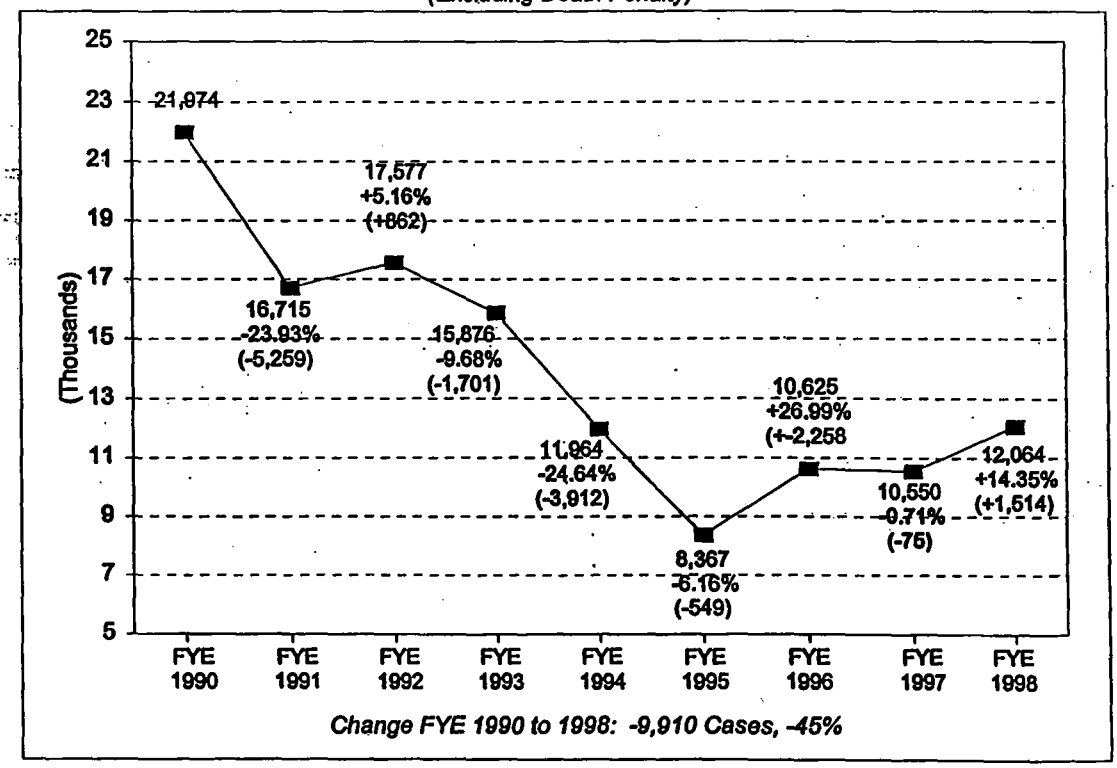
(Excluding Death Penalty)



Change FYE 1990 to 1998: 64,750 Cases, 92%

PRIVATE BAR CASES

(Excluding Death Penalty)



Change FYE 1990 to 1998: -9,910 Cases, -45%

NUMBER OF CASE FILINGS AND NUMBER OF CASES WITH COURT APPOINTED COUNSEL (CAC)

Sorted by Highest to Lowest Percent of Combined Filings with Appointed Counsel

CALENDAR YEAR 1998

	Misdemeanors			Felonies			Combined		
County	Total Filings	No. with CAC	Percent with CAC	Total Filings	No. with CAC	Percent with CAC	Total Filings	No. with CAC	Percent with CAC
Sherman	21	20	95.2%	31	21	67.7%	52	41	78.8%
Harney	16	13	81.3%	59	46	78.0%	75	59	78.7%
Baker	44	28	63.6%	167	137	82.0%	211	165	78.2%
Polk	786	538	68.4%	485	416	85.8%	1,271	954	75.1%
Jefferson	669	402	60.1%	377	363	96.3%	1,046	765	73.1%
Morrow	27	19	70.4%	100	71	71.0%	127	90	70.9%
Deschutes	2,798	1,875	67.0%	1,378	1,040	75.5%	4,176	2,915	69.8%
Linn	1,431	832	58.1%	1,552	1,245	80.2%	2,983	2,077	69.6%
Douglas	1,190	679	57.1%	1,558	1,233	79.1%	2,748	1,912	69.6%
Lane	2,959	1,672	56.5%	3,763	2,964	78.8%	6,722	4,636	69.0%
Umatilla	1,530	730	47.7%	1,362	1,257	92.3%	2,892	1,987	68.7%
Josephine	1,745	1,035	59.3%	1,029	841	81.7%	2,774	1,876	67.6%
Marion	5,927	3,741	63.1%	2,640	2,038	77.2%	8,567	5,779	67.5%
Klamath	2,829	1,704	60.2%	955	829	86.8%	3,784	2,533	66.9%
Lincoln	1,494	876	58.6%	554	462	83.4%	2,048	1,338	65.3%
Coos	2,053	1,091	53.1%	1,012	902	89.1%	3,065	1,993	65.0%
Washington	5,649	2,886	51.1%	4,337	3,448	79.5%	9,986	6,334	63.4%
Multnomah	14,015	6,756	48.2%	8,654	7,340	84.8%	22,669	14,096	62.2%
Crook	661	337	51.0%	254	223	87.8%	915	560	61.2%
Curry	837	417	49.8%	324	276	85.2%	1,161	693	59.7%
Columbia	399	185	46.4%	362	267	73.8%	761	452	59.4%
Wasco	753	335	44.5%	508	397	78.1%	1,261	732	58.0%
Tillamook	869	454	52.2%	302	225	74.5%	1,171	679	58.0%
Malheur	888	430	48.4%	413	311	75.3%	1,301	741	57.0%
Lake	257	132	51.4%	75	52	69.3%	332	184	55.4%
Benton	1,117	465	41.6%	752	554	73.7%	1,869	1,019	54.5%
Jackson	3,832	1,551	40.5%	1,851	1,510	81.6%	5,683	3,061	53.9%
Yamhill	1,234	472	38.2%	861	615	71.4%	2,095	1,087	51.9%
Clatsop	936	357	38.1%	466	343	73.6%	1,402	700	49.9%
Hood River	634	260	41.0%	227	147	64.8%	861	407	47.3%
Clackamas	4,252	1,631	38.4%	2,549	1,338	52.5%	6,801	2,969	43.7%
Grant	27	6	22.2%	51	28	54.9%	78	34	43.6%
Union	612	138	22.5%	354	252	71.2%	966	390	40.4%
Gilliam	36	2	5.6%	32	20	62.5%	68	22	32.4%
Wheeler	14	5	35.7%	12	2	16.7%	26	7	26.9%
Wallowa	135	14	10.4%	58	37	63.8%	193	51	26.4%
Total	62,676	32,088	51.2%	39,464	31,250	79.2%	102,140	63,338	62.0%

NUMBER OF CASE FILINGS AND NUMBER OF CASES WITH COURT APPOINTED COUNSEL (CAC)

CALENDAR YEAR 1998

	Misdemeanors			Felonies			Combined		
County	Total Filings	No. with CAC	Percent with CAC	Total Filings	No. with CAC	Percent with CAC	Total Filings	No. with CAC	Percent with CAC
Baker	44	28	63.6%	167	137	82.0%	211	165	78.2%
Benton	1,117	465	41.6%	752	554	73.7%	1,869	1,019	54.5%
Clackamas	4,252	1,631	38.4%	2,549	1,338	52.5%	6,801	2,969	43.7%
Clatsop	936	357	38.1%	466	343	73.6%	1,402	700	49.9%
Columbia	399	185	46.4%	362	267	73.8%	761	452	59.4%
Coos	2,053	1,091	53.1%	1,012	902	89.1%	3,065	1,993	65.0%
Crook	661	337	51.0%	254	223	87.8%	915	560	61.2%
Curry	837	417	49.8%	324	276	85.2%	1,161	693	59.7%
Deschutes	2,798	1,875	67.0%	1,378	1,040	75.5%	4,176	2,915	69.8%
Douglas	1,190	679	57.1%	1,558	1,233	79.1%	2,748	1,912	69.6%
Gilliam	36	2	5.6%	32	20	62.5%	68	22	32.4%
Grant	27	6	22.2%	51	28	54.9%	78	34	43.6%
Harney	16	13	81.3%	59	46	78.0%	75	59	78.7%
Hood River	634	260	41.0%	227	147	64.8%	861	407	47.3%
Jackson	3,832	1,551	40.5%	1,851	1,510	81.6%	5,683	3,061	53.9%
Jefferson	669	402	60.1%	377	363	96.3%	1,046	765	73.1%
Josephine	1,745	1,035	59.3%	1,029	841	81.7%	2,774	1,876	67.6%
Klamath	2,829	1,704	60.2%	955	829	86.8%	3,784	2,533	66.9%
Lake	257	132	51.4%	75	52	69.3%	332	184	55.4%
Lane	2,959	1,672	56.5%	3,763	2,964	78.8%	6,722	4,636	69.0%
Lincoln	1,494	876	58.6%	554	462	83.4%	2,048	1,338	65.3%
Linn	1,431	832	58.1%	1,552	1,245	80.2%	2,983	2,077	69.6%
Malheur	888	430	48.4%	413	311	75.3%	1,301	741	57.0%
Marion	5,927	3,741	63.1%	2,640	2,038	77.2%	8,567	5,779	67.5%
Morrow	27	19	70.4%	100	71	71.0%	127	90	70.9%
Multnomah	14,015	6,756	48.2%	8,654	7,340	84.8%	22,669	14,096	62.2%
Polk	786	538	68.4%	485	416	85.8%	1,271	954	75.1%
Sherman	21	20	95.2%	31	21	67.7%	52	41	78.8%
Tillamook	869	454	52.2%	302	225	74.5%	1,171	679	58.0%
Umatilla	1,530	730	47.7%	1,362	1,257	92.3%	2,892	1,987	68.7%
Union	612	138	22.5%	354	252	71.2%	966	390	40.4%
Wallowa	135	14	10.4%	58	37	63.8%	193	51	26.4%
Wasco	753	335	44.5%	508	397	78.1%	1,261	732	58.0%
Washington	5,649	2,886	51.1%	4,337	3,448	79.5%	9,986	6,334	63.4%
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Yamhill	1,234	472	38.2%	861	615	71.4%	2,095	1,087	51.9%
Total	62,676	32,088	51.2%	39,464	31,250	79.2%	102,140	63,338	62.0%

RIGHT TO COUNSEL AT STATE EXPENSE
OREGON'S INDIGENT DEFENSE PROGRAM

SOURCES OF AUTHORITY FOR APPOINTMENT OF COUNSEL, BREAKOUT OF INDIGENT DEFENSE CASELOAD BY AUTHORITY AND EXPENDITURE ANALYSIS

Detailed research materials on legal issues and authority for appointment of state-paid counsel available upon request to the Indigent Defense Services Division (986-5907)

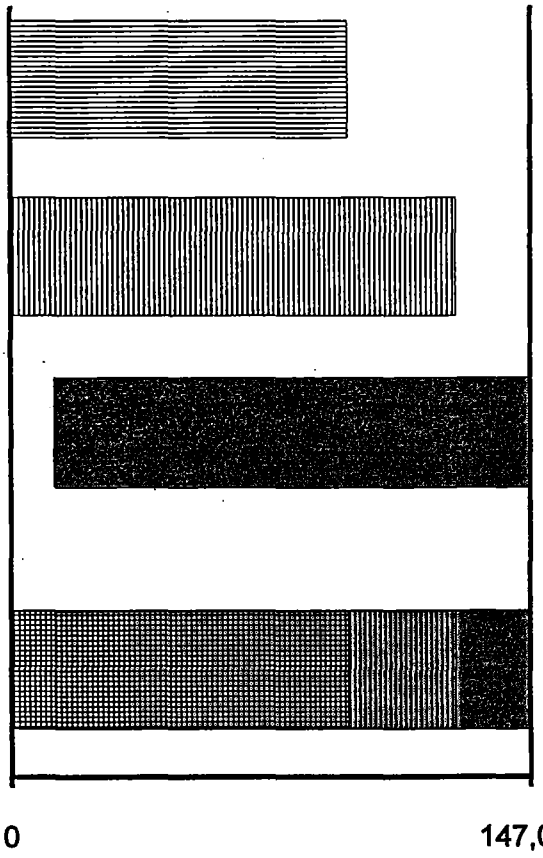
RIGHT TO COUNSEL AT STATE EXPENSE
TYPES OF CASES AND SOURCE(S) OF AUTHORITY
FYE 1998 CASELOAD

	PART "A"		PART "B"		
	FYE 1998 Caseload		Source(s) of Direct Authority for Appointmen of State-Paid Counsel		
Trial Level Case Type	Number of Cases	Percent of Total Caseload	Federal Constitution	Oregon Constitution	Oregon Revised Statutes
Death Penalty	26	Less than 0.1%	26	26	26
Murder	64	Less than 0.1%	64	64	64
Felonies	39,748	27.0%	39,748	39,748	39,748
Extradition	1,055	0.7%	Not decided	Not decided	1,055
Misdemeanors *	43,960	29.9%	15,386	43,960	43,960
Contempt	2,789	1.9%	2,789	2,789	2,789
Probation Violations	22,688	15.4%	22,688	22,688	22,688
All Juvenile	33,531	22.8%			
Dependency/Review	22,933	15.6%	Unknown	Unknown	22,933
TPR - Parent	415	0.3%	415	415	415
- Child	470	0.3%	Not decided	Not decided	470
Delinquency	7,066	4.8%	7,066	7,066	7,066
Probation Violation	2,516	1.7%	2,516	2,516	0
Other Juvenile	131	Less than 0.1%	0	0	131
Civil Commitment	1,748	1.2%	1,748	1,748	1,748
PCR/Habeas Corpus	768	0.5%	0	0	768
Other (for example, PSRB)	687	0.5%	0	0	687
Total Caseload	147,064	100.00%	92,446	121,020	144,548

* 1994 gross estimate of percentage of misdemeanors resulting in no actual incarceration (65%)

"TPR = Termination of Parental Rights, "PCR" = Postconviction Relief, "PSRB" = Psychiatric Security Rev

Basis of Authority for Appointment of Counsel at State-Expense in Oregon By Types of Cases (FYE 1998 Caseload)



Federal Constitution: 92,501 cases

Oregon Constitution: 121,075 cases

ORS: 144,548 cases

Cases covered by any one of the above: 147,064 cases

Analysis of Indigent Defense Account Expenditures for Attorneys
By Case Category and Case Type
(Trial-Level, Non-Death Penalty)
FYE 1998

Category	Case Type	Number of Cases FYE 1998	Average Cost Per Case	Annual Cost By Case Type and Category	Per Case Average Cost By Category	Category Share of Total Caseload	Category Share of Total Cost
FELONY	Murder	64	$ 9,400	$ 601,600			
	Class A Felony	6,175	$ 780	$ 4,816,500			
	Class B Felony	6,680	$ 520	$ 3,473,600			
	Class C Felony *	23,686	$ 400	$ 9,474,400			
	Traffic Felony	3,207	$ 280	$ 897,960			
Subtotal	**Felony**	**39,812**		**$ 19,264,060**	**$ 483.88**	**27.1%**	**42.3%**
MISDEMEANOR	DUII	7,789	$ 300	$ 2,336,700			
	Others	36,171	$ 250	$ 9,042,750			
Subtotal	**Misdemeanor**	**43,960**		**$ 11,379,450**	**$ 258.86**	**29.9%**	**25.0%**
PROBATION VIOLATION	Felony PV	12,350	$ 150	$ 1,852,500			
	Misdemeanor PV	10,338	$ 120	$ 1,240,560			
Subtotal	**Probation Violation**	**22,688**		**$ 3,093,060**	**$ 136.33**	**15.4%**	**6.8%**
CONTEMPT	**All**	**2,789**	**$ 220**	**$ 613,580**	**$ 220.00**	**1.9%**	**1.3%**
INMATE (generally)	Habeas Corpus	306	$ 430	$ 131,580			
	Postconviction Relief	462	$ 970	$ 448,140			
Subtotal	**Inmate**	**768**		**$ 579,720**	**$ 754.84**	**0.5%**	**1.3%**
JUVENILE COURT	TPR – parent	469	$ 1,600	$ 750,400			
	TPR – child(ren)	414	$ 840	$ 347,760			
	Dependency	6,676	$ 400	$ 2,670,400			
	Review	16,257	$ 220	$ 3,576,540			
	Felony	4,067	$ 330	$ 1,342,110			
	Misdemeanor	3,001	$ 270	$ 810,270			
	Probation Violation	2,394	$ 110	$ 263,340			
	Other	253	$ 200	$ 50,600			
Subtotal	**Juvenile Court**	**33,531**		**$ 9,811,420**	**$ 292.61**	**22.8%**	**21.6%**
OTHER	Extradition	1,055	$ 270	$ 284,850			
	Civil Commitment	1,748	$ 190	$ 332,120			
	Other	687	$ 200	$ 137,400			
Subtotal	**Other**	**3,490**		**$ 754,370**	**$ 216.15**	**2.4%**	**1.7%**
GRAND TOTAL	**All**	**147,038**		**$45,495,660**	**$ 309.41**	**100.0%**	**100.0%**

* Class C felony includes unclassified felonies

"TPR" = Termination of Parental Rights

DETERMINATION OF "INDIGENCE"
OREGON'S INDIGENT DEFENSE PROGRAM

SUMMARY

DETERMINATION OF "INDIGENCE" FOR PURPOSES OF APPOINTMENT OF COUNSEL AT STATE EXPENSE

The Oregon statutory standard for determining who is eligible to receive services paid from the Indigent Defense Account mirrors that established under the federal constitution. Specifically, ". . . a person is indigent if the person is determined to be financially unable to retain adequate counsel without substantial hardship in providing basic economic necessities to the person or the person's dependent family." ORS 135.050 and ORS 151.485.

This standard is implemented statewide under a two-prong means test. An applicant for state-paid representation is required to provide a verified financial statement, listing detailed information regarding income, assets, debts, and dependents. Federal food stamp guidelines serve as the first determinant of eligibility. If the applicant's income is less than or equal to the eligibility level for food stamps, the applicant is presumed to be indigent, unless s/he has liquid assets that could be used to hire an attorney. If an applicant's income exceeds food stamp standards, that person is eligible for state-paid counsel only if his/her income and liquid assets are determined to be sufficient to hire an attorney. The guidelines used for this latter determinant are established by the SCA and are subject to the approval of the Supreme Court. The current guideline amount, for example, for the cost of hiring an attorney in a DUII prosecution is $750.

Indigence verification specialists (court employees) are responsible for obtaining, screening, and verifying the financial background of persons applying for appointed counsel and making recommendations to judges whether or not the person qualifies for appointed counsel under the food stamp and retainer tests.

call her key
Need 1/12/97

STATE OF OREGON, KLAMATH COUNTY

No: [redacted] Charge: ~~ASSAULT~~ AM 135. 750
HARASS

AFFIDAVIT
Indigence and Request for Court-Appointed Counsel (Confidential)

If you are applying for an attorney on someone else's behalf, give that person's name:

I, the undersigned, being duly sworn, say that I am before the court in this case. I am asking for appointment of an attorney to represent me in this case because I cannot pay for an attorney now without causing substantial hardship to myself or my dependent family. The following information is true, and I ask the court to use it to determine whether I can have an attorney appointed and costs paid at public expense. I understand that I can be required to document or verify this information. I understand failure to do so could result in my request being denied or, if counsel has already been appointed, the withdrawal of counsel. I understand that if I do not tell the truth, I can be charged with a crime, and if convicted, I can be incarcerated.

BE SURE TO READ THE "COURT-APPOINTED ATTORNEY ADVICE OF RIGHTS" FORM.

PLEASE PRINT CLEARLY AND COMPLETE EVERY LINE BELOW THAT IS APPLICABLE TO YOU--IF SOMETHING DOES NOT APPLY, WRITE "N/A."

1. PERSONAL Full Name of Applicant [redacted]

Residence Address [redacted]

Mailing Address (if different) _____

Phone No. [redacted] Birth Date [redacted]

☒F ☐M Marital Status: ☐Married ☐Single ☐Separated ☐Divorced ☒Widowed

List the following information for everyone living in your household:

Name	Relationship	Age	Monthly income

2. EMPLOYMENT AND INCOME

Present or last employer _____ How long? _____ Occupation _____
Location _____
Hourly wage: $ _____ Average hours per week _____ Net (after tax) monthly income: $ _____
If unemployed, how long since last employment? _____

Spouse's employer _____ How long? _____ Occupation _____
Location _____
Hourly wage: $ _____ Average hours per week _____ Net (after tax) monthly income: $ _____
If unemployed, how long since last employment? _____

Other income for you and spouse, dependents or household members (for example: Social Security, unemployment, retirement, public assistance, child support, workers' compensation, and disability):

Source of income (describe)	Amount	How long received?	How often received?
RETIREMENT	$ 1125.43	8 YRS	ONCE MONTHLY
S/S disability	$ 731.00	4 YRS	ONCE MONTHLY
+ [redacted] monthly payment.	4??.00		

Other household members who help pay for your living expenses:

Name	Amount	Payment for what (describe)?
	$	
	$	

3. PROPERTY AND ASSETS OWNED BY YOU, YOUR SPOUSE AND DEPENDENTS

Real estate: Address, City	Value	Amount Owed	Payments made to:
[redacted]	$ 35,000	$ -0-	
	$	$	

Credit cards: Card Name/Bank	Limit	Balance Owed	Monthly payments
	$	$	$
	$	$	$

Motor Vehicles: Make, Year	Value	Amount Owed	Payments made to:
97 Dodge [redacted]	$ 13,000	$ 10,000	[redacted]
	$	$	
	$	$	
	$	$	

Bank or Savings accounts (you and spouse):

Name of Bank	Savings or Checking	Balance
[redacted]	BOTH	$ 1,000.00
[redacted]	BOTH	$ 2,000.00

Cash not in bank (you and spouse): $ -0-

All other property or assets and value (for example, furniture, stocks, bonds, boats, guns and jewelry:

Money owed to you or spouse by others:

Name of Debtor	Amount Owed
[redacted]	$ 30,000
	$

4. MONTHLY EXPENSES

List all expenses that you pay monthly, either individually or jointly with your spouse:

Rent/mortgage	$ 250	Utilities	$ 100.00	Credit card payment(s):	$ 500.00
Car payment(s)	$ 240	Insurance	$	Court-ordered payments	$
Medical debts	$	Child support	$	Other:	$

873.00

Food + 1 = 125

Defendant's Signature: [redacted] Date: [redacted]-99

SUBSCRIBED AND SWORN to before me this 5 day of Jan, 19 99.

Nan Maddock

Clerk, Notary or Judge

My commission expires:

68,000.00 Liquidable Assets +

Rev. 11/97

ELIGIBILITY WORK SHEET

[redacted] | [redacted] | Harass

Applicant's Name | Case Number | Case Type or Charge (if criminal)

Household Size		Monthly Income (Net/Gross - Circle one)
Applicant: 1		$ 1125.43
Spouse:	+	$ 731.00
Dependents	+	$ 477.00
Children:		$
OTHER:		$
TOTAL: 1		$ 2256.43
		$
SUBTRACT		$
Income From Guideline Below or True Living Expenses, Whichever is LESS (Circle which is used)		$ 873 -

SUBTRACT
Monthly Court Ordered Payments* $ _____
Monthly Medical Bills*: $ _____
*Only if payment is actually being made.

AVAILABLE INCOME: $ 1383 43 -

ASSETS:

Real Estate ("equity" **):	$ 35,000 -
Motor Vehicles ("equity" **):	$
Bank Accounts:	$ 3000. -
Cash:	$
Other:	$ 30,000 -

LIQUID ASSETS: $ 68,000 -

**Equity is the amount the owner would have left if the item were sold and the loan were paid in full.

DETERMINING ELIGIBILITY
Total Income and Assets Available $ [redacted] 69,383 43

Minus $20 Application Fee: $ 69,363 43

Privately-Hired Attorney Fee $ 500 -
(From Guideline Schedule for County or Judicial District)

If income and assets are more than the privately-hired attorney fee, recommend denial. If less, recommend appointment.

INCOME GUIDELINES - From Adult & Family Services Division, Dept. of Human Resources, updated October 1, 1997

Household Size	GROSS INCOME Monthly	GROSS INCOME Annual	NET INCOME (77% of Gross) Monthly	NET INCOME (77% of Gross) Annual	Household Size	GROSS INCOME Monthly	GROSS INCOME Annual	NET INCOME (77% of Gross) Monthly	NET INCOME (77% of Gross) Annual
1	~~$855~~ 873	$10,260	$658	$7,896	5	$2,034	$24,408	$1,565	$18,780
2	$1,150	$13,800	$885	$10,620	6	$2,329	$27,948	$1,791	$21,492
3	$1,445	$17,340	$1,111	$13,332	7	$2,623	$31,476	$2,018	$24,216
4	$1,739	$20,868	$1,338	$16,056	8	$2,918	$35,016	$2,245	$26,940
	Each additional household member					$295	$3,540	$227	$2,724

CALCULATING CONTRIBUTION AMOUNT (only if eligible for court-appointed counsel)
Maximum Contribution Amount for Case Type $ [redacted]
(From Schedule)

Contribution Amount Recommended $ _____
(Contribution Amount from Schedule or Total Income or Assets Available after paying Application Fee, whichever is less. Minimum of $100).

APPLICATION FEE - $20
Recommend Payment?
Yes ____ No ____

(Desk Manual, Sec. 4 a) Revised: 2/9/98
qdata/verifwrk.wb2

STATE OF OREGON
KLAMATH COUNTY

☐ Circuit Court
☐ District Court

FILED
STATE OF OREGON
KLAMATH COUNTY CIRCUIT COURT

Case No(s): _____ 98 JAN 7 AM 10:28

Charge(s): [redacted] HARRIS CLERK OF COURT

BY _____

Verifier's Recommendation on Request for Court-Appointed Counsel

Order Appointing or Denying Counsel

Case Name: [redacted]

Verifier's Recommendation on Request for Court-Appointed Counsel

(To be completed by Verification Specialist)

Based on the Affidavit of Eligibility for Court-Appointed Counsel, I recommend a $20 application fee be
☐ ORDERED ☐ WAIVED, and I respectfully recommend that applicant's request for a court-appointed attorney

☐ APPROVED.

☐ APPROVED. Applicant has $_____ in resources. Verifier's recommendation is that _____ (*applicant*) be ordered to pay a $_____ participati payment to the court, due on _____ (*date*).

→ ☐ Applicant has $_____ posted as security.
(The scheduled maximum contribution amount for this case is $_____.)

☒ DENIED.

☐ CONTINUED for _____ weeks for verification of information.

☐ NO RECOMMENDATION.

[redacted]
Date

Nan Waddell
Verifier

1-541-883-5503x280
Telephone

Nan H Waddell
Print/Type Verifier's Name

Order Appointing Or Denying Counsel

(To be signed by Judge)

☐ The court orders payment of the $20 Application Fee.

☐ The court waives payment of the $20 Application Fee.

→ ☐ The court APPROVES applicant's request for court-appointed counsel.

→ ☐ The court APPROVES applicant's request for court-appointed counsel and orders applicant to mak participation payment of $_____ due to the court on _____ (*date*).

→ ☐ The court orders that current bail security be applied to the extent necessary to meet the participation payment obligation.

→ (*Name*)_____ is hereby appointed as counsel by the court, contingent upon verification. The compensation rate for noncontract-appointed counsel is at the current rat unless a higher rate has been authorized by the State Court Administrator.

→ ☒ The court DENIES applicant's request for court-appointed counsel.

5 Jan 99
Date

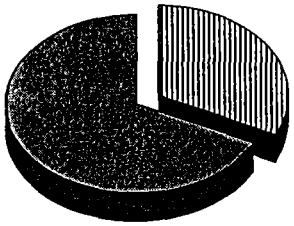
Lola B.
Judge

XXXX — Application Fee Ordered
XXXX — Application Fee Waived
ORAC — Counsel Appointed
ORAZ — Counsel Appointed and Participation Payment Ordered
ORDY — Counsel Denied.

Indigence Verification Program
Breakdown of Judges' Actions
on
Indigence Verification Specialists' (IVS) Recommendations
to
Deny/Withdraw Court Appointed Counsel (CAC)

July 1, 1997 - June 30, 1998

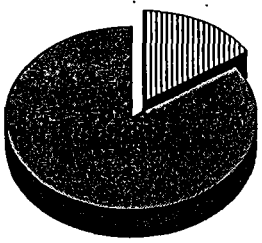
IVS Recommendations to Deny/Withdraw CAC After Initial Evaluation



Judge follows recommendation:	2,900	(67.7%)
Judge appoints counsel:	1,384	(32.3%)

IVS Recommendations: 4,284

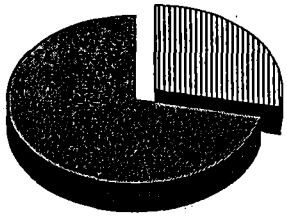
IVS Recommendations to Deny/Withdraw CAC After Verification



Judge follows recommendation:	1,160	(84.5%)
Judge appoints counsel:	213	(15.5%)

IVS Recommendations: 1,373

Combined IVS Recommendations to Deny/Withdraw CAC



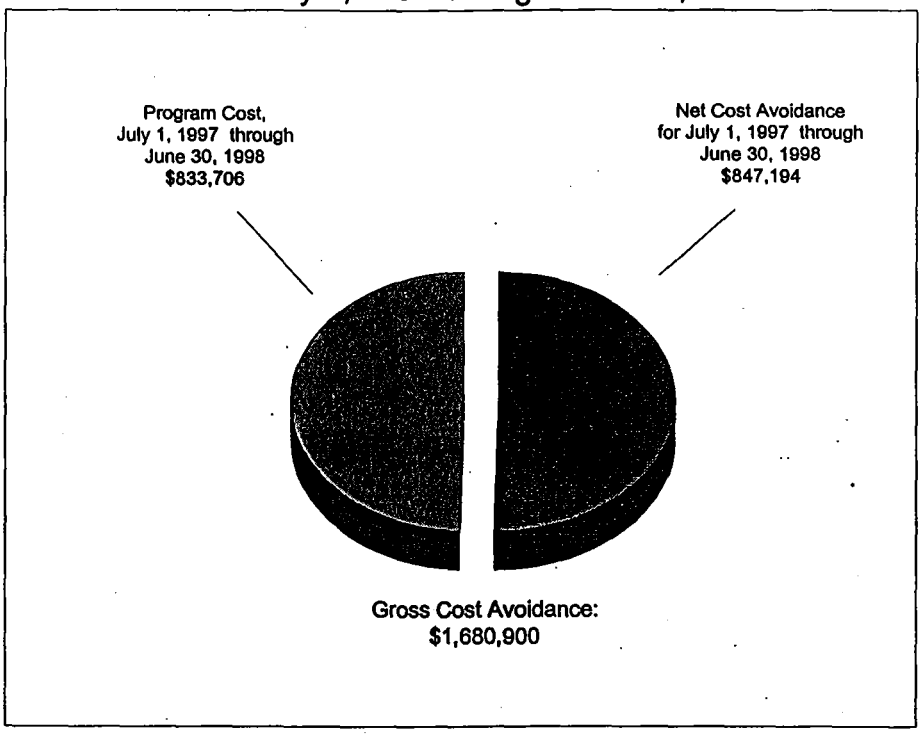
Judge follows recommendation:	4,060	(71.8%)
Judge appoints counsel:	1,597	(28.2%)

Total IVS Recommendations: 5,657

= Judge follows recommendation

= Judge appoints counsel

Indigence Verification Program Statistics
Analysis of Indigent Defense Cost Avoidance
July 1, 1997 through June 30, 1998



ANALYSIS OF GROSS COST AVOIDANCE:

Denials/withdrawals after initial evaluation of defendant's application:	2,900
Denials/withdrawals after verification of defendant's application (no hearing):	1,039
Denials/withdrawals after verification of defendant's application (hearing):	121
Defendant withdraws application:	1,227
Less reappointments:*	(115)
Net Number of Defendants Denied Court-Appointed Counsel	5,172

* Court-appointed counsel was initially denied/withdrawn, defendant unable to retain counsel, and court-appointed counsel was reappointed.

Estimated average savings per defendant denied counsel is $325

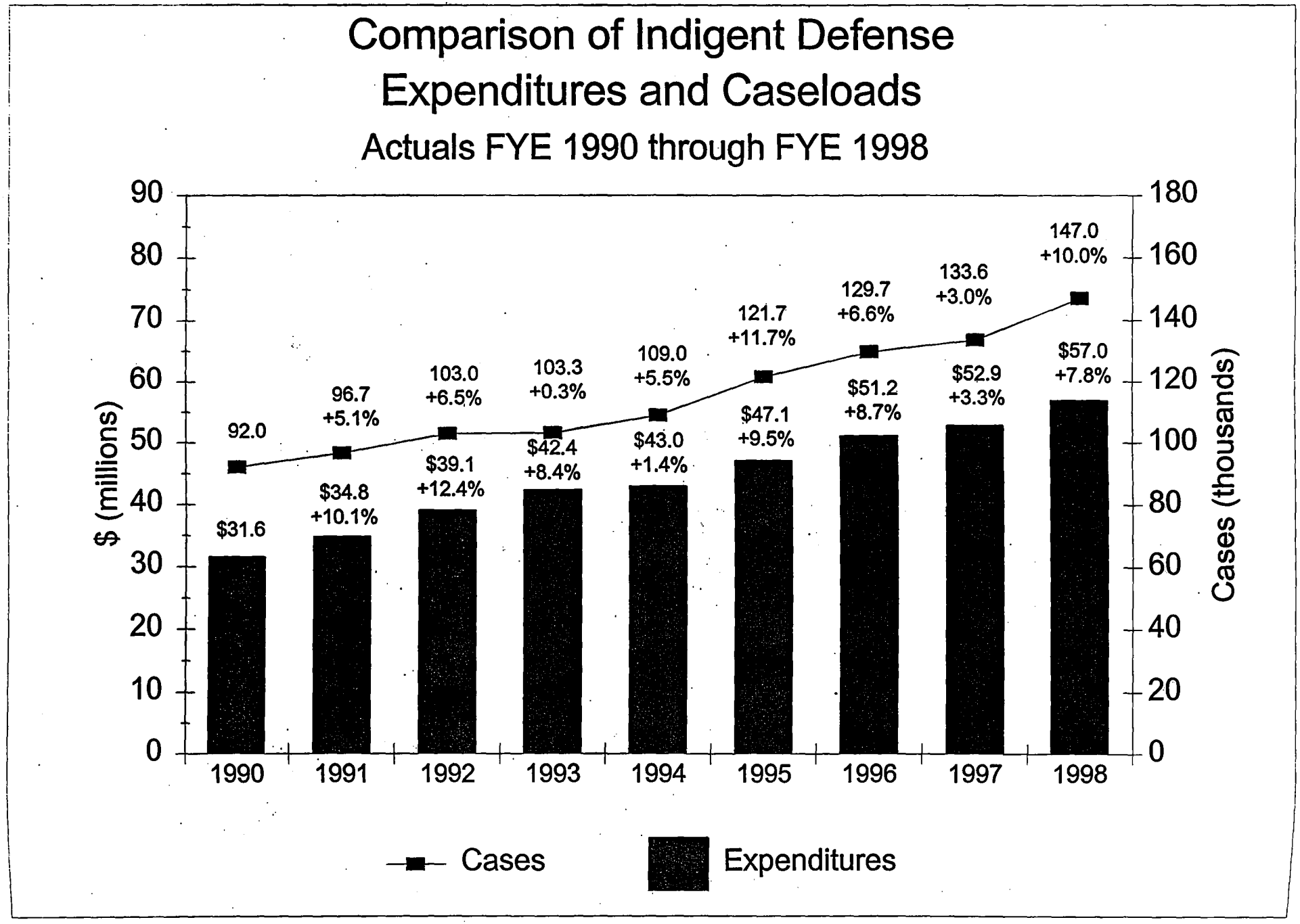
$325 per defendant x 5,172 defendants = $1,680,900

PROGRAM COSTS:

For the period July 1, 1997 through June 30, 1998, the Indigence Verification Program costs totaled $833,706.

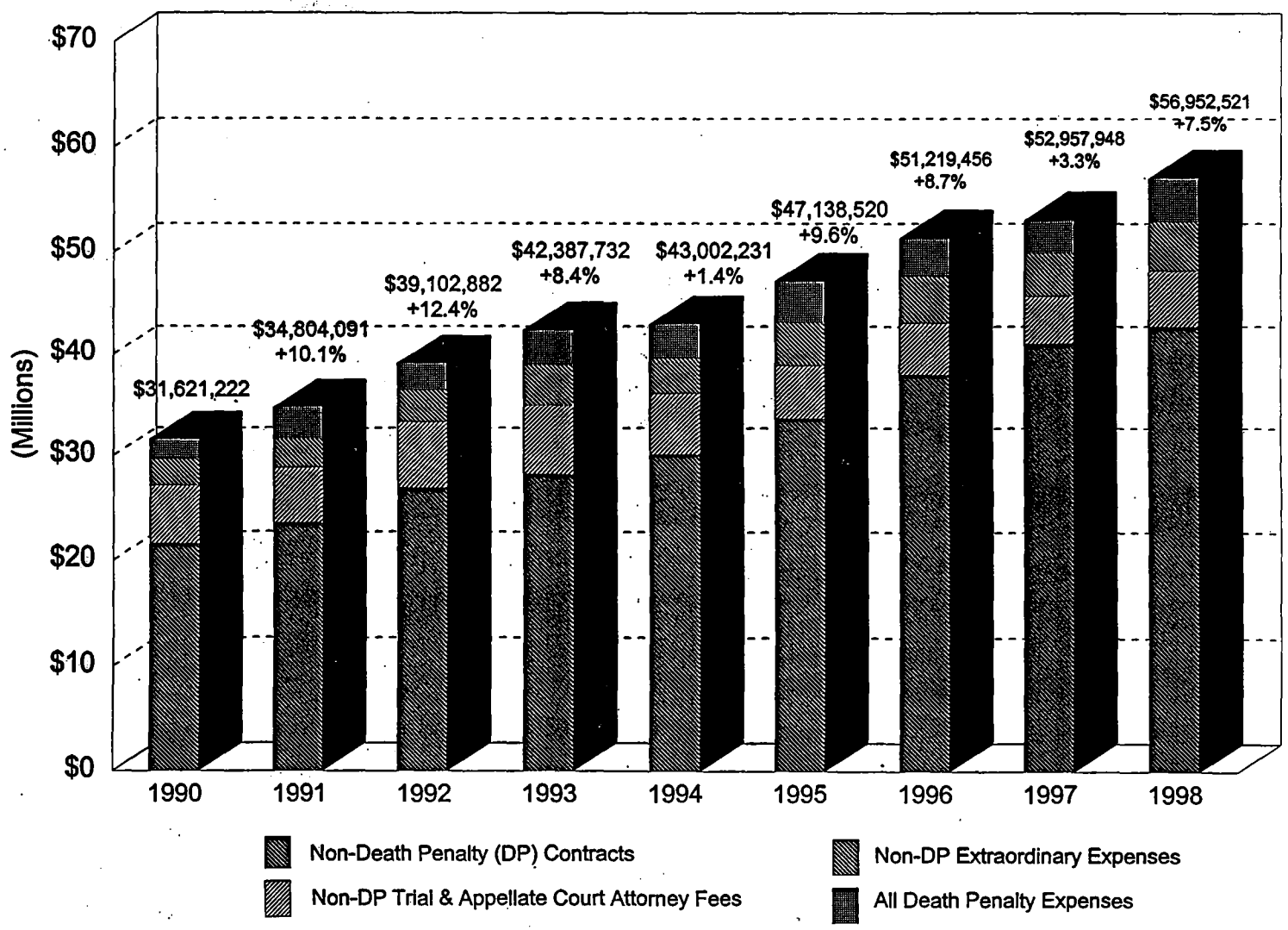
NET COST AVOIDANCE: $1,680,900 - $833,706 = $847,194

EXPENDITURES AND "PER CASE" COSTS
OREGON'S INDIGENT DEFENSE PROGRAM


Comparison of Indigent Defense
Expenditures and Caseloads
Actuals FYE 1990 through FYE 1998
$ (millions)
Cases (thousands)
90
80
70
60
50
40
30
20
10
0
180
160
140
120
100
80
60
40
20
0
92.0
96.7
+5.1%
103.0
+6.5%
103.3
+0.3%
109.0
+5.5%
121.7
+11.7%
129.7
+6.6%
133.6
+3.0%
147.0
+10.0%
$31.6
$34.8
+10.1%
$39.1
+12.4%
$42.4
+8.4%
$43.0
+1.4%
$47.1
+9.5%
$51.2
+8.7%
$52.9
+3.3%
$57.0
+7.8%
1990
1991
1992
1993
1994
1995
1996
1997
1998
Cases
Expenditures

Indigent Defense Expenditures

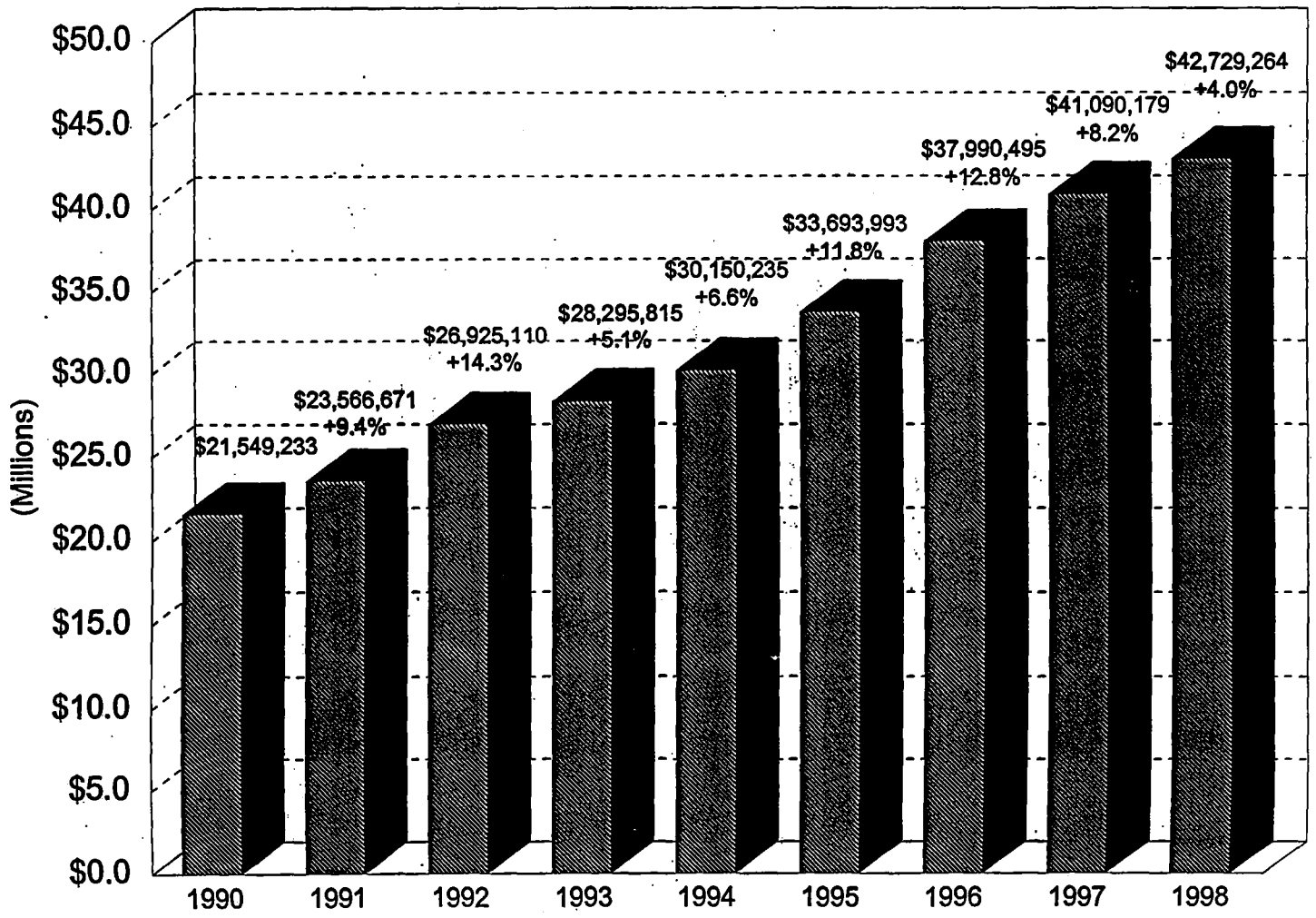
Actuals FYE 1990 through FYE 1998



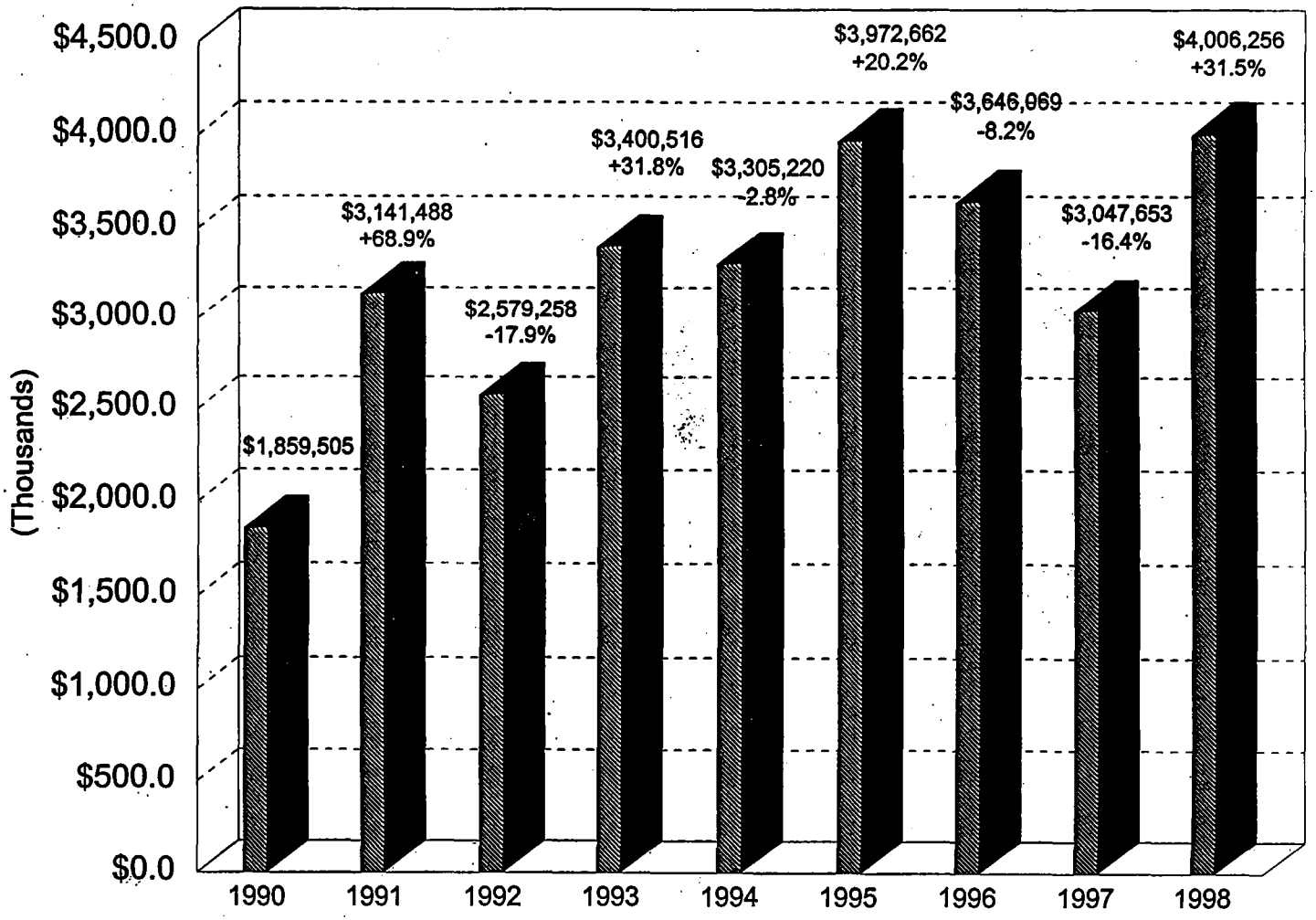
All dollar amounts represent payments made during respective fiscal year, except adjustments to FY 1991 and later contract payments (accounting change) were made to consistently reflect percentage share of expenditures and percentage increases and contract overages

Indigent Defense Expenditures
Non-Death Penalty Contracts

Actuals FYE 1990 through FYE 1998

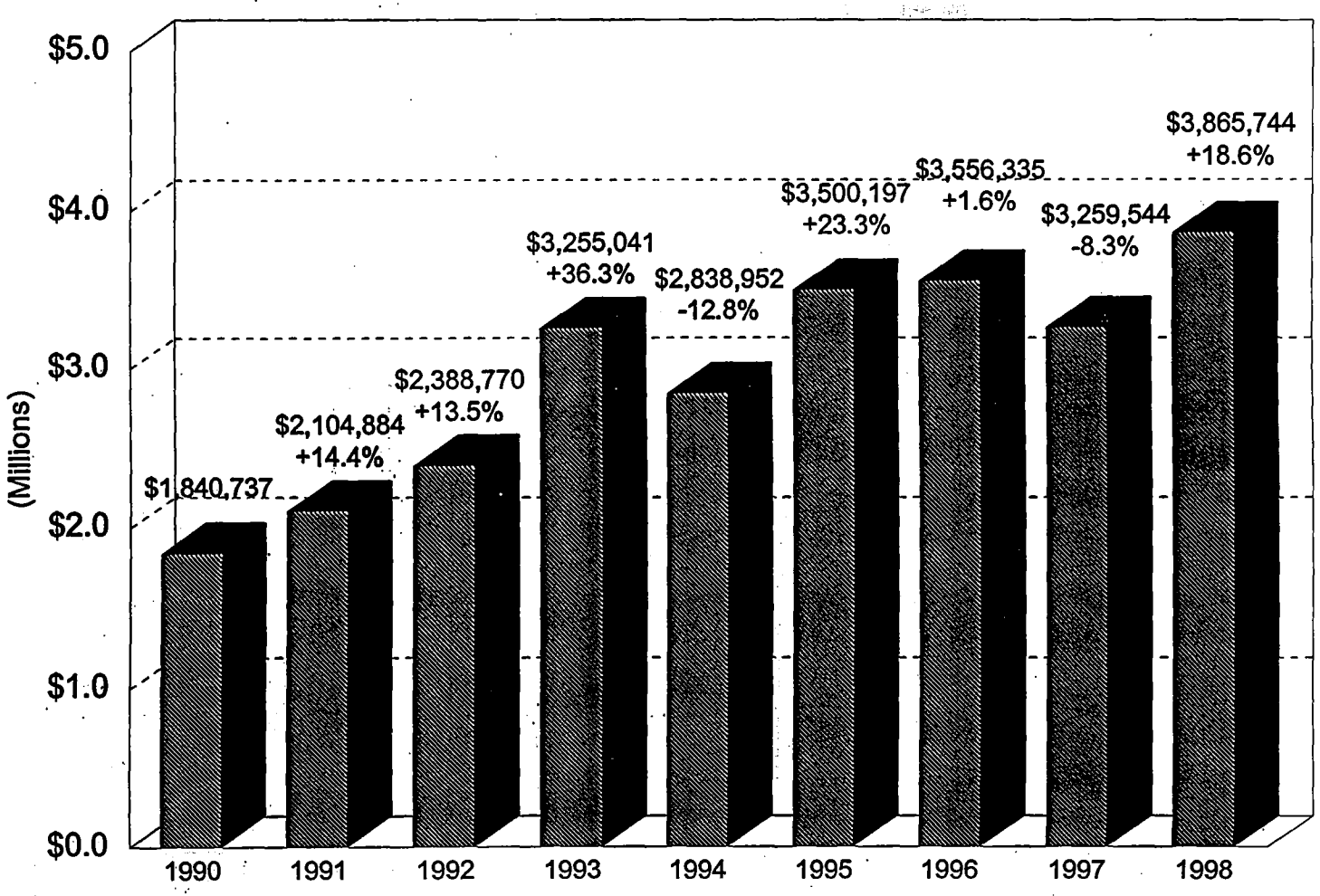


Indigent Defense Expenditures
Death Penalty Expenses
Actuals FYE 1990 through FYE 1998



Indigent Defense Expenditures
Non-Death Penalty Extraordinary Expenses

Actuals FYE 1990 through FYE 1998



COMPARISON OF
INDIGENT DEFENSE COSTS PER CASE
FOR
PRIVATE BAR ("PB") ATTORNEY AND ATTORNEY CONTRACT EXPENSES *
ALL CASE TYPES EXCEPT APPELLATE AND DEATH PENALTY
(Excludes Extraordinary Expenses)

	EXPENDITURE AMOUNT	NUMBER OF CASES	AVERAGE COST PER CASE
FYE 1990	$26,912,177	92,038	$292.40
FYE 1991	$28,548,495	96,730	$295.14
FYE 1992	$32,916,714	103,028	$319.49
w/o PB hrly incr. **	$30,416,714	103,028	$295.23
FYE 1993	$34,618,008	103,330	$335.02
w/o PB hrly incr. **	$32,118,008	103,330	$310.83
FYE 1994	$35,889,733	108,963	$329.38
w/o PB hrly incr. **	$33,389,733	108,963	$306.43
FYE 1995	$38,691,431	121,700	$317.92
w/o PB hrly incr. **	$36,191,431	121,700	$297.38
FYE 1996	$42,763,296	129,693	$329.73
w/o PB hrly incr. **	$40,263,296	129,693	$310.45
FYE 1997	$45,345,687	133,596	$339.42
w/o PB hrly incr. **	$42,845,687	133,596	$320.71
FYE 1998	$47,742,166	147,038	$324.69
w/o PB hrly incr. **	$45,242,166	147,038	$307.69

"PB" = Private-bar (non-contract, hourly-paid) attorneys.

The increase in the average per case cost from FYE 1990 to FYE 1998 is: $32.29 per case or 11.0% which represents an average increase over the eight years of $4.04 or 1.4% per year.

Factoring out the $2.5 million increase in private bar compensation first appropriated in FYE 1992, the increase in the average per case cost from FYE 1990 to FYE 1998 is: $15.29 per case or 5.2% which represents an average increase over the eight years of $1.91 or 0.7% per year.

* Attorney Contract Expenses include some "extraordinary expenses", such as staff investigators and interpreters.

** Increase in private-bar hourly rate effective 6/1/91 ($30/$35 to $40).

asc:/percase.1/4/99.corr

"REGULAR" CASELOAD COSTS (NON-DEATH PENALTY, TRIAL-LEVEL ATTORNEY COSTS)

Expenditure Amount	FYE 1990	FYE 1998	Increase
Regular Caseload Cost	$26,912,177	$45,242,166	68%

CONSUMER PRICE INDEX ("CPI")

Consumer Price Index	FYE 1990	FYE 1998	Increase
Portland	124.9	166.1	33%

PERCENT INCREASE IN REGULAR COSTS/CONSTANT DOLLARS	**35%**
PERCENT INCREASE IN REGULAR CASES	**60%**

ALL DEATH PENALTY EXPENSES, APPELLATE EXPENSES, NONATTORNEY SERVICES ("NONATTORNEY"), AND 1991 PRIVATE BAR HOURLY RATE INCREASE

Expenditure Amount	FYE 1990	FYE 1998	Increase
Death Penalty	$ 1,859,505	$ 4,006,256	115%
Non-Death Penalty			
Appellate	$ 1,008,803	$ 1,338,355	33%
Nonattorney	$ 1,840,747	$ 3,865,744	110%
1991 PB Increase	$ N/A	$ 2,500,000	N/A
SUBTOTAL	$ 4,709,045	$11,710,355	149%

Expenditure Amount	FYE 1990	FYE 1998	Increase
TOTALS	$31,621,222	$56,952,521	80%

NOTE: Total expenditures for ALL types of cases and ALL types of indigent defense expenditures have increased 80 percent from FYE 1990 to FYE 1998. Adjusted for constant dollars, based upon the consumer price index increases since 1990, the increase in total expenditures represents a 47 percent increase. The FYE 1998 indigent defense caseload represents a 60 percent increase over the FYE 1990 caseload.

ac:dc/t:expend.cpl

1999-01 BUDGET REQUESTS
OREGON'S INDIGENT DEFENSE PROGRAM

INDIGENT DEFENSE ACCOUNT

INDIGENT DEFENSE ADMINISTRATION

1999-01 Requested Appropriations -- Indigent Defense Account

Current Service Level **$139,599,793**

1. Projected 1997-99 Indigent Defense Workload/Adjustments

$137,766,331	$ 16,300,916	caseload increase (4% each FYE 1999/00/01)
	$ 1,308,450	2.8% goods & services
	$ 3,201,464	non-state employee adjustment (3.7%)
	$ 20,810,830	
	$116,955,501	1997-99 total appropriation
	$137,766,331	

2. Federal Adoption and Safe Families Act

$ 1,833,462

New Policy Packages **$ 17,025,000**

1. Hourly Rate Increase Attorneys (HB 2294) and Public Defender/Prosecutor Salary Parity

$ 10,100,000 One scenario: $3.4 million for public defender attorneys' salary parity with prosecutors AND $6.7 million for hourly-paid attorneys which allows, among other scenarios, $55 per hour for non-death penalty cases and $85 per hour for death penalty cases OR $75 per hour for all attorneys for one year.

2. Limited Right to State-Paid Counsel: Certain Guardianship Cases (SB 80)

$ 175,000

3. Indigent Defense Account Reserve

$ 6,750,000 (if caseload increase for each FYE 1999/00/01 is 6% (versus 4%))

asc:99/01budget.IDA:4/4/99

1999-01 Requested "New Policy" Budget Requests -- Indigent Defense Administration

New Policy Packages $2,740,510

1.	Indigent Defense Services Division		
	a.	Workload/Additional Staffing -- 1 Executive Analyst, 1 Indigent Defense Analyst, 1 Administrative Analyst I (page 213)	**$ 342,299**
	b.	Potential New Workload/Additional Staffing -- Administrative (versus judicial) Review of Indigent Defense Billings (SB 24) (page 217)	**$ 755,852**
2.	Indigent Defense Billing System Integration (page 210)		**$ 747,947**
3.	Public Defense Services Commission (SB 66) 2 Staff (page 217)		**$ 225,000**
4.	Indigence Verification Program		
	a.	Workload/Additional Staffing -- 9 Verifiers (page 213)	**$ 659,412**
	b.	Workload/Additional Services & Supplies (page 213)	**$ 10,000**

asc:99/01budget.ADMIN:4/14/99

1999-01 Indigent Defense Account

"Current Service Level"		Requested	Appropriated
1.	Indigent Defense Workload/Adjustments	$137,766,331	$137,766,331
	$ 16,300,916 caseload increase (4% each FYE 1999/00/01) $ 4,509,914 2.8% goods & services and 3.7% K personal services $ 20,810,830 $116,955,501 1997-99 total appropriation, including Emergency Board $137,766,331		
2.	Federal Adoption and Safe Families Act	$ 1,833,462	$ 1,833,462
	SUBTOTAL	**$139,599,793**	**$139,599,793**

"Decision Packages"		Requested	Appropriated
1.	Hourly Rate Increase Attorneys (HB 2294) and Public Defender/Prosecutor Salary Parity	$ 10, 100,000	$ 0
2.	Limited Right to State-Paid Counsel: Certain Guardianship Cases (SB 80)	$ 175,000	$ 0
3.	Indigent Defense Account Reserve (if caseload increase for each FYE 1999/00/01 is 6% (versus 4%))	$ 6,750,000	$ 0
	SUBTOTAL	**$ 17,025,000**	**$ 0**
	GRAND TOTAL	**$156,624,793**	**$139,599,793**

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1999-01 Indigent Defense Administration

Decision Packages		Requested	Appropriated
1.	Indigent Defense Services Division		
	a. Workload/Additional Staffing	$ 342,299	$ 0
	b. Potential New Workload/Additional Staffing -- Administrative (versus judicial) Review of Indigent Defense Billings (SB 24)	$ 755,852	$ 0
2.	Indigent Defense Billing System Integration	$ 747,947	$ 0
3.	Public Defense Services Commission (SB 66) Staffing and Costs	$ 225,000	$ 100,000
4.	Indigence Verification Program		
	a. Workload/Additional Staffing	$ 659,412	$ 0
	b. Workload/Additional Services & Supplies	$ 10,000	$ 0
	GRAND TOTAL	**$ 2,740,510**	**$ 100,000**

CRIMINAL JUSTICE FOUNDATION
2003 STATE STREET
SALEM, OR 97301

REPORT ON INDIGENT DEFENSE IN OREGON

Introduction

Indigent defense is traditionally defined as the state-paid defense of a defendant in a criminal case who cannot afford to pay for his or her defense. Oregon expands this definition to also include non-criminal defendants such as children and parents in dependency and termination of parental rights proceedings.[1] Oregon's indigent defense system now costs Oregon taxpayers almost $117 million for the current 1997-99 biennium. This study on the provision of indigent defense in Oregon was conducted by the Criminal Justice Foundation to identify strengths and weaknesses of Oregon's indigent defense system, and to suggest changes which will improve this system.

The first section of this report analyzes the federal requirements regarding taxpayer-paid legal counsel for indigent defendants. The second section compares the current Oregon concepts with federal requirements. The third section outlines the practical operation of Oregon's indigent defense system. The fourth section discusses issues that surround Oregon's current system of indigent defense. The fifth section

[1] *See* Appendix A. Appendix A was provided by IDSD. This Appendix details the types of cases that are covered by the indigent defense system in Oregon and also covers the basis of authority for these cases. In the future, it might be wise for Oregon (as other states have done) to separate the dependency and termination proceedings from criminal proceedings.

identifies alternatives that may be used in Oregon to improve the provision of indigent defense services.

I. The Federal Court System

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]."[2] The right to counsel is an essential right to defendants who are charged with crimes because, without this right, the defendant would not have the ability to effectively assert his or her personal rights as a citizen.[3] The appointment of counsel allows the criminal process to proceed fairly so that no individual's rights are denied without due process of the law.[4] Therefore, under the federal Constitution, a defendant accused of a crime has the right to appointed counsel at state expense if the defendant cannot afford his own defense counsel.

In criminal cases, under the federal Constitution, the right to counsel exists as to all felonies,[5] misdemeanors when the sentence is to a jail term,[6] and to civil proceedings such as juvenile delinquency proceedings.[7] The extent of the federal right to indigent defense counsel extends from the time that judicial proceedings have been initiated against the accused, whether by way of formal charge, preliminary

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2 U.S. Constitution, Sixth Amendment.

3 Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963). In Gideon the Supreme Court held that a defendant's right to appointed counsel extended to the states through the due process clause of the Fourteenth Amendment of the United States Constitution. Thus, according to Gideon, the states have a duty to provide criminal defendants with appointed counsel.

4 *Id.*

5 *Id.*

6 Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006 (1972).

7 In re Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967).

hearing, indictment, information, or arraignment,[8] through to sentencing[9] and appeal[10]. In short, if a defendant is charged with a felony, he or she will receive indigent defense counsel at the federal level.[11]

On the other hand, regarding misdemeanors, federally-paid counsel will be provided for persons charged with Class A misdemeanors in federal court, and the court may use its discretion to appoint federally-paid counsel in Class B or C misdemeanor cases if a determination has been made at the beginning of such case that no incarceration will be imposed.[12]

On the civil side, the federal Criminal Justice Act requires that representation be provided to any indigent person who is charged with a violation of probation, any juveniles alleged to have committed an act of juvenile delinquency, any person subject to a mental commitment hearing, and any person entitled to the appointment under the federal statute relating to transfer of offenders to and from foreign countries.[13]

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8 Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232 (1977).

9 Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254 (1967).

10 Douglas v. California, 372 U.S. 353, 83 S.Ct. 814 (1963).

11 LEGAL RESEARCH PAPER ON THE CONSTITUTIONAL AND STATUTORY RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AT STATE EXPENSE, Indigence Defense Services, 1-2 (date unknown) [hereinafter LEGAL RESEARCH PAPER].

12 This requirement is a result of the Criminal Justice Act. This source is used throughout the first section of this study.

13 THE RIGHT TO COUNSEL AT GOVERNMENT EXPENSE: COMPARISON OF OREGON'S PROVISIONS TO FEDERAL PROVISIONS Indigent Defense Services (November 9, 1994) [hereinafter COMPARISON OF OREGON AND FEDERAL AUTHORITY].

II. Oregon's Indigent Defense System - Federal Comparison

Indigents accused of crimes in Oregon are entitled to state-paid legal services under the Sixth Amendment to the United States Constitution (as discussed above) and Article I, Section 11 of the Oregon Constitution, which provides that "in all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel . . ..".[14] Oregon expands on the federal requirements of areas in which appointed counsel must be provided for defendants. Based on information provided by Indigent Defense Services Division of the Supreme Court Administrator's office (hereinafter IDSD), attorneys in Oregon provide legal services at state expense in 133,620 cases per year.[15] Of these 133,620 cases, federal constitutional authority only mandates that 85,347 defendants (64 percent) receive court-appointed counsel.[16] The remainder of the 133,620 cases that are state-paid (48,273) are not mandated by the federal Constitution.[17] Under what authority are these 50,000 cases deemed to be indigent defense cases? The answer lies within Oregon case law and Oregon statutes.

Specifically, the Oregon Constitution has been interpreted to require indigent defense services to 26,268 (20%) more indigents than the federal constitution requires. Additionally, the Oregon Revised Statutes provide indigent defense services to 19,438 (15%) more indigents than both the Oregon Constitution and federal Constitution require. Therefore, Oregon expands the federal provision of indigent

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14 Article I, Section 11 of the Oregon Constitution; LEGAL RESEARCH PAPER, *supra* note 11, pgs. 3-10.

15 COMPARISON OF OREGON AND FEDERAL AUTHORITY, *supra* note 11, at 5.

16 *Id.* at 2.

17 *See* Appendix A.

defense by 35%. Furthermore, this leaves 2,567 Oregon indigent defense cases that have no documented[18] federal or state authority.

In a 1977 decision, the Oregon Supreme Court interpreted the Oregon Constitution to require the appointment of counsel for indigent defendants in all criminal proceedings, regardless of whether the defendant is actually incarcerated as a result of conviction.[19] In summary, in Oregon, court-appointed counsel is required in three instances: (1) if the crime charged is a felony;[20] (2) if there is **potential**[21] that the defendant will serve a sentence of one day or more in jail; and (3) if there is no potential for incarceration but the defendant **might have** pre-trial detention in jail and substantial potential fines.[22]

III. Oregon's Indigent Defense System – Operations

The State Court Administrator, under the authority of the Chief Justice of the Oregon Supreme Court, and through the Indigent Defense Services Division (IDSD) operates the indigent defense program in Oregon. The Judicial Branch, through this system (a) creates the policies and guidelines that are used to determine whether indigence exists; (b) determines what qualification standards to impose on indigent

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[18] The use of the term "documented" does not indicate that the representation is in any way inappropriate. It instead indicates that the source for the representation is not clear.

[19] Brown v. Multnomah County, 280 Or. 95 (1977); see *also* COMPARISON OF OREGON AND FEDERAL AUTHORITY, *supra* note 11, at 5.

[20] As noted in the preceding paragraph, this is mandated by the federal Constitution, and therefore, Oregon must comply with this mandate.

[21] The fact that Oregon appoints counsel if there is a potential for incarceration is very different from the federally mandated standard that only those who are to be **actually** incarcerated after conviction will receive the assistance of state-paid counsel.

[22] COMPARISON OF OREGON AND FEDERAL AUTHORITY, *supra* note 11, at 5, 6. In short, Oregon's Constitution provides for state-paid representation for all indigent misdemeanants because misdemeanor convictions carry the potential for a jail sentence.

de[illegible]se providers; (c) appoints indigent defense providers; (d) compensates providers fo[illegible]ndigent defense services; (e) authorizes n[illegible]n-attorney extraordinary expenses; and (f) negotiates contracts for the provision of indigent defense services.[23]

Specifically, the Indigent Defense Services Division (IDSD) plays an important role in the administration of indigent legal services in Oregon. The IDSD is responsible for the managerial administration of the Indigent Defense Account and the Indigence Ver[illegible]ification Pr[illegible]gram. The Indigent Defense Account provides the fun[illegible] necessary to compensate counsel and pay the associated reasonable and necessary expenses where the provision of counsel at state expense is constitutionally or statutorily mandated. Therefore, counsel and funds are provided for the defense of indigent persons summoned into state court on criminal prosecutions, juvenile, civil commitment, or probation violation proceedings, and for indigent persons seeking relief in state courts in habeas corpus, post-conviction, or appellate proceedings.

Another one of IDSD's primary responsibilities is to negotiate contracts with independent (non-state employee) law firms, public defenders, and others to provide indigent defense representation. The IDSD is currently comprised of 7.1 (FTE) staff members and has a biennial budget of $830,690.[24]

Indigent defense services are primarily delivered to indigent defendants in one of two ways: under a contract with the State Court Administrator's office or on a

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[23] Oregon State Bar, FINAL REPORT OF THE OREGON STATE BAR INDIGENT DEFENSE TASK FORCE at 8 (July 1994) [hereinafter FINAL REPORT].

[24] The funding level for the IDSD ($830,690 f[illegible]e 1997-99 biennium) represents less than 1% of the funding level for direct indigent defense services ($116,955,501 for the current biennium). Additionally, the staffing of the IDSD has remained effectively unchanged since FY 1989, while the number of contracts that that IDSD negotiates and monitors has increased 61% from FY 1989 to FY 1998.

case-by-case appointment basis.[25] Generally, the services are provided pursuant to contracts that are entered into between the State Court Administrator's office and nonprofit public defender organizations, law firms, individual attorneys, or a combination of individual attorneys.[26] In fact, attorney services for approximately 92 percent of the annual indigent defense caseloads are generally provided under two-year contracts negotiated by IDSD. The division is currently responsible for 79 contracts which cover 34 of Oregon's 36 counties. Those cases that are not handled by an indigent defense contractor are assigned to attorneys who qualify to represent indigents and who are in private practice. These attorneys are paid an hourly rate for the work that they do on assigned cases.[27]

IV. Issues Relating to the Current System in Oregon

The first issue regarding the provision of indigent defense counsel in Oregon is the breadth of the system. As noted earlier, the federal Constitution mandates the provision of indigent defense counsel under certain circumstances. But, the Oregon Constitution and the Oregon statutes increase the breadth of the provision of indigent defense counsel from 85,347 cases mandated by the federal Constitution to 133,620 cases.[28]

Approximately 16,500 (14%) of the indigent defense caseload in Oregon has no direct constitutional authority from either the Oregon or United States

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25 *Id.* at 16.

26 REPORT TO THE NOVEMBER 1994 EMERGENCY BOARD ON THE OPERATIONAL AND FINANCIAL DESIRABILITY OF ESTABLISHING A STATE AGENCY PUBLIC DEFENDER SYSTEM IN OREGON, Indigent Defense Services Division 1 (November 7, 1994).

27 Oregon Judicial Department's 1999-01 Fiscal Plan.

28 Two percent of the indigent defense cases in Oregon have no documented federal or state authority. *See* Appendix B.

Constitutions. These indigent defense cases are taxpayer-supported only because of the requirements in Oregon's statutes.[29] This expansion of the right to indigent defense counsel creates a broad system that provides indigent defense services to a wider range of individuals than the federal Constitution, or even the Oregon Constitution, require.

A second issue regarding the current indigent defense system in Oregon is that it lacks a uniform performance monitoring system.[30] This lack of a uniform performance monitoring system entails two factors. First, there is presently no comprehensive performance monitoring system for indigent defense practitioners to determine the quality of their representation.[31] Although the capability of indigent defense counsel is reviewed prior to assigning work to the attorney, there is not a sufficient number of staff members at IDSD to monitor the attorney's performance on the cases that he or she handles.

Additionally, there are no detailed standards for measuring effective and efficient representation. This lack of "cost accountability" is a significant problem. It exists mainly due to the inadequate number of staff members at Indigent Defense Services. IDSD does not have the time, the staff, or the resources to evaluate attorney spending on indigent defense cases.

The lack of a substantive monitoring system that reviews the costs spent by attorneys allows some cases to have extraordinarily high attorney fees. For example,

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29 *Id.*

30 FINAL REPORT, *supra* note 21, at 16.

31 *Id.*

in State v. Gable[32] in Marion County, the two lead attorneys on the case received a combined total of $271,036 for attorney fees. This calculated out to be 6,329.41 billable hours between April 6, 1990 and July 12, 1991.[33] On the other hand, the prosecution's attorney costs (basically salary and benefits) were $205,871, which also includes their compensation for all of the other cases they handled from April 6, 1990 to July 12, 1991.[34]

In State v. Manzo-Hernandez, the defendant was accused of killing an Oregon State Police trooper.[35] The cost of this defendant's defense totaled almost $1.1 million.[36] The attorneys were on the case from September 30, 1992 to February 9, 1995. During this time, two of the defense attorneys had a combined total of 7,918.91 billable hours, which calculates into attorney fees of $435,540.11.[37]

In State v. Conan Wayne Hale,[38] one of the attorneys worked from May 29, 1996 to May 29, 1998 and earned $280,698.19. At $55 an hour, this averages out to

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32 Marion County case number 90C20442; April 6, 1990 to July 12, 1991. The Foundation recognizes that approximately 15% of the indigent defense cases are handled with contracts that state an hourly fee, such as is the case in this Marion County case. The use of this case, and the others mentioned in the report, simply exemplifies some of the problems inherent with the current system. Additionally, the other 85% of the case load that is handled on a flat fee basis has its own accountability issues such as the assignment of appropriate staff to accomplish certain tasks. The point of using these case examples is to illustrate a need to develop a fully staffed accountability review system regardless of the payment methodology that is used.

33 This breaks down to be 421.96 billable hours per month and 98.13 billable hours per week or 49.07 hours per attorney per week.

34 This represents the prosecuting attorneys' salaries for the year, and therefore it takes into account the other caseloads that the attorneys were handling while they were also handling the Gable case. The figures that were used for the defense attorney fees only take the Gable case into account.

35 Klamath County case number 9201724CR; September 30, 1992 to February 9, 1995.

36 The actual cost from the indigent defense account payments was $986,226.22.

37 This amounts to monthly billable hours of 282.82 and 65.77 billable hours per week, or 32.89 hours per attorney per week. By comparison, the Klamath County DA's entire office budget for FYE 1997 was $788,461.

38 Lane County case number 109604830; May 29, 1996 to May 29, 1998.

be 5,103.6 billable hours.[39] The second attorney worked from August 1997 to May 1998 and received compensation of $114,796. At $50 an hour, this averages out to be 2,295.92 billable hours for the case.[40]

The purpose of using these three case examples is to illustrate the high costs sometimes associated with the payment of attorney fees for indigent defense counsel.[41] At present, these attorneys are almost unaccountable for the costs and billings associated with their representation of indigent defendants. The system does not have a method – or staff – to monitor the amount of time an attorney is billing and spending on a case.

A third issue regarding the provision of indigent defense counsel in Oregon is that historically a judge approved costs that the indigent defense attorney was going to spend defending the indigent client. Today, this process is bifurcated between local judges and the IDSD director. The IDSD has authority for accounting and auditing purposes. Judges continue to have responsibility for reviewing non-attorney billings for reasonableness and necessity.[42] Currently there are 155 judges statewide who authorize indigent defense expenditures. Some of the costs that these judges approve are the costs of investigations, testimony by experts, and testimony by family members at trial.

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39 This calculates to 212.65 hours a month and 49.45 hours a week.

40 This calculates to 229.60 hours a month and 53.39 hours a week.

41 According to IDSD, the average cost of death penalty cases from cases filed since 1993 is $70[illegible]33. Of a total of 122 death penalty cases, the range of defense costs is from $1,752 all the way to almost $1 million.

42 *See* ORS 135.055(3). Additionally, there is a bill that was filed for the upcoming legislative session that recommends amending relevant statutes to provide for an administrative review process, rather than the judicial review process, in the future.

In some cases unusual costs are approved. One example can be found in the Manzo-Hernandez case. In this case, the judge allowed indigent defense counsel to hire two cultural experts that provided professional services and expert testimony on legal issues in this case. These cultural experts also traveled, at state expense, to Mexico on three occasions to study the environment that the defendant was raised in. The total cost for these two cultural experts was $22,000.

The problem that arises with having judges approve expenses is that they are under pressure to approve the expenditures because, if they do not, the defense may argue on appeal that the defendant was not provided a fair and reasonable trial. Therefore, there is a practical conflict in having the judges approve and disapprove defense expenses.

A fourth issue regarding the provision of indigent defense services in Oregon is the overall cost of the indigent defense system compared to the costs of prosecuting the indigent defendants. Appendix B contains information that the Criminal Justice Foundation compiled from various sources. This Appendix provides the indigent defense expenses and the prosecutor's expenses in a county-by-county analysis.[43]

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[43] *See* Appendix C. We realize that these comparisons between the expenses of the district attorneys' offices and the indigent defense counsel are not exactly comparable. For instance, the column detailing the number of cases the DAs in each county handle also includes infractions. Infractions are included because infractions require processing and staff time. Second, it is further important to note that the breakdown among counties cannot be completely precise because some indigent defense providers operate in one county but also provide indigent services in other counties. Third, as was noted earlier in the report, indigent defense providers must pay overhead and it is possible that the budget figures for the DAs' offices do not always include budget figures for overhead items such as rent.

This data suggests that, in 17 counties, more is spent defending indigent defendants than is spent on the entire prosecutorial budget for the county.[44]

For example, the State of Oregon spent $986,226.22 to defend Manzo-Hernandez, who was charged with killing a police officer. Most of this expense was incurred in fiscal years 1992 and 1993. The Klamath County District Attorney who prosecuted this case only had about $700,000 for his entire budget for each of those years. The indigent defense expense of this single aggravated murder case would have funded the entire Klamath County DA operations for a year and four months.

At first, the Criminal Justice Foundation thought that the above analysis, and specific case examples, may be out of line, and may have unduly focused on specific case costs. Also, the Criminal Justice Foundation was concerned that its critique of overall costs may be inappropriate, given the constitutional imperative that indigent defendants be provided with legal counsel. However, a comparison of indigent defense expenses in Oregon with those of other states establishes that Oregon has a high rate of indigent defense costs.

During the 1997-99 biennium, it is anticipated that the total cost of indigent defense in Oregon will be $116,955,501. Based on an expenditure of approximately $49.5 million in the 1997 fiscal year, and an estimated July 1998 population of 3,275,000 million persons, the per capita annual expenditure in Oregon for indigent defense is $15.11. This compares unfavorably with indigent defense expenditures, per capita, reflected in a survey of eight states, where fiscal year 1997 per capita

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[44] *See* Appendix C. A comprehensive study of the specific budget data for indigent defense attorneys and the district attorneys' office was beyond the scope of this study.

indigent defense expenditures, from all sources, ranged from a low of $3.90 to a high of $11.99, with an average of $5.89 per capita. The Oregon per capita expenditure of $15.11 is over twice as high as the average of these eight states.[45]

V. Alternatives to Oregon's Current Indigent Defense System

One significant solution to the problems confronting the delivery system for indigent defense is the establishment of a truly independent entity for the provision of such services, or for oversight of such services. A bill to establish such an independent entity was filed in the 1997 legislative session, with the support of the Chief Justice of the Supreme Court and the State Court Administrator. The bill was SB 278. Unfortunately, the bill did not pass.

There is no "model" for the provision of indigent defense services, nationally, but one steady pattern of reform has been to move the oversight function to independent entities, either at the county level or the state level. Since counties do not pay for indigent defense in Oregon, it appears more appropriate for such an independent entity to be established on a statewide basis.

The separate entity could be a state agency, a public corporation, a nonprofit corporation established by the state, or a private for-profit corporation which contracts

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[45] Comparative analysis of indigent defense expenditures and caseloads in states with mixed state and county funding, prepared for the Georgia Indigent Defense Council on behalf of the American Bar Association, Bar Information Program, by the Spangenberg Group. This can be found on the Internet at http://www.gidc.com/spangen.htm (February 25, 1998). It is important to note that it is an imperfect science to compare one state's indigent defense system with another state's indigent defense system. For instance, it is important to note that in many states, indigent defense programs do not include funding for representation of parents and children in dependency and termination of parental rights cases. Oregon does include these figures, which does contribute to a higher indigent defense expenditure in Oregon (20,156 of these types of cases were included in the FY 1997 indigent defense budget).

with the state to provide oversight. Preference should be given to a model which moves the indigent defense monitoring and operations outside of the judicial branch itself, since it is always difficult for the judicial branch to reign in defense expenditures, for fear of appearing less than impartial in the adjudication of cases.

It is also preferable to keep any indigent defense entity separate from other executive branch entities, since the executive branch has a number of agencies associated with the prosecution of cases, such as the Oregon Department of Justice (handling all criminal appeals and assisting with many prosecutions) and the State Police.

There are other changes which can be made to reduce the cost of indigent defense, and potentially improve efficiency. These include: (1) a modification of the Oregon Constitution to specify that indigent defense need not be required in any case other than where required under the federal constitutional standards; (2) the elimination or modification of statutes which allow indigent defense in Oregon beyond the requirements of the Oregon Constitution; (3) the limitation of the availability of indigent defense to the trial level (through overall limits on the right of appeal); (4) the redefinition of indigent defense eligibility standards (one change may be to establish a sliding scale so as to require some defendants to pay a portion of the cost of their defense, where full indigency has not been established); (5) stricter application of the principle that indigent defendants have an obligation to repay the state for the cost of their indigent defense (this can include recoupment of the cost of indigent defense through a portion of an inmate's income from prison work

programs); (6) tightening of the reporting requirements as to billable hours reports by attorneys handling indigent defense (more specificity can be required where the review is carried out by an entity outside of the judicial branch, so that the judicial branch does not have access to potentially confidential information involving the defense strategy or tactics).

Summary

Oregon can be proud of its efforts to make sure that any individual who is charged with a crime, who cannot afford legal counsel, will be provided with defense counsel to prepare and present an appropriate defense for the individual. At the same time, Oregon faces many other financial obligations, and there are many unmet needs. An indigent defense system which is costly, and which does not contain sufficient cost accountability or cost controls, requires careful reevaluation. There are alternative systems available, and other states obviously are able to provide justice through the criminal defense system at lower cost. These alternatives must be considered.

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INDIGENT DEFENSE IN OREGON

Glossary of Terms

Appellate Court — Appellate courts review the merits and procedural histories of cases which have previously been heard in trial court.

Indigency — Oregon's guidelines for determining indigency follow the qualification guidelines for the federal food stamp program. However, regardless of income levels, a person will be considered indigent if it is deemed that reasonable defense costs will create significant financial hardship for that person or their family.

Indigency Verification — Indigency is determined by the judge presiding over the case. The judge generally bases his decision upon a financial statement which is prepared by the defendant and verified by a court-employed Verification Specialist. There are 27 full-time Verification Specialists around the state.

Indigent Defense — The United States Constitution mandates that counsel be appointed to criminal defendants if they are facing incarceration upon conviction and are financially unable to retain an attorney. The Oregon Constitution expands this mandate to include anyone facing the possibility of incarceration if convicted who is financially unable to retain an attorney. The Oregon Revised Statutes further expand this mandate to include some civil cases.

Indigent Defense Account (IDA) — The Indigent Defense Fund is a part of the Oregon Judicial Department's budget. It is used to pay for the cost of court-appointed counsel and other defense-related expenses for all trial level (non-appellate) cases and a limited number of appellate cases.

Indigent Defense Services Division (IDSD) — IDSD is a division of the State Court Administrator's Office. IDSD is responsible for the administration of the Indigent Defense Fund. This includes selecting and contracting with attorneys who will serve as appointed counsel. IDSD contracts with private attorneys, consortiums of attorneys, and non-profit public defender associations to provide court-appointed counsel.

Prosecutor — Prosecuting attorneys represent the people of the state in litigation against a criminal defendant. Prosecuting attorneys may work at the county level in a District Attorney's office or on the state level in the Attorney General's office.

Public Defender A public defender is a court-appointed attorney whose work consists primarily of representing indigent defendants in criminal cases. In Oregon a public defender may also represent indigent clients in some types of civil cases.

State Court Administrator The office of the State Court Administrator assists the Chief Justice of the Supreme Court in his role as the administrative authority in the Oregon Judicial Department. Among numerous other duties, the State Court Administrator supervises the non-judge staff and the accounting system of the State Court.

Trial Court Trial Court is the court of original jurisdiction where all evidence is first heard and considered. Trial court is the first court to consider legislation.

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RIGHT TO COUNSEL AT GOVERNMENT EXPENSE
TYPES OF CASES AND BASIS OF AUTHORITY
TRIAL LEVEL

LEGEND:
Y = Yes; Direct Authority; Absolute Right, If Indigent
N = No; Direct Authority; No Right
S = Some; Direct Authority; Discretionary or Due Process Right, If Indigent

? = Unknown

Y? = Likely; No Direct Authority
N? = Unlikely; No Direct Authority
S? = Likely for Some; No Direct Authority

* = Estimate of Caseload
** = Limited to Indian Child Welfare Act Cases

	OREGON COURTS BASIS OF AUTHORITY					FEDERAL COURTS BASIS OF AUTHORITY	
CASE TYPE	Oregon Constitution	Oregon Statute	Federal Constitution	Federal Statute	Annual Number of I.D. Cases	Federal Constitution	Federal Statute
CRIMINAL/OFFENSE							
Pre-Criminal Charges							
Interrogation	Y	N	Y	N	0	Y	Y
Line-up	Y	N	Y	N	0	Y	Y
Other Critical Stage	Y	N	Y	N	0	Y	Y
Death Penalty & Murder	Y	Y	Y	N	133	Y	Y
Felonies	Y	Y	Y	N	27,709	Y	Y
Misdemeanor							
Actual Jail	Y	Y	Y	N	10,961*	Y	Y
Potential Jail	Y	Y	N	N	19,907*	N	S
Violation/Infraction							
NO Jail Potential	Y?	N	N	N	0	N	N
Small Fine Only	N	N	N	N	0	N	N
Contempt	Y	Y	Y	N	1,776	Y	?
Diversion							
W/Guilty Plea	Y?	Y?	Y?	N	2,000*	Y?	Y?
W/O Guilty Plea	N	N	N	N	0	N?	N
Show Cause/Term.	Y	N	S?	N	725*	?	Y
CIVIL							
Extradition	?	Y	?	N	1,042	?	Y
Material Witness	S?	Y	S?	N	5*	S?	Y
Probation Violation							
Felony	Y	Y	S	N	10,924	S	Y
Misdemeanor	Y	Y	S	N	7,848	S	Y
Parole Violation	S	S	S	N	0	S	Y
Involuntary Commitment	Y	Y	Y	N	1,819	Y	Y
PSRB Hearing	Y?	Y	Y?	N	370	Y?	Y?
Involuntary Sterilization	Y?	Y	Y?	N	0	N/A	N/A
Mental Retardation	Y?	Y	Y?	N	0	N/A	N/A
Postconviction Relief	N?	Y	N	N	628	N	N
Habeas Corpus	N	Y	N	N	337	N	S
Forfeiture	?	N	Y?	N	0	Y?	S

Appendix A-1

CASE TYPE	OREGON COURTS BASIS OF AUTHORITY					FEDERAL COURTS BASIS OF AUTHORITY	
	Oregon Constitution	Oregon Statute	Federal Constitution	Federal Statute	Annual Number of I.D. Cases	Federal Constitution	Federal Statute
JUVENILE							
Delinquency	Y	Y	Y	N	6,311	Y	Y
Dependency							
Parent	Y	S	S?	Y**	2,738	N/A	N/A
Child	?	Y	S?	S**	2,346	N/A	N/A
Review Hearing							
Parent	?	Y	?	Y**	3,650	N/A	N/A
Child	?	Y	?	S**	4,302	N/A	N/A
Probation Violation	Y	N	S	N	2,097	N/A	N/A
Emancipation	N?	Y	N?	N	0	N/A	N/A
Term. Parent. Rights							
Parent	S	Y	S	Y**	277	N/A	N/A
Child	S	Y	?	S**	30	N/A	N/A
Contested Adoption							
Parent	S	N	S?	Y?**	11	N/A	N/A
Child	S?	N	?	S?**	0	N/A	N/A
Perm. Guardianship							
Parent	S	N	S?	Y?**	0*	N/A	N/A
Child	S?	N	?	S?**	0*	N/A	N/A

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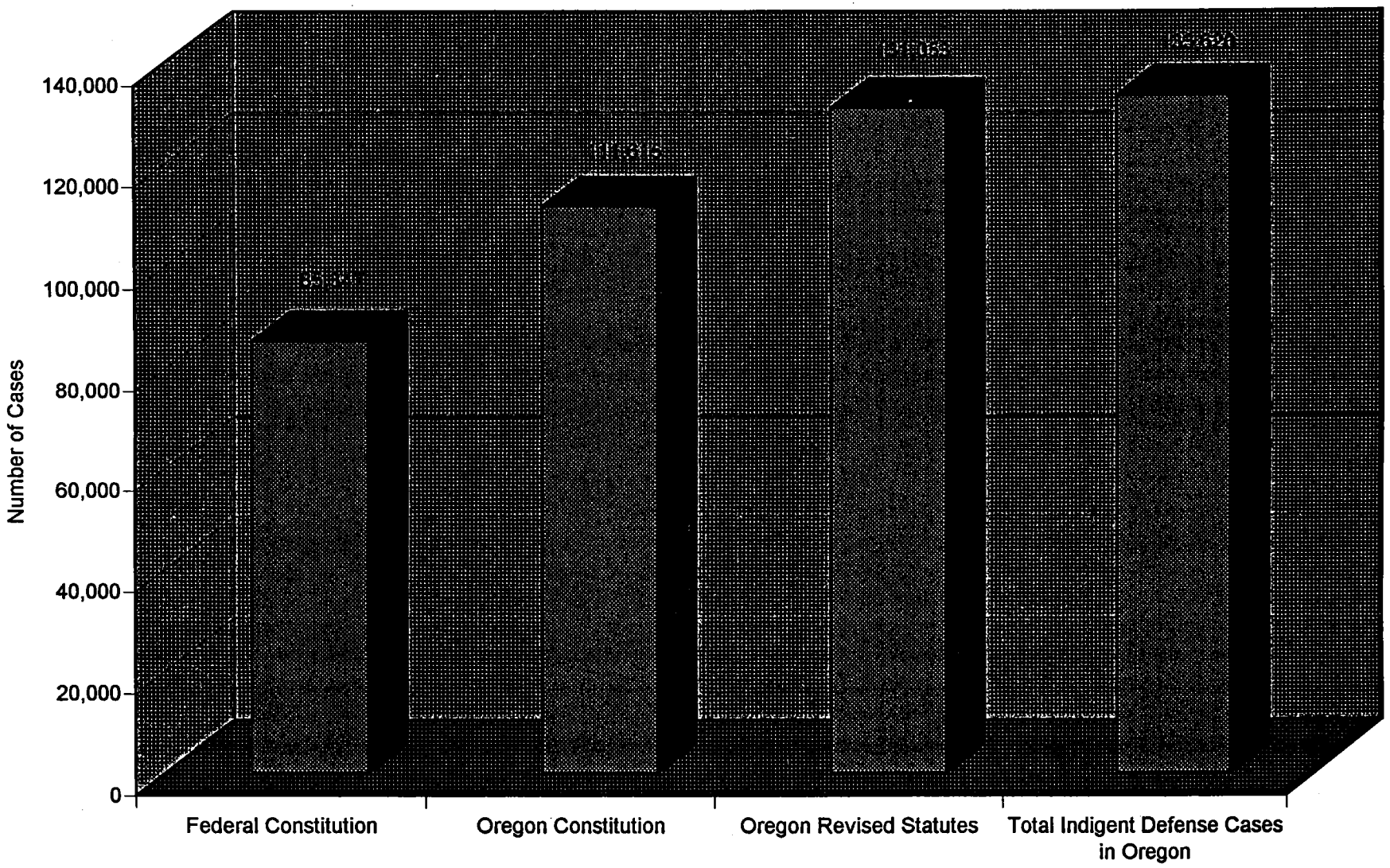
Basis of Authority for Appointment of State-Paid Counsel



COUNTY BY COUNTY COMPARISON OF INDIGENT DEFENSE SPENDING TO PROSECUTION SPENDING
FOR FISCAL YEAR ENDING 06/30/97

	County	DA's Budget	Ind. Def. Costs	DA Court Cases	Ind. Def. Cases
1	Baker	$ 182,915	$ 277,915	150	526
2	Benton	$ 1,082,105	$ 489,719	8,151	1,505
3	Clackamas	$ 4,798,529	$ 2,428,632	24,028	8,042
4	Clatsop	$ 590,000	$ 484,583	6,681	1,239
5	Columbia	$ 558,060	$ 356,626	4,004	918
6	Coos	$ 635,632	$ 1,415,476	11,525	3,668
7	Crook	$ 228,243	$ 182,450	3,591	1,291
8	Curry	$ 170,000	$ 44,610	3,991	816
9	Deschutes	$ 1,362,686	$ 2,518,184	17,633	5,050
10	Douglas	$ 1,268,000	$ 1,696,414	11,707	3,802
11	Gilliam	$ 94,306	$ 23,279	56	93
12	Sherman	$ 27,486	$ 1,003	82	CWA
13	Wheeler	$ 17,262	$ 2,278	28	CWA
14	Grant	$ 69,924	$ 117,945	77	162
15	Harney	$ 107,042	$ 62,389	54	65
16	Hood River	$ 121,490	$ 103,977	4,306	1,002
17	Jackson	$ 1,950,107	$ 2,171,129	16,540	4,233
18	Jefferson	$ 232,951	$ 369,383	6,074	1,447
19	Josephine	$ 1,256,450	$ 526,424	12,512	3,464
20	Klamath	$ 788,461	$ 1,187,364	11,654	5,475
21	Lake	$ 62,992	$ 6,414	1,676	CWA
22	Lane	$ 4,595,720	$ 4,829,412	16,804	13,318
23	Lincoln	$ 962,105	$ 1,015,473	9,706	2,372
24	Linn	$ 1,225,094	$ 1,171,359	8,340	3,461
25	Malheur	$ 535,069	$ 606,296	1,750	1,716
26	Marion	$ 5,711,942	$ 3,364,816	14,184	10,512
27	Morrow	$ 82,151	$ 14,387	168	2,787
28	Umatilla	$ 774,862	$ 1,091,760	10,277	CWA
29	Multnomah	$15,636,820	$17,208,782	124,409	40,037
30	Polk	$ 624,415	$ 414,852	6,690	1,793
31	Tillamook	$ 258,089	$ 454,462	1,210	742
32	Union	$ 195,000	$ 265,669	5,938	789
33	Wallowa	$ 76,297	$ 14,926	753	CWA
34	Wasco	$ 341,132	$ 685,061	6,610	1,282
35	Washington	$ 3,884,979	$ 2,683,502	19,453	10,204
36	Yamhill	$ 797,003	$ 1,161,327	8,630	1,695
	Totals	$51,305,319	$49,448,278	379,442	133,596

Appendix C

OREGON JUDICIAL DEPARTMENT
Office of the State Court Administrator

BY FACSIMILE TO 362-0513
ORIGINAL BY U.S. MAIL

January 4, 1999

Honorable Kevin L. Mannix
Criminal Justice Foundation
2003 State Street
Salem, OR 97301

Re: Draft Criminal Justice Foundation Report on Indigent Defense in Oregon

Dear Senator Mannix:

Thank you for the opportunity to review the above-referenced draft report.

BACKGROUND INFORMATION

When we met February 26, 1998 to discuss the foundation's plan to review and issue a report on Oregon's indigent defense program, you emphasized your commitment that the report would be fair. As a part of that commitment you agreed to allow my review of the draft report prior to its issuance. I sincerely appreciate this commitment and the opportunity for review.

Shortly after the foundation's provision of the draft report to me, I informed you I intended to provide three areas of review: recommended corrections; recommended inclusion of additional information in the final report; and additional information that may prove useful to the foundation and you during the upcoming legislative session.

As you know, I had hoped to have my review completed within a few weeks of my receipt of the draft report on November 16, 1998. Unfortunately, a combination of unanticipated personal matters, the necessity of preparing for the legislative session (including proposed legislation and budgetary matters), addressing the need to provide local courts caseload coverage for more than thirty indigent defense contracts expiring December 31, 1998, and the Indigent Defense Services Division's (hereafter, "IDSD") regular workload have resulted in both the delay in providing this letter to you and my decision to generally limit this letter to only the first of the three planned "areas of review" -- recommended corrections.

In short, due to the above constraints and based upon my review of the draft report, I determined it most important for the foundation, members of the legislative assembly (who I understand will be provided with the report), and my office that I "proof" the draft report for accuracy. Although I wish I could take the time necessary to provide all of the information I originally had hoped, I trust I will be able to provide that information during session.

During the course of our interactions with the foundation's researchers, we discussed the difficulties associated with reviewing and comparing one subsystem (the indigent defense program) within the context of an entire system (generally, Oregon's juvenile and criminal justice systems). This became most clear when a researcher shared a draft spreadsheet comparison of prosecution and indigent defense costs and caseloads. As is discussed in more detail below with regard to "Appendix B" to the draft report, there are differences in the types of cases for which indigent defense and district attorneys are responsible and differences in the reporting of overhead and other costs between the two components that make such comparisons difficult at best.

It is my understanding that Oregon's statewide indigent defense system (versus the majority of other states' local (county and municipal) or "mixed" (county and state) funding of indigent defense) is one of the most studied systems in the nation. Unfortunately, none of these many studies have compared indigent defense caseloads and costs to those of the other components of the criminal and juvenile justice systems. Dating back to the first of three Oregon State Bar "Indigent Defense Task Forces", I have advocated such a study and would be pleased to participate in such a study.

Similarly, the few studies that have been conducted to compare caseloads and costs between states, limited only to the indigent defense component, have resulted in "apples and oranges" comparisons. This is discussed in more detail below with respect to the draft report's reliance on an eight-state study conducted by The Spangenberg Group in February of 1998. For purposes of this introduction to my comments, it bears noting that Attorney General Janet Reno's emphasis on the importance of indigent defense and the need for a comprehensive study of indigent defense workloads and costs nationwide is "bearing fruit". I serve on the national advisory panel which is in the process of conducting a comprehensive and we hope, an "apples-to-apples" review of indigent defense programs.

In closing this portion of my letter, I wish to make it clear that none of my comments and recommended corrections to the draft report are intended for any purpose other than to assist the foundation in presenting an accurate and complete report. The foundation's staff and researchers are to be commended for their efforts.

RECOMMENDED CORRECTIONS TO THE DRAFT REPORT

Agreeing with the foundation's preference to keep its report relatively short and being mindful of the short time frame within which any of my recommendations will need to be incorporated into the report, I have made a conscious effort to recommend changes that are easily accomplished. In other words I have guarded against making more comprehensive changes that I would include in a report authored by the IDSD.

The first two sentences of the introduction to the draft report cause significant concern with respect to the accuracy of the draft report and the tone established for the report.

The first sentence of the draft report reads: "Indigent defense is defined as the state-paid defense of *a defendant in a criminal case* who cannot afford to pay for his or her defense."

(Emphasis added). As the IDSD's caseload statistics show (see Part A of the chart below) and as I specifically attempted to stress in meetings with the foundation's researchers, court appointments to represent criminal defendants at the trial level represent only 57 percent of the total indigent defense trial-level caseload (75,729 of the total 133,620 case appointments in FYE 1997). The remaining 43 percent of the caseload (57,891 of the total 133,620 case appointments in FYE 1997) is for legal representation of persons who are **not** criminal defendants; for example, children and parents in "abuse and neglect" (dependency and termination of parental rights) proceedings. Federal and Oregon laws mandate the provision of state-paid representation in many cases other than simply for criminal defendants.

Chart #1	PART "A"		PART "B"		
Trial Level Case Type	FYE 1997 Caseload		Source(s) of Direct Authority for Appointment of State-Paid Counsel		
	Number of Cases	Percent of Total Caseload	Federal Constitution	Oregon Constitution	Oregon Revised Statutes
Death Penalty	24	Less than 0.1%	24	24	24
Murder	70	Less than 0.1%	70	70	70
Felonies	35,223	26.4%	35,223	35,223	35,223
Extradition	955	0.7%	0	0	955
Misdemeanors *	40,412	30.2%	14,144	40,412	40,412
Contempt	2,609	1.9%	2,609	2,609	2,609
Probation Violations	21,333	16.0%	21,333	21,333	21,333
All Juvenile	30,190	22.6%			
Dependency/Review	19,356	14.5%	unknown	unknown	19,356
TPR – Parent – Child	424,376	0.3% 0.3%	424 unknown	424 unknown	424 376
Delinquency	7,350	5.5%	7,350	7,350	7,350
Probation Violation	2,567	1.9%	2,567	2,567	0
Other Juvenile	117	Less than 0.1%	0	0	117
Civil Commitment	1,603	1.2%	1,603	1,603	1,603
PCR/Habeas Corpus	637	0.5%	0	0	637
Other (for example, PSRB)	564	0.4%	0	0	564
Total Caseload	133,620	100.0%	85,347	111,615	131,053

* 1994 gross estimate of percentage of misdemeanors resulting in no actual incarceration (65%)
"TPR" = Termination of Parental Rights, "PCR" = Postconviction Relief, "PSRB" = Psychiatric Security Review Board

The greatest rate of growth in indigent defense caseloads has been in two main areas:

1. representation of children in termination of parental rights and dependency matters (regardless of indigence) and of parents who are financially unable to retain counsel in termination of parental rights and dependency matters; and

2. contempt proceedings -- the majority of which are child support-enforcement proceedings and Family Abuse Prevention Act proceedings.

Since FYE 1990, the termination of parental rights caseload has increased 223 percent, the dependency caseload has increased 209 percent, and the contempt caseload has increased 243 percent. These compare, for example and for the same time period, to a 60 percent increase in the total trial-level indigent defense caseload, a 43 percent increase in felony cases, and a 75 percent increase in juvenile delinquency and probation violation cases.

The draft report infrequently refers to the "non-criminal defendant" portion of the indigent defense caseload. References to this portion of the indigent defense workload tend to be found in portions of the report where the information presented is taken from reports authored by the IDSD. The report references "defendants", "indigent defendants" or "criminal defendants" throughout as the clientele of the indigent defense program. They are but a portion of the individuals who are represented by state-paid counsel.

I recommend the draft report be revised to refer to "persons eligible for indigent defense representation" or to otherwise acknowledge that criminal defendants are not the sole recipients of representation provided under Oregon's indigent defense program.

The second sentence in the introduction states: "[t]his system now costs Oregon taxpayers $80 million a year." I presume this figure was derived from an incorrect figure for the biennium. [On page 12, the draft report incorrectly states the anticipated cost for indigent defense for the 1997-99 biennium is $160,955,501. The correct 1997-99 appropriated and estimated expenditure amounts are $116,955,501.] **I recommend the introduction statement be changed to read: "[t]his system cost taxpayers almost $50 million during FYE 1997, the time period reviewed for this report." In the alternative, I recommend the introduction be changed to read: "[t]his system is expected to cost taxpayers almost $117 million for the current 1997-99 biennium."** There are additional concerns regarding the use of even $116,955,501 for purposes of the draft report's discussion on page 12. In the interest of maintaining a chronological approach to my recommended changes, I will address those concerns and make recommendations for changes in that portion of the draft report toward the conclusion of this letter.

Although I have not checked all the spellings of case names and case citations contained in the draft report's footnotes, I did notice, **on page 2, that footnote 2 should be corrected from "Wainright" to "Wainwright" and footnote 5 should be corrected from "Hemlin" to "Hamlin".**

The first two sections of the draft report, "The Federal System" and "Oregon's Indigent Defense System -- Federal Comparison", attempt to condense two reports issued by the IDSD.

Although I favor brief rather than lengthy reports, the subject area of federal versus state mandates for the provision of government-paid representation is complicated.

The first IDSD report that apparently was relied upon by the foundation for its synopsis on pages 2 through 4 of the draft report was researched and issued in 1988 and is not referenced in the draft report. The second IDSD report was prepared in response to your request, made at the December 1993 Emergency Board meeting, that the November 1994 Emergency Board be provided a report that addresses "how Oregon's law on the right to counsel at state expense differs from the 'federal right' to counsel." This latter report, first referenced in footnote 11 on page 3, is incorrectly referenced as a "February 1997" report. **I recommend the reference be corrected from "(Feb. 1997)" to "(November 9, 1994)".** Additionally, references to this report in subsequent footnotes 13, 14, 15 and 18 include page references for example to "D-2". I believe my office provided a copy of the report that had been included in a large notebook containing many reports and information concerning indigent defense and that the report was designated section "D" of that notebook. **Correct references to page numbers in the 1994 Emergency Board report would be accomplished by removing the "D" in each reference.**

The 1994 right to counsel comparison provided two comparisons: Oregon's right to counsel at state-expense compared to:

1. the right to government-paid counsel in the federal court system; and

2. the right to appointed counsel under the federal constitution as applied to the states.

The first section of the draft report appears to address the right to government-paid counsel in the federal court system which for example, does not include any abuse and neglect (dependency) cases. **The second full paragraph on page 2 would more properly be included in the second section of the draft report since it correctly sets forth the federal constitutional provisions with respect to criminal cases.** More recent research since the 1994 Right to Counsel Emergency Board paper was written shows that with respect to Class B and C "petty" misdemeanors, a judge has the discretion to appoint counsel or not appoint counsel only if there will be no incarceration if the defendant is convicted. I **recommend** the title of the section be changed to "The Federal **Court** System" and that **"if a determination has been made at the beginning of such a case that no incarceration will be imposed" be added at the end of the sentence referencing Class B or C misdemeanor cases on page 3.**

The second section of the draft report addresses the federal constitutional right to counsel compared to the right to counsel under Oregon's constitution and statutes. It is clear that under the federal constitution there is a right to appointed counsel in misdemeanor cases if there will be actual versus a potential for incarceration. The draft report incorrectly states that "...federal constitutional authority only mandates that 35,000 defendants (27 percent) receive court-appointed counsel." The last sentence of this section incorrectly states that "...felons are covered due to the requirements of the federal constitution, but misdemeanants are entitled to state-paid counsel as required by both Oregon case law and statutory law." In addition, the

FYE 1997 total caseload (133,620) used for purposes of the draft report, as stated above, includes **non**-criminal cases -- for which the federal constitution requires appointment of counsel in many instances. As discussed below in more detail, the draft report has internal inconsistencies between the text and Appendix A.

Additionally, there are serious issues arising from the representations made in both the text and the appendix. For example, at the top of page 4, the draft report states that 95,000 of the approximate 130,000 total caseload are not mandated by the federal constitution. This simply is not true. In an effort to display the relative indigent defense caseload for which there is a federal constitutional mandate, an Oregon constitutional mandate and merely a statutory mandate in a clearer format than was done in the 1994 Emergency Board report (Enclosure 3), Part B of Chart #1 on page 3 of this letter lists the number of cases for which direct authority exists for each of the three mandates. There is federal constitutional authority for appointment of counsel in 85,347 cases or 64 percent of the total FYE 1997 caseload. The discussion below regarding Appendix A to the draft report should assist in your efforts to more accurately state the "federal comparison" in Section II of the draft report.

The third section of the draft report, "Oregon's Indigent Defense System -- Operations" is primarily taken from IDSD materials provided to the foundation's researchers. Restricting my comments only to recommended corrections, the following are noted with respect to this section. The first paragraph is referenced as being based upon a 1994 Oregon State Bar (OSB) Indigent Defense Task Force Report. It accurately reflects that portion of the OSB's and other IDSD reports except for its parenthetical reference to "(such as sending cultural experts to Mexico to study a defendant's home"). Because the paragraph is not represented as a direct quote from the OSB report, I am not recommending -- as a matter of accuracy -- that this parenthetical be removed.

Although the number of contracts and the number of counties covered by indigent defense contracts is accurately stated in the text, these figures are current figures. The source of this information could not be, as footnote 24 suggests, a 1994 report as identified in that footnote. **I recommend footnote 24 be changed to the "Oregon Judicial Department's 1999-01 Fiscal Plan".** Unfortuately, I do not have a page number since the plan is in production and not available to me this week.

Section IV, "Issues Relating to the Current System in Oregon", sets out four issues identified by the foundation. The first issue relates to the "breadth" of the right to appointed counsel in Oregon. The confusion identified in Section III continues in the first two paragraphs on page 7. The draft report at this point states that only 35,000 of 130,000 total indigent defense cases are mandated by the federal constitution. The "Appendix A" bar graph however displays approximately 72,000 of the FYE 1997 130,000 total caseload as mandated under the federal constitution and indicates this number represents 55 percent of the total caseload.

Although I do not know for certain, I presume the primary resource used to develop Appendix A was the November 1994 right to counsel comparison report referenced above -- specifically Enclosure 3 to that report. (A copy of this enclosure is attached for convenience as Atttachment 1.) Using the estimated breakout of the total 107,946 FYE 1994 cases in that

chart, I cannot reconstruct how the 55 percent figure was determined. There are some types of cases in which there is clear federal constitutional authority for appointment of counsel, but only if certain criteria are determined to exist (i.e., those case types in the enclosure identified with "S" under the "federal constitution" heading). If one assumes only those case types in the Enclosure 3 that have a "Y" listed in the federal constitution column and no others, the percentage of the total caseload is only 45 percent. If one includes all the case types identified in the federal constitution column as "Y" and "S", then 65 percent of the total caseload (84,500 cases) falls within the federal constitutional mandate. If one uses the figures from the 1994 enclosure that are listed as "Y", "S", "Y?" and "S?" under the federal constitution column, the percentage of total caseload is 73 percent which would represent 94,900 cases of the approximately 130,000 FYE 1997 total caseload. **I would be happy to spend some time with the researcher to better understand how the numbers in the report were determined. In the alternative and if this were a report authored by the IDSD, I would use the 64 percent figure (taken from "Part B" of chart 1 in this letter) as the number of indigent defense cases for which the federal constitution provides authority for appointment of counsel.**

Appendix A remains of concern because it can be viewed as showing that individuals in four percent of the indigent defense caseload (approximately 5,200 cases) are provided counsel at state-expense without there being **any** legal authority and that would be a mistaken impression. For those case types not directly authorized by statute, either the federal or Oregon constitutions provide the authority for appointment and payment. In other words there are case types in which all three bases (federal and state constitution and state statute) provide legal authority, cases in which two sources of authority exist and case types in which only one basis of authority exists (for example, Oregon statute). Regardless, the total number of cases are all subject to some basis of authority for appointment of counsel. Appendix A may be viewed as showing or implying that there are some small number of indigent defense cases for which there is no constitutional or statutory authority for appointment of counsel at state-expense. This is not the case.

Attachment 2 to this letter is a proposed alternative bar graph to the draft report's Appendix A. We believe this graph better portrays the breakout of indigent defense caseload by source of authority.

If the decision is made not to replace the draft report's Appendix A with our proposed alternative bar graph, a correction does need to be made to it. The appendix references Fiscal Year 1995-96 in two places. Based upon the total caseload displayed in the graph and the information provided to the researchers by IDSD, the reference should be to Fiscal Year 1996-97 or preferably FYE 1997.

On page 8, the draft report concludes **"... the indigent defense attorneys are almost unaccountable for their cost-effectiveness when handling a case".** As you, the researchers and I have discussed, concerns with regard to compensation of any professional, including indigent defense counsel, on an hourly basis are the primary reason 92 percent of the indigent defense caseload is handled under contracts. With one exception, the cases handled under contracts are compensated on a flat fee basis; i.e., a contract attorney receives a flat amount, agreed to as a part of contract negotiations, for a case regardless of whether the

amount of time required is one hour or 100 hours. This method is preferred primarily for two reasons -- it provides accountability and it allows a better ability to project expenditures.

By including the one contract where attorneys continue to be paid on an hourly basis, the total number of hourly rate cases represent approximately 15 percent of the total caseload. **Because the above quoted sentence, I believe, overstates the breadth of the issue with respect to accountability, I recommend that it be narrowed to note that the accountability issue applies primarily or particularly to the indigent defense cases in which representation continues to be compensated on an hourly rate basis.**

This section of the draft report continues by referencing three cases in which attorney fees were out-of-the-ordinary. All three of these cases were death penalty cases. To provide some context, the average total indigent cost of death penalty cases, as shown on Attachment 3, for cases filed since 1993 is $70,233. The average cost for attorney fees and attorney expenses in these cases is $43,884. Of a total of 122 such cases, total expenses range from the almost $900,000 in the Conan Hale case, referenced in the report, to a low of $1,752.

The foundation's researcher requested information concerning six death penalty or murder cases that were the subject of newspaper articles. Of those six, three are addressed in the draft report. Restricting my comments again only to issues of accuracy, I provide the following recommendations.

On page 8, footnote 30, regarding the Gable case -- 421.96 billable hours per month is correct. When converting monthly hours to weekly hours, the draft report assumes four weeks in each month. Using this method, there are four weeks of the year that are not taken into account. Using 4.3 weeks per month results in a more accurate representation. **Accordingly, I recommend the weekly amount be changed to 98.13 hours and more importantly that the following be added at the end of this footnote "or 49.07 hours per attorney per week".**

At the bottom of page 8, the draft report states the cost of the defense in the Manzo-Hernandez case totaled almost $1.1 million. Footnote 33 states the actual defense cost of the Manzo-Hernandez case to be $1,079,95X.00 (one digit is missing in the draft report). The almost correct figure for the defense costs in the Manzo-Hernandez case is stated later in the draft report on page 11. The first sentence of the first full paragraph on that page lists the cost as $986,226.22. The actual figure provided by IDSD is $968,226.22. **The $1.1 million, footnote 33, and page 11 figures should be corrected. Additionally, the sentence on page 11 incorrectly states "...in fiscal year 1993, the State of Oregon spent $986,226.22 (sic) to defend Manzo-Hernandez...." and compares this figure to the 1993 annual budget for the Klamath County District Attorney's office. The total defense costs span a period of 28 months, making references to one year or the same year misleading.**

On page 9, regarding the discussion of costs in the Manzo-Hernandez case, I recommend the following additional corrections be made. **Footnote 34 should read "This amounts to monthly billable hours of 282.82 and 65.77 billable hours per week or 32.89 hours per attorney per week".** These recommended changes result from using 28 versus 27 months as the duration of the case and 4.3 weeks per month rather than four weeks per month.

The defense attorneys in the Manzo-Hernandez case provided representation under a contract with the IDSD. The salary amounts for each of the two attorneys under contracts during this case were $58,244 in 1993 and $61,089 in both 1994 and 1995. The remainder represents overhead costs. In the context of the draft report's comparison of the defense attorneys' compensation to the salary of the local prosecutor in that case, these salary amounts would present a better comparison. The Department of Justice attorney's salary is reported as not available. In the same document that the Department of Justice publishes annually that shows district attorney budgets (which appears likely to have been the source of the foundation's researchers' prosecution figures in "Appendix B" to the report), the top salary level for a senior assistant attorney general, which I believe to be Mr. Chatfield's classification, was $69,180 per year during the time period of this case.

Finally, with reference to the Conan Hale case, I recommend footnotes 37 and 38 be corrected to adjust for 4.3 weeks per month which results in 53.16 hours a week being 49.45 hours per week and 57.40 hours a week being 53.39 hours per week. I will briefly discuss with you another aspect of this case in the near future.

Briefly, I believe references to defense attorneys "earning" $X amount of money, without some acknowledgment that the hourly rate (generally $55 per hour) must cover attorney staff salaries and benefits, rent, services and supplies, etc. (particularly when comparing the "earned amounts" to prosecution salaries only and no other costs such as overhead and law enforcement) can be misleading.

With this said, I acknowledge that hourly billed cases are the most difficult to monitor. That fact coupled with the range of what is "reasonable and necessary" representation in a particular death penalty case results in what often are "high profile" cases becoming "high profile" cases from the courts' and the IDSD's perspective. In the late 1980s the SCA and a few attorneys agreed on flat fee amounts for representation in some death penalty cases. This approach was determined to be unsatisfactory for both parties at that time. Continuing improvements in cost accountability, as well as in best ensuring that the representation that is provided will withstand challenge in later years, are primary goals of the division.

On page 10, the draft report identifies a third issue with respect to the current indigent defense system; specifically, judges being responsible for approving or denying non-attorney expenses in indigent defense cases. This issue is two-pronged. Any expenses other than "out-of-pocket" expenses (defined in the "Indigent Defense Payment Policies and Procedures") must be preauthorized either by a judge or by the director of the IDSD. All billings by non-attorneys must be reviewed and "signed off on" by a judge or a clerk of the court.

The preapproval process is bifurcated between local judges and the IDSD director as a result of legislation passed during the 1995 legislative session. ORS 135.055(3) was amended to allow for an administrative (versus judicial) process for reviewing such services as investigation, psychological, expert, interpreter. As you may recall, no funding or additional FTE was provided to implement an administrative review process. As noted and discussed below with respect to the description of the "Indigent Defense Fund" included in the draft report's glossary, statutory authority was provided for some costs of an administrative review program under

some circumstances to be paid from the Indigent Defense Account. No such funds have been expended for the reasons discussed below. Currently, the director of the IDSD with the assistance of existing staff reviews attorney requests in death penalty and most Measure 11 cases. The experience of having one person reviewing requests statewide has been beneficial in many respects and efforts will be made to shift additional caseloads to the administrative review process. **This discussion is provided because the draft report might be read to state that only judges are involved in the preauthorization process. I recommend the word "historically" be added to the first sentence of the first full paragraph on page 10. That sentence would read: "A third issue regarding the provision of indigent defense counsel in Oregon is that *historically* a judge must approve....".**

Judges (and court clerks) continue to have sole responsibility, other than the IDSD's and SCA's authority for accounting and auditing purposes, for reviewing non-attorney billings for reasonableness and necessity. The Judicial Department has a bill presession filed for the upcoming legislative session that would amend relevant statutes to provide for an administrative (more central) versus judicial review process in the future. This proposed change is similar to the 1995 change with respect to preauthorization of non-attorney services.

The draft report cites an "extreme example" of expenses that judges approve. This example reportedly involved a judge allowing "...an attorney to send a cultural expert to travel to Mexico so that he could study the environment that the defendant grew up in." The report incorrectly states that the case in which this occurred was the **Conan Wayne Hale** case. **The correct case reference is the Manzo-Hernandez case. The reference to footnote 36 in footnote 39 also will need to be corrected to reference footnote 32.**

The draft report states "[t]he cost of sending this expert to Mexico was approximately $22,000." The $22,000 figure is accurate only with respect to the **total amount** that was paid to two individuals who provided professional services and expert testimony on a number of legal and factual issues prior to and during the trial in this matter. Services were provided over a period of sixteen months (October 11, 1993 through February 6, 1995) and only after an offer was made to the prosecution that the defendant would plead guilty and forego his right to a trial and sentence determination by a jury in return for a "true life" (non-death) sentence. The total amount expended for travel expenses to and within Mexico was $1,470.25. Total fees for professional services billed during three visits to Mexico were $4,221.00.

One of the defendant's attorneys, Duane McCabe, stated the following in a letter to me after the case was closed. "One area of misconception seems to be that the Early family traveled to Mexico at the taxpayers' expense. The fact of the matter is that because we knew the Earlys had family and property in Mexico, and that they routinely traveled to Mexico, the cost was much less than if we had hired someone else." Many of the attorneys who provide indigent defense representation make genuine efforts to contain costs even in death penalty cases. I have personally witnessed this effort since I have been responsible for reviewing requests for preauthorization of non-attorney services since January 1996.

In the Manzo-Hernandez case, counsel located local (Bend) professors who could, with some research and investigation, serve as experts on issues relating to mitigation and the defendant's

level of understanding given evidence not only of cultural differences but brain damage. The rate paid these experts for their research, investigation and pre-trial expert testimony was $45 per hour. In addition 7.4 hours for expert testimony during the trial of this matter were compensated at the rate of $150 per hour. It bears noting that in addition to there having been no increases in hourly rates for indigent defense attorneys since 1991 or investigators since the state takeover of indigent defense in 1983, indigent defense providers are reimbursed for costs at rates well below those established for private and other public entities; e.g., mileage reimbursement is set at 21 cents per mile and has remained unchanged at least since 1988.

As with a number of the issues raised in the draft report, I do wish there had been contact with me or Kathryn Aylward on this impression (taken from a newspaper article I believe) that $22,000 of state money was spent to "send" an expert to Mexico. **As far as recommending a "simple to make change" to correct this portion of the draft report, the best I can arrive at is to replace the last two sentences of the first full paragraph on page 10 of the draft report to read as follows. "In this case, the judge allowed the attorneys to employ two cultural experts who, among other things, studied the environment within which the defendant grew up. The total amount paid these experts, including reimbursement for travel expenses to Mexico, was approximately $22,000."** This recommended change still leaves the potential for the reader to assume that the majority of the $22,000 was paid for travel to Mexico which is not correct. **My preference, based upon the facts, would be that these two sentences be removed from the report altogether.** However, no examples of judicial outrageousness in the preauthorization of expenses come to mind to provide an alternative example of what the draft report wishes to bring to readers' attention.

In closing my comments to the "third issue" subsection of the fourth section of the draft report, I view the "problem" identified in the second full paragraph on page 10 as an issue that exists regardless of whether judges or non-judges review requests for experts and other expenses. The core "problem" for any "reviewing authority" is balancing the quality or level of defense against the potential that a court may -- years later -- determine a defendant received inadequate or ineffective representation, resulting in additional costs to all components of the criminal justice system.

"Appendix B" to the draft report was first shown to me in early June. I raised a number of concerns about this comparison of prosecution and indigent defense costs and caseloads, including that the indigent defense expenditures displayed in that chart include appellate expenditures (including approximately $1 million per year for transcripts alone) for which the district attorneys are not responsible and termination of parental rights expenditures (the prosecution costs of such cases being borne by SCF). Additionally, I informed the researchers that I knew many of the district attorneys' reported budgets do not include an amount for rent, phones, computer services (overhead) which the indigent defense program figures capture. One prosecutor's reported budget not only does not include overhead costs (including paper and pens), but does not include a "narcotics deputy district attorney" since that position is "other funded". I also informed the researchers the indigent defense expenditures by county are overstated in the primary county is which an indigent defense contractor provides representation in multiple counties and understated in the secondary counties. Finally, although all non-attorney indigent defense costs (such as investigation) are included in the

comparison, there is no reference to the fact that law enforcement, to a certain degree, is a part of the prosecution side of the equation.

We were informed June 17, 1998 that the Appendix B chart was not being pursued by the foundation. Regardless, I understand you wish to include the table as an appendix. Assuming this is a fait accompli, I make the following recommendations with respect to the accuracy of footnote 40 and the table. **Footnote 40 states "...some of the indigent defense counsel must pay rent....". To the best of my knowledge all indigent defense attorneys and non-attorney providers must pay rent. In the following sentence, "stable" should be "table".** The table lists a total of 379,442 cases as being prosecution cases. As you and I briefly discussed, I am not interested at this point in "haggling" over such differences in responsibility for certain case types such as termination of parental rights cases or appeals. However, the inclusion of "infractions" within the cases attributed to the district attorneys is a significant error. Attachment 4 to this letter lists the number of infractions by county for FYE 1997. Infractions total 244,912 cases or 65 percent of the total caseload listed for the prosecution. District attorneys and their staff do not screen infractions (for example, speeding tickets) and do not appear in court on these matters unless a person requests a trial on the infraction **and** has retained counsel. **I recommend the infraction caseload be deducted from the "DA Court Cases" column of Appendix B and that court statistics for "juvenile petitions" and "mental health" proceedings be added to that column. Attachment 4 provides the detail and overall adjustments recommended by county and statewide.** Unfortunately, I know of no statewide compilation of district attorneys' caseloads. As a result, the foundation researchers and I, in providing the recommended adjustments, rely upon state court statistics for the district attorney caseloads. These court statistics do not include probation violation cases or a breakout of postconviction relief, habeas corpus, juvenile review, or extradition cases.

The final sentence of footnote 40 states the table "...suggests the need for a uniform monitoring system overseeing the provision of indigent defense services in Oregon". There is a uniform system for indigent defense. Differences in compensation between indigent defense attorneys primarily is a function of the seriousness of caseload in a particular county and the number or lack of attorneys in a geographical region who are interested in providing representation under Oregon's indigent defense program. As stated at the beginning of this letter, I would be interested in being included in a study that does take the time and effort necessary to prepare an apples-to-apples comparison of prosecution and indigent defense expenditures.

At the top of page 12, as previously noted, the draft report states the anticipated cost of indigent defense in Oregon will be $160,955,501. In addition to this figure being overstated by $44 million, one-half of that figure ($80 million) is used to compare Oregon's per capita costs to those of eight other states that were the subject of a review conducted by The Spangenberg Group. That study reviewed, inter alia, state expenditures for the FYE 1997. **I recommend that the reference in the second sentence in the first full paragraph on page 12 to "approximately $80 million" be changed to "approximately $49.5 million" which is the amount listed on Appendix B. Using that figure, Oregon's annual per capita "indigent defense" cost is $15.11 rather than the $24.43 stated in the draft report.**

I am informed by the primary researcher of the Spangenberg study, David Carroll, that many states' "indigent defense" programs do not include funding for representation of parents and children in dependency ("abuse and neglect") and termination of parental rights (TPR) cases. Rather funding is provided for government paid representation in these types of cases separate from and in addition to "indigent defense" funding. In fact, Mr. Carroll is able to confirm that only one of the eight states studied included some unknown number of "deprivation" cases in the caseload and expenditure information provided for the study. In Oregon, there were 20,156 dependency and TPR appointments in FYE 1997. As stated at the beginning of this letter, dependency and TPR caseloads are one of Oregon's fastest growing indigent defense caseloads.

In addition, I have confirmed municipal court caseloads and associated indigent defense costs for the eight states studied by The Spangenberg Group were not included in the Spangenberg study. There is no compiled data available on municipal court indigent defense costs in those eight states or for Oregon. However, based upon my limited knowledge of other states and upon the overall tendency in Oregon for municipal courts to close or decide only to handle infraction cases, I would believe -- at least until I saw data -- that if municipal court indigent defense costs were included in the Spangenberg study and for Oregon, that the differences between per capita costs in Oregon and the other states would be less. Additionally, it is not clear from the Spangenberg study and discussions with the primary researcher the extent to which non-attorney costs such as transcripts were included in the other states' data.

I understand the desire and indeed legitimacy of comparing Oregon's indigent defense costs to those in other states. In addition to the known variables identified above, there are others that further time and effort could identify. As the Spangenberg report states on page 3, "[m]aking comparisons between various indigent defense systems is an imperfect science, due to a wide number of variables affecting indigent defense services in each state." It is my hope that the nationwide study of indigent defense costs in which I am involved will be able to take into account and identify differences due to the many variables.

I have no other specific **recommendation** with respect to this portion of the draft report other than to recommend a sentence or two that identifies the increased comparison caseload for Oregon resulting from the inclusion of dependency and TPR cases and a caveat similar to that quoted above from the Spangenberg report.

The "Glossary of Terms" references the "Indigent Defense Fund". The correct statutory name for this "fund" is the "State Court Indigent Defense **Account**" (hereafter, "IDA"). The final sentence in the description of that account states: "[a]dditionally, the administrative costs for the Indigent Defense Services Division are taken from the Indigent Defense Fund." **In addition to recommending the word "fund" be changed to "account", I recommend this sentence at a minimum be deleted since, in fact, no monies from the IDA fund the IDSD's administrative costs.** The IDSD's administrative costs ($830,690 this biennium) are funded as a part of the Judicial Department's budget, not from the IDA. The IDA is statutorily restricted to payment of the costs of indigent defense representation.

The confusion may arise because ORS 151.430(9) provides, in part, that the SCA may contract for the administrative review of extraordinary expenses under certain circumstances and that funds from the IDA may be expended for such contracts. As discussed above, the administrative review of requests for extraordinary expenses was an additional responsibility the director and one staff member of the IDSD have "absorbed", since no additional resources were provided therefor. No funds from the IDA have been expended for the administrative review process, primarily due to projections that no "surplus" IDA funds are available for this purpose.

To conclude my recommendations for changes in the draft report, the glossary includes "State Public Defender" (hereafter, "SPD"). The draft report does not mention the SPD. The SPD statutorily is separate from Oregon's "Indigent Defense Program". **I recommend the SPD reference be deleted from the glossary to avoid confusion.**

I wish to close this letter by stating my appreciation for the fact the report references a number of times the limited staffing level of the Indigent Defense Services Division (IDSD) of the State Court Administrator's office. As the report acknowledges, the IDSD plays an important role in the administration of indigent legal services in Oregon. The funding level for the IDSD ($830,690 for the 1997-99 biennium) represents less than one percent of the funding level for direct indigent defense services ($116,955,501 for the current biennium).

Only one of many measures of the IDSD's increased workload is the increase in the number of attorney contracts the IDSD is responsible for negotiating and monitoring. Legal representation that is mandated by federal and state law to be provided from funds appropriated to the Indigent Defense Account, as noted in the draft report, is provided in 92 percent of the trial-level caseload pursuant to indigent defense contracts. With one exception, these contracts compensate attorneys on a flat fee versus hourly rate basis. Negotiation and monitoring of these contracts represent one of the division's largest workloads for the director and the IDSD's four FTE analyst staff. The number of these contracts has increased 61 percent from FYE 1989 to FYE 1998. The seven full-time-equivalent (FTE) staffing level for the IDSD has remained effectively unchanged since FYE 1989.

As you know, the Judicial Department has sponsored (not simply supported as stated on page 12 of the draft report) a bill each of the past five biennia that would transfer the responsibility for Oregon's indigent defense system from primarily the IDSD to an independent commission. LC 1105 is the Judicial Department's independent commission bill that has been presession filed for the 1999-01 legislative session. As was identified in the research paper I prepared at your request for the November 7, 1994 Legislative Emergency Board, adequate staffing of any independent commission or entity which would assume responsibility for the indigent defense program is crucial.

In addition to the critical need for adequate staffing to effectively and efficiently administer a statewide program that provides direct services (legal representation) entirely on a private sector basis (there are no state employees who provide services within Oregon's indigent defense program), there is a critical need for an integrated indigent defense information system. The information systems being used today include an accounts payable system that was

created in 1987 and miscellaneous PC based systems developed by IDSD staff. The Judicial Department's proposed budget for 1999-01 includes a request for funding an improved information system.

In the interim, the division continues to deal with issues of salary and benefits parity between prosecutor and indigent defense providers, hourly rates that have been static for the attorney providers who continue to accept appointments to indigent defense cases on an hourly rate basis since 1991 and for investigators who provide indigent defense services since 1983, and increasing caseloads and mandates which affect all system components. The following is provided only as a quick insight into a side of the indigent defense program that the foundation's researchers did not "view". It is an excerpt from a September 16, 1998 letter received from a public defender contractor in one of the 17 counties identified in the draft report's Appendix B as expending more on indigent defense than on prosecution.

> "Out of a total of ten attorneys [in the two counties served by the contractor] we have had five resignations in the past year. Unfortunately there may be still more resignations within the next few months. One attorney position has finally been filled (although the attorney will not be able to join us until the second week of October) after it was offered to two qualified attorneys who were not able to accept the position because of the inadequate salary. They had turned down the position because the salary offered from our current salary scale does not allow them to live and make minimum payments on their student loans."

Within one month, two additional attorneys submitted their resignations, including the director of the public defender office.

I will be available to answer any of your questions. Thank you for providing me the opportunity to review the foundation's draft report.

Sincerely,

Ann Christian, Director
Indigent Defense Services Division

Attachments

RIGHT TO COUNSEL AT GOVERNMENT EXPENSE
TYPES OF CASES AND BASIS OF AUTHORITY
TRIAL LEVEL

LEGEND:
Y = Yes; Direct Authority; Absolute Right, If Indigent
N = No; Direct Authority; No Right
S = Some; Direct Authority; Discretionary or Due Process Right, If Indigent

? = Unknown

Y? = Likely; No Direct Authority
N? = Unlikely; No Direct Authority
S? = Likely for Some; No Direct Authority

* = Estimate of Caseload
** = Limited to Indian Child Welfare Act Cases

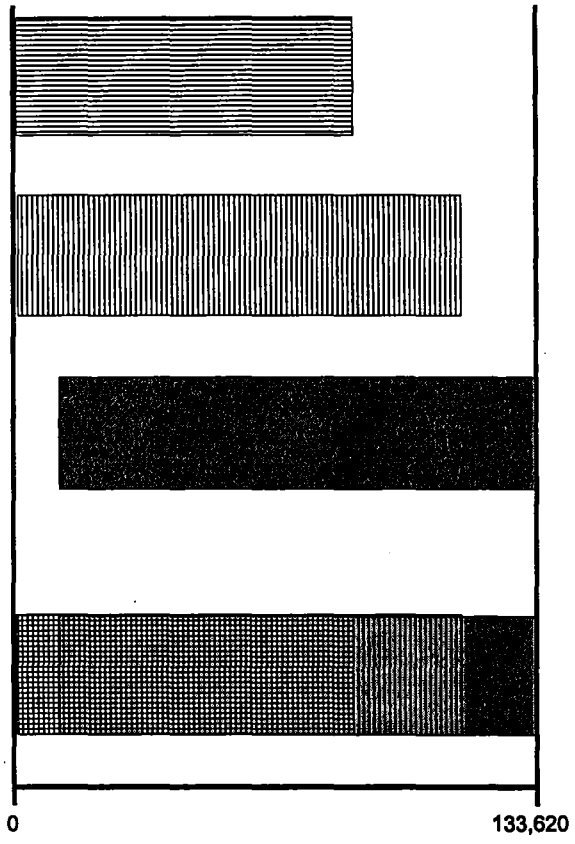
	OREGON COURTS BASIS OF AUTHORITY					FEDERAL COURTS BASIS OF AUTHORITY	
CASE TYPE	Oregon Constitution	Oregon Statute	Federal Constitution	Federal Statute	Annual Number of I.D. Cases	Federal Constitution	Federal Statute
CRIMINAL/OFFENSE							
Pre-Criminal Charges Interrogation	Y	N	Y	N	0	Y	Y
Line-up	Y	N	Y	N	0	Y	Y
Other Critical Stage	Y	N	Y	N	0	Y	Y
Death Penalty & Murder	Y	Y	Y	N	133	Y	Y
Felonies	Y	Y	Y	N	27,709	Y	Y
Misdemeanor Actual Jail	Y	Y	Y	N	10,961*	Y	Y
Potential Jail	Y	Y	N	N	19,907*	N	S
Violation/Infraction NO Jail Potential	Y?	N	N	N	0	N	N
Small Fine Only	N	N	N	N	0	N	N
Contempt	Y	Y	Y	N	1,776	Y	?
Diversion W/Guilty Plea	Y?	Y?	Y?	N	2,000*	Y?	Y?
W/O Guilty Plea	N	N	N	N	0	N?	N
Show Cause/Term.	Y	N	S?	N	725*	?	Y
CIVIL							
Extradition	?	Y	?	N	1,042	?	Y
Material Witness	S?	Y	S?	N	5*	S?	Y
Probation Violation Felony	Y	Y	S	N	10,924	S	Y
Misdemeanor	Y	Y	S	N	7,848	S	Y
Parole Violation	S	S	S	N	0	S	Y
Invol. Commitment	Y	Y	Y	N	1,819	Y	Y
PSRB Hearing	Y?	Y	Y?	N	370	Y?	Y?
Invol. Sterilization	Y?	Y	Y?	N	0	N/A	N/A
Mental Retardation	Y?	Y	Y?	N	0	N/A	N/A
Postconviction Relief	N?	Y	N	N	628	N	N
Habeas Corpus	N	Y	N	N	337	N	S
Forfeiture	?	N	Y?	N	0	Y?	S

CASE TYPE	OREGON COURTS BASIS OF AUTHORITY					FEDERAL COURTS BASIS OF AUTHORITY	
	Oregon Constitution	Oregon Statute	Federal Constitution	Federal Statute	Annual Number of I.D. Cases	Federal Constitution	Federal Statute
JUVENILE							
Delinquency	Y	Y	Y	N	6,311	Y	Y
Dependency							
Parent	Y	S	S?	Y**	2,738	N/A	N/A
Child	?	Y	S?	S**	2,346	N/A	N/A
Review Hearing							
Parent	?	Y	?	Y**	3,650	N/A	N/A
Child	?	Y	?	S**	4,302	N/A	N/A
Probation Violation	Y	N	S	N	2,097	N/A	N/A
Emancipation	N?	Y	N?	N	0	N/A	N/A
Term. Parent. Rights							
Parent	S	Y	S	Y**	277	N/A	N/A
Child	S	Y	?	S**	30	N/A	N/A
Contested Adoption							
Parent	S	N	S?	Y?**	11	N/A	N/A
Child	S?	N	?	S?**	0	N/A	N/A
Perm. Guardianship							
Parent	S	N	S?	Y?**	0*	N/A	N/A
Child	S?	N	?	S?**	0*	N/A	N/A

lr-misc\rticouns
11/07/94

Attachment 2

Basis of Authority for Appointment of Counsel at State-Expense in Oregon By Types of Cases



Federal Constitution: 85,347 cases

Oregon Constitution: 111,615 cases

ORS: 131,053 cases

Cases covered by any one of the above: 133,620 cases

AVERAGE INDIGENT DEFENSE COSTS
OF
CLOSED AGGRAVATED MURDER CASES
FILED SINCE 1993
(Cost data entered through 11/23/98)

	Attorney Expenses	Other Expenses	All Expenses
Overall Average Cost Per Case	$43,884	$26,350	$70,233
Average Without Most Costly Case	$40,488	$23,195	$63,683
Average Without Least Costly Case	$44,215	$26,557	$70,773
Average With Trial	$69,764	$45,914	$115,678
Average Without Trial	$30,617	$16,267	$46,884

Attachment 3

Attachment 4

Recommended Adjustments to Appendix B
"DA Court Cases"
FYE 1997

		Infractions	Juvenile	Mental Health	Total Adjusted
1	Baker	0	301	4	305
2	Benton	(5,287)	176	135	(4,976)
3	Clackamas	(16,608)	1,160	355	(15,093)
4	Clatsop	(4,457)	326	44	(4,087)
5	Columbia	(1,978)	393	62	(1,523)
6	Coos	(7,161)	923	56	(6,182)
7	Crook	(2,236)	182	11	(2,043)
8	Curry	(2,607)	314	20	(2,273)
9	Deschutes	(12,218)	351	7	(11,860)
10	Douglas	(7,484)	607	233	(6,644)
11	Gilliam	0	0	0	0
12	Sherman	0	0	0	0
13	Wheeler	0	0	0	0
14	Grant	0	62	9	71
15	Harney	0	0	4	4
16	Hood River	(2,873)	85	4	(2,784)
17	Jackson	(8,846)	1,680	424	(6,742)
18	Jefferson	(4,269)	107	8	(4,154)
19	Josephine	(8,455)	592	63	(7,800)
20	Klamath	(6,839)	685	46	(6,108)
21	Lake	(1,107)	111	10	(986)
22	Lane	(8,793)	1,021	102	(7,670)
23	Lincoln	(6,449)	382	22	(6,045)
24	Linn	(4,745)	825	132	(3,788)
25	Malheur	(215)	268	16	69
26	Marion	(5,154)	3,369	424	(1,361)
27	Morrow	(6)	0	4	(2)
28	Umatilla	(6,216)	442	56	(5,718)
29	Multnomah	(94,028)	3,454	2,904	(87,670)
30	Polk	(4,610)	448	55	(4,107)
31	Tillamook	(99)	206	66	173
32	Union	(3,989)	266	10	(3,713)
33	Wallowa	(420)	97	13	(310)
34	Wasco	(5,056)	286	7	(4,763)
35	Washington	(7,161)	1,971	32	(5,158)
36	Yamhill	(5,546)	1,160	33	(4,353)
37					
38	Totals	(244,912)	22,250	5,371	(217,291)

DRAFT REPORT

January 10, 2000

Board of Governors
Oregon State Bar
5200 S.W. Meadows Road
Lake Oswego, Oregon 97035

Dear Board of Governors,

The Oregon State Bar's Indigent Defense Task Force III has completed its study of the quality of indigent defense services provided to criminal defendants in Oregon. This letter is intended to serve as a working draft of our final report to the Board of Governors (Board), in response to the charge set out by the Board in Karen Garst's letter of April 1998. Task Force member Diana Stuart and I are scheduled to meet with you on January 28, 2000 to discuss our findings and draft report, following which our Task Force will issue a final report. We anticipate dissolving Task Force III following the adoption of our final report, although several Task Force members have expressed a willingness to continue to serve as a work group for the newly formed Indigent Defense Commission, headed by Chief Justice Wallace Carson, should there be a need for further input from our group.

Introduction

The current OSB Indigent Defense Task Force is the third task force formed by the Oregon State Bar (OSB) to study the provision of indigent defense services in Oregon. In 1993, then Oregon State Bar President Julie Frantz appointed a project oriented Indigent Defense Task Force to replace the former OSB Committee on the Indigent Accused. That Task Force (Task Force I) was charged with providing recommendations to the Board regarding "funding", "quality of representation" and 1993 legislative issues. Task Force I delivered its final report in July 1994, and included the recommendation that the OSB promulgate and adopt standards for providing indigent defense services. The second OSB Indigent Defense Task Force (Task Force II) took on that task. It submitted its final report in June 1996, entitled "Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases". That report comprehensively defined the standards that counsel, including indigent defense providers, should meet to provide competent legal counsel; in essence, the report established, for every step of criminal, juvenile and civil commitment proceedings, the practices and procedures viewed by Task Force II as essential "to assure that the system operates as an integrated whole in the delivery of justice". The Board of Governors adopted the principles

and standards set out in the Task Force II report. The Bar has endeavored to distribute copies of the report to indigent defense providers and other participants in the criminal justice system.

The current Task Force has focused on issues relating to the quality of legal representation as it is actually provided to indigent clients in the state. As charged by the Board, Task Force III has examined whether there are types of providers, types of cases, or geographic areas of the state in which quality of services is a concern. In examining the questions set out by the Board, Task Force III also has reviewed existing monitoring practices in the various judicial districts across the state to find whether monitoring for quality is conducted.

To conduct this study, the Task Force began with an interview of Ann Christian, the director of the Indigent Defense Services Division of the State Court Administrator's Office. We followed that with an interview of Dan O'Leary, the chair of the Task Force II. Following those interviews, Task Force III members developed a survey designed to inquire, in an open-ended manner, into the areas of quality concern identified in the Board charge. The survey was administered by Task Force III members with substantial assistance from many volunteer surveyors recruited by Task Force members; the volunteer surveyors and Task Force members each made a substantial time commitment to the survey effort, and this study would not have been possible without their considerable contributions.

The survey was designed to solicit the experience and opinions of legal professionals throughout the judicial system. Several hundred legal professionals were interviewed: judges, including but not limited to presiding judges, prosecutors, defense lawyers and defense firm administrators were all surveyed. Many of the interview subjects were chosen at random, from comprehensive lists of local lawyers and judiciary, but an effort was made to include all top administrators and a sampling of other lawyers in various roles: staff lawyers at public defender and contractor offices, private bar members, and sole practitioners participating in consortia. Similarly, almost all the elected prosecutors of each county were surveyed, but input was also solicited from staff prosecutors. Surveys were conducted in every district of the state and, although no formalized equation was applied to determine how many surveys were conducted in a particular district, an effort was made to select a number of survey participants in proportion to the population of the district involved. In all, the Task Force believes opinions were solicited from a large and representative sample across the state.

The charge to Task Force III was to ascertain what quality controls currently exist. We address that issue first. We also evaluate, pursuant to your charge, whether certain factors impact the quality of indigent defense services in the state: the type of provider, geographic area, and the case type. Each factor is addressed separately below. Following the draft report are appendices of Karen Garret's letter of April 1998 setting out the BOG charge to our Task Force (Appendix A), Bar President Mark Johnson's letter of December 1998 to the selected survey participants (Appendix B), the survey letters and instructions circulated to those enlisted to conduct the survey (Appendix C), a roster of the members of this Task Force and, separately, of the volunteers who assisted the Task Force in conducting the survey (Appendix D), a sample survey (Appendix E).

Summary

The theme that arose again and again, throughout our many interviews, was that funding is the key to fulfilling the state's obligation to provide adequate representation to people charged with crimes or facing other serious restrictions of their liberties, such as the potential termination of their parental rights. Although some mechanisms exist for promoting high quality indigent defense services, those mechanisms are dependent, finally, on a provider organization's ability to fund them. Supervision and training require time, and that time can only be provided when adequate funding is available. Perhaps most importantly, based on the responses we received from participants across the criminal justice spectrum, sufficient funding must be available to adequately staff provider organizations so that caseloads do not overwhelm the ability of individual attorneys to perform necessary services. This last factor was stressed so consistently that we conclude that high caseloads have become a serious problem in the state, and are the most frequent cause of inadequate representation.

Overburdened attorneys are most likely to miss the opportunity to establish a client's innocence, or to develop effective disposition plans for a case. This issue is of particular concern to members of this Task Force, because no quality control safeguards exist in many jurisdictions. In particular jurisdictions, quality control mechanisms have developed as a matter of local practice but those that exist do not appear to be utilized in any consistent manner. Furthermore, post conviction remedies are not viewed as an adequate safeguard, for the most part, because the quality of representation afforded to post conviction petitioners is considered the least sufficient in the criminal justice system. The Indigent Defense Services Division does not have the budget to allow comprehensive quality control checks, although it does respond to problems brought to its attention; on occasion, that office actively solicits input from the local judiciary and others, but that practice appears to be decreasing in recent years. Our survey did not identify any consistently applied quality control mechanisms, but rather a decrease in the Indigent Defense Services Division's ability to monitor the quality of the services that department administers. Official monitoring mechanisms are almost non-existent. Although the standards set out by Task Force II, and subsequently incorporated in the contract language of Indigent Defense Services Division's indigent defense contracts, provide a valuable measurement of quality representation, no concerted attempt to measure indigent defense practice by those standards occurs.

The Task Force does not view monitoring as an end in itself. The goal of monitoring is to ensure quality. To that end, it is important to consider whether any monitoring system implemented will exacerbate the work load of the affected providers to the detriment of their clients.

Types of Providers

Oregon employs a hybrid system of indigent defense representation. Historically, judicial districts maintained lists of attorneys who accepted appointment to indigent defense cases, often combining that work with more varied law practices. Judges exerted almost complete

control over the lists, and were even known to use their authority to enlist members of the civil bar when the need arose. Over the years, starting with the larger metropolitan areas, the demand for representation became so great that public defender offices were formed to specialize in indigent defense work. More recently, within the last two decades, the Indigent Defense Services Division has begun to award indigent defense contracts to small firms, referred to as contractors, and, to a lesser extent, to consortia of sole practitioners and small firms.

Task Force members were surprised to find such a wide variety of provider models across the state; it is not an overstatement to note that there may not be two judicial districts, statewide, employing exactly the same model for providing indigent defense services. Outlying counties appear to be converting, by and large, to a contracting system, with small firms sometimes staffing offices in more than one county seat and shifting staff attorneys among the counties served. (In the geographically expansive but sparsely populated judicial districts, many counties may be encompassed within a single judicial district.) Public defender offices are employed, for the most part, only in the more populous counties, although not all relatively large counties have public defender offices and some small and mid-size cities, including Pendleton and Roseburg, house public defenders. Consortia appear to be most popular in the mid-to-large metropolitan areas of the mid-Willamette Valley, with almost all indigent defense representation in Marion and Clackamas provided by consortia. To a lesser degree, consortia also exist in Multnomah and Jackson Counties. In Multnomah and Washington Counties, however, the general model is best described as a combination of public defender offices and small firm contractors. Appellate representation in the state is provided, for the most part, by a single appellate public defender office, supplemented by private bar appointments. Most post conviction work is handled by small firm contractors in the relatively remote areas where prisons are located, although the Marion County consortium represents most post convictioners in Salem-area prisons; a smaller number of post conviction cases are handled by private bar appointment, generally as a 'safety valve' to the contracted caseloads.

Although no districts have a large consortium and also significant small firm contracts, making a side-by-side comparison difficult, respondents from districts utilizing large consortia of relatively experienced attorneys report few quality problems; those respondents attribute this to the overall quality of the individual attorneys invited to join a consortium (who are brought in at a level more equivalent to that of a partner than associate) and the design of the consortia, administered by a coordinator who oversees the overall production of consortium members and to whom problems regarding a particular attorney can be brought. The presence of a central administrator to investigate and respond to problems with particular attorneys is viewed as an effective quality control mechanism by respondents in districts employing a consortium model. Respondents in districts with small firm contractors did not relate the same confidence, across the board, with the internal quality control mechanisms of the small firm contractors, and had only limited experience attempting to address perceived problems with the quality of representation provided by individual lawyers employed by small firms. Interestingly, some respondents also commented on the different economic dynamic of a contract office compared to a public defender or consortium of sole practitioners: small firm contractors were viewed as the most vulnerable to financial pressures, since the principals in those firms have personal

financial liabilities for the offices they head that are far greater than their counterparts. Public defender offices are non-profit organizations, so their administrators are unlikely to bear great financial responsibility for the organization's obligations. Sole practitioners in a consortium are likely to be responsible only for their own overhead, and to have retained practices that will cover their expenses if their indigent defense appointments come to a halt. Small firm contractors, however, usually employ several associate attorneys and are personally obligated for the overhead expense necessary to employ those attorneys: those ongoing obligations to pay for the proportionately larger overhead expenses may make it a practical impossibility for the firm to forego a subsequent contract, even where the contract funds are insufficient to fulfill the contract's requirements adequately. Although observers do not suggest that this happens frequently, concerns were voiced about particular contractors in some districts.

Staffing

Many indigent defense providers, particularly small private firms handling indigent defense cases through contracts, report difficulty in hiring competitive candidates to handle indigent defense caseloads. The degree of difficulty attracting satisfactory candidates appears to fluctuate by district, and is influenced by the general job market in the legal community, but it appears that indigent defense positions are almost always at the bottom of the pay scale in the legal community. Many recent graduates have significant student loan obligations which cause them to bypass public service employment. Combined with high caseloads, it is no surprise that applicant pools may be small and contract administrators find it difficult to retain experienced practitioners. Most of the attorneys hired by these firms are recent law school graduates. Even where satisfactory candidates are not available, judges have a constitutional obligation to appoint counsel so the Indigent Defense Services Division and, in turn, the contract administrators and public defenders must hire the best of those available: failing to provide counsel altogether is simply not an option. A few districts have reached a crisis point in recent years, finding that no attorneys are available to accept appointments; in more than one situation, the Indigent Defense Services Division has gone to great lengths to entice new lawyers to relocate to underserved areas. Many respondents foresee an increase in incidents like this across the state, as more and more experienced providers succumb to the difficulty of attracting and retaining staff attorneys while managing ever more complicated caseloads without meaningful increases in compensation.

It was common for participants in our survey to note that the skill of the individual lawyer is the true determiner of the quality of representation an indigent defendant receives, to a far greater degree than the type of office providing the service: a skilled and diligent lawyer may overcome obstacles that cause another to falter. Yet, as counties grow larger and contract offices become more common, there is a clear tendency to judge quality on an office-by-office basis rather than lawyer-by-lawyer. The most criticized offices were described as high volume, low experience, high turnover offices, where lawyers left before developing satisfactory skills. Unlike most public defender offices or consortia that provide services in all, or almost all, case types (as a general rule, public defender offices and consortia do not coexist in the same districts, as one or the other is the primary provider of indigent defense services in the district), small firm contractors often fill particular niches, or specialized areas

of practice. Often, districts have implemented procedural changes - in an effort to promote judicial efficiency in high volume areas like drug dockets and traffic courts - and contracts have been created to provide attorneys to cover the specialized dockets. Given this genesis, it is not surprising that some contractors are viewed as providing a type of high volume service that precludes in-depth individual assessment of clients' cases. In rarer cases, the specialized contracts are viewed as bringing a greater expertise, or specialization to the area of practice. Those experiences illustrate the potential advantages of awarding specialty contracts to smaller firms, but the more common experience seems to be diminished quality. High volume dockets, on their own, do not dictate lower quality representation but high volume dockets combined with a low flat-rate payment structure will inevitably lead to this result. It is not clear that larger offices, whether public defender or consortia, would effectively resist this dynamic, but it is possible that the larger offices could better absorb the stresses of the fast track dockets and better resist the pressures to sacrifice quality for judicial efficiency. The overall perception of survey respondents appears to be that fast track dockets may result in the culpable clients receiving initial probationary offers that are more attractive than they might have been under older, less 'efficient' models, but the gain of culpable clients comes at the expense of those whose more cognizable claims are overlooked or obscured by lawyers that are too busy to give individual cases the attention they may deserve. In a high volume environment, experience was perceived as the single most important attribute of an attorney, as it is assists the attorney to distinguish between meritorious cases and those that should be disposed of on a fast-track basis – in an environment where little or no case preparation is possible. Many respondents did single out particularly attorneys as exemplary, and as worthy standards for the profession: for those providers who were praised, "experienced" was the most commonly used word.

Training

Larger firms, particularly public defender offices, are able to provide far superior levels of training and supervision through institutionalized mentoring programs and formalized series of seminars. The larger defender offices have a practice of rotating even their most experienced attorneys through misdemeanor and juvenile caseloads as a means of providing peer assistance to younger attorneys;- the practice also allows the more experienced attorneys to reduce their stress with a period of less complex litigation. Public defender offices and consortia are reported to be the models least likely to appoint inexperienced attorneys to cases they are not equipped to handle.

Larger consortia are less susceptible to training and mentoring deficiencies than small contract firms by their nature: consortia tend to be comprised of older, experienced attorneys – mostly sole practitioners - who have voluntarily formed an association allowing them to share administrative burdens without impeding the ability of the individual attorneys to pursue non-indigent defense practices in combination with the representation of appointed clients. Therefore, the nature and experience of the attorneys involved in consortia allows beneficial collaboration and oversight without the need for the extensive training and mentoring that attorneys with no criminal defense experience require.

In smaller offices, training resources are limited and fewer mentors are available. More experienced attorneys in the firm may not have the time to provide ongoing assistance to the newer attorneys, given their own large caseloads. The problem is compounded in the high turnover rate of relatively new attorneys: once a staff attorney gains trial experience, the salary increases available in the indigent defense system will not compete with the salaries the lawyer can command by leaving indigent defense practice. The constant hiring cycle makes it that much more difficult for the contract firm administrators to provide meaningful training and supervision.

Although public defender offices had the most formalized systems in place, consortia and contractors often provide mentoring to new attorneys and employ rotation models that allow newer members to observe and be observed by the more experienced attorney members. However, the common perception is that the larger the organization, the more likely it is that effective mentoring and peer support mechanisms will allow problems with inadequate representation to be recognized and dealt with in-house, before serious mistakes occur.

Geographic Analysis

Despite the nominal consolidation of the county courts into a statewide system in 1983, there continue to be significant differences among Oregon judicial districts' indigent defense operations. Uniform distinctions between urban and rural districts are less easy to draw than might be expected. Similarly, after compiling the results of our survey, we came to the conclusion that generalizations about geographic regions of the state are difficult to make. In large part, this is because judicial districts adjoining one another often have very different schemes for providing indigent defense services. Also, since most procedures and policies are set at a local level by presiding judges and elected prosecutors, political boundaries create significant divisions even within seemingly contiguous geographic regions. Nonetheless, it is possible to see some broad patterns, particularly when the large urban counties, such as Multnomah, Washington, and Clackamas, are compared to the smaller, more rural counties.

The single universal response in all locations, large and small, urban and rural, is that inadequate funding for indigent criminal defense services is the cause of most systemic and serious problems in the provision of services. Every county, with the possible exceptions of Marion and Clackamas, reported that attorneys are forced to accept too many cases in order to meet office expenses, preventing adequate time and attention from being spent on each case. After caseload size, however, there was a split between larger and smaller counties as to what systemic problems were perceived to be the most serious. In the larger counties, lack of training and experience were most often the next highest rated problems while, in smaller counties, District Attorney charging practices and lack of extraordinary expenses authorizations for investigators and expert witnesses were rated the highest. It is noteworthy that District Attorney charging practices were not viewed as significant a factor in larger counties.

Another difference between large and small counties is the extent to which judges involve themselves in monitoring the adequacy of representation by individual attorneys. In smaller counties, the judges have personal experience with all the lawyers handling indigent cases and

often take an active role in responding to concerns about adequacy of representation, either as reported to the court or as actually observed by judges themselves. In some of these counties, the bench has developed informal procedures for responding to such concerns. Often, the procedure involves direct contact with the attorney in question. In smaller counties, judges continue to have direct control over the appointment process and are able to utilize that control to address concerns about the quality of representation. On occasion, the judiciary will limit an attorney from handling certain types of cases while the perceived problem is addressed. This "hands on" approach is more difficult to employ in counties with many judges and defense attorneys, due to the dilution of personal contact between the attorneys and judges. Therefore, it appears that more monitoring occurs in the more sparsely populated counties.

The greatest concerns about adequate criminal defense representation are reported to arise with isolated sole practitioners or small offices where there is little or no direct peer interaction or oversight. Anecdotally, it appears that peer oversight plays a valuable role in monitoring the quality of representation. In more remote geographic areas, where there are fewer experienced attorneys with whom newer attorneys can consult, and firms providing indigent defense services often have small offices spread across vast multi-county judicial districts, the problem is exacerbated. In these situations, the combination of inadequate office funding and geographic remoteness limits training opportunities and makes peer review difficult to obtain. In turn, when problems with a particular provider do develop, replacements can be difficult to locate.

Types of Cases

Throughout the state, a universal concern for the quality of representation in certain kinds of cases is voiced. Juvenile court representation is widely viewed as the area in which representation least often meets acceptable standards. Parents in dependency actions, who face possible termination of their parental rights, are viewed as routinely receiving some of the worst representation of all. Juveniles in delinquency actions, the rough equivalent of adult criminal charges, follow close behind. However, ironically, convicted defendants who bring post-conviction petitions to challenge the adequacy of their trial level representation are viewed as the 'adult system' clients who receive the most problematic representation; although most respondents are generally unfamiliar with post conviction practice, those with experience in the area are very direct in voicing their concerns. All three case types – post conviction, juvenile dependency/termination and juvenile delinquency – are viewed as the areas in which clients' interests are often served poorly by inadequate representation. Unlike other case types, where instances of inadequate representation are considered to be unacceptably high but certainly not the norm, clients with any of these three case types are viewed as facing an unreasonable likelihood of receiving poor representation.

Concern was consistently voiced about the quality of representation provided in other types of cases, as well, although the observations were somewhat less pointed and less uniform: misdemeanors, minor felonies, drug cases and sex offenses were reported to be other areas of concern statewide. Observers noted that the attorneys providing services are often the least experienced, and appear not to receive enough training or support to cope with their ever

enlarging caseloads. With respect to misdemeanors, minor felonies and drug cases, many districts have adopted practices to streamline dockets and encourage speedy resolutions; while these efficiencies have many benefits, they serve to encourage minimal effort and interaction with the client for some indigent defense providers. Some offices providing such services are viewed as little more than "plea factories", staffed with lawyers who may not recognize or act on differences between clients and cases. Inadequately trained, inexperienced attorneys struggling to cope with caseloads that increasingly grow in size is the reported cause of inadequate representation, universally linked to the system's failure to adequately fund defense services. In many instances, those surveyed observed that more experienced attorneys are unwilling to handle fast track, high volume dockets that do not allow or encourage good trial practice.

Sex offenses present their own set of problems. The cases are always challenging, presenting difficult pre-trial and trial issues. Unlike most other case types, the factual backgrounds are often extremely complicated, involving numerous interactions and connections between prospective witnesses. Competent investigation often requires not only interviewing witnesses over many hours but also obtaining records relating to various medical, school and family issues. Counsel can expect vigorous resistance from many sources, not the least of which can be the prosecutor's office. The work load associated with developing a case to the point that a competent decision can be made about whether or not to take a case to trial is far greater than that associated with any other case type, save homicides. However, unlike homicides, sex offenses have a particular stigma that many practitioners, themselves, react to. Combined with the funding inadequacies present throughout the system, and the prospect of Measure 11 sentences that can amount to true life sentences, the cases present a challenge that even many experienced practitioners find overwhelming. As a result, experienced practitioners in many judicial districts refuse or avoid appointments to sex cases. The people charged with these most serious of offenses, by default, have appointed counsel who may lack both the experience and the time to handle the cases adequately. Again, participants in our survey report that the only solution is to provide significantly greater resources to encourage experienced attorneys to take on the challenge of these cases.

Post-conviction cases can be equated to sex offenses in this regard: they are perceived as being among the most difficult cases, factually, legally and emotionally. Litigious prisoners will be a part of a post conviction caseload, and those clients are not sought after by most practitioners. Representing post conviction petitioners also necessitates criticizing the work of other members of the Bar, an often unenviable obligation. Problems with post conviction representation are detailed at greater length below. However, like sex offenses, competent representation by experienced attorneys is at its most important in the area of post conviction relief: only an experienced, diligent attorney is likely to assess a post-conviction claims adequately, and federal legislation has ensured that overlooked issues will be fatal to future efforts to obtain relief. Respondents indicate that only increased compensation will make these cases attractive enough to experienced practitioners to draw competent representation.

In less populated areas of the state, judges repeatedly noted difficulty in obtaining qualified representation for more serious or specialized kinds of cases, since the local legal economies

are often too small to support such specialists, especially where the few attorneys with sufficient experience are unwilling to accept indigent rates of pay. Along with sex offense and post conviction cases, parental terminations were raised by many respondents as a particular concern. Ballot Measure 11 charges, generally, have presented a problem in certain judicial districts, as attorneys tire of handling cases with significantly increased sentencing consequences without receiving commensurate increases in compensation. The Indigent Defense Services Division and, in districts where judges retain control over the appointment process, the courts seek to appoint the most skilled attorneys to the most serious cases; in the smaller districts, limited options can force appointment of less-qualified lawyers.

In the more populous judicial districts, however, the dynamic is different: the more serious the offense, the more likely the person charged will receive experienced and skilled legal representation. In the larger districts, the concerns voiced were about the "fast track" dockets and newer attorneys handling caseloads that were too large for their abilities. Particular concerns, however, should not obscure the fact that even more experienced and competent attorneys are feeling the effects of increasingly difficult caseloads. Experienced practitioners and other observers report that cases are more complex than five or ten years ago, requiring greater investigation and preparation, due to enhanced procedural laws and sentencing provisions. The increase in mandatory sentences makes clients more resistant to negotiated resolutions, causing difficulty in client relations and complicating the work involved. As a result, even more experienced attorneys are struggling to manage burgeoning caseloads of complex cases.

Post Conviction Proceedings

Our Task Force has chosen the address the adequacy of post conviction representation at greater length than other kinds of cases where inadequacies in representation were generally observed due to the concern of Task Force members that post conviction relief itself is supposed to - but does not - provide a viable forum for monitoring the adequacy of the representation provided in individual cases.

Post conviction petitions are handled almost exclusively in the relatively few judicial districts where state prisons are located. As a result, only a handful of judges and practitioners in the state have firsthand experience with this post conviction work. There is limited understanding of and appreciation for the role of post convictions in most areas of the state. In areas where the cases are heard rarely, if at all, the general assumption reported in our survey is that post conviction procedures provide adequate safeguards and effectively monitor the quality of representation. However, those interviewed who have more familiarity with post conviction representation have a very different view. Geographically, in rural areas where prisons are seated, local judges and the state Indigent Defense Division report chronic difficulty finding competent attorneys willing to accept the cases for the funds allocated. Funding is considered grossly inadequate to meet the challenges the cases present. In another judicial district, the unwillingness of consortium members to handle post conviction cases has forced the consortium administrator to offer post conviction attorneys an hourly fee significantly higher than for other non-capital indigent defense work: Marion County attorneys earn more for post-

conviction, habeas and Measure 11 cases than other case types. Overall, it appears that competent experienced attorneys are not interested in handling post conviction cases as presently compensated.

The Task Force interviewed Steven Wax, the Federal Defender for the District of Oregon. His office represents persons convicted in the state courts who bring federal petitions for habeas corpus relief, the final level of review for most state court convictions. His perspective of the quality of representation provided to indigent clients across the state is a uniquely broad one. Mr. Wax has come to the conclusion that neither state post conviction nor federal habeas review adequately monitors state indigent defense representation. One factor he points to as particularly troubling is that state post conviction cases are underfunded even more than trial level representation: unlike trial level representation, where cases are often negotiated by way of plea or other compromise resolution, virtually every post conviction case goes to trial. The Indigent Defense Services Division bids case loads, for all case types, with the assumption that a certain percentage of the cases assigned will be resolved by way of guilty pleas or dismissals but, unlike most case types, this assumption is not valid in the context of post conviction cases. There is no procedural mechanism in the area post conviction relief for negotiated resolutions. Virtually all post conviction cases go to trial. Every post conviction case, therefore, requires thorough investigation, preparation, and litigation. The Federal Defender's Office has found, however, that few post conviction cases in state court are investigated. That office has investigated cases five or ten years later, discovered new evidence and, in some cases, successfully obtained a new trial for the client. Effective advocacy in this area should occur at the state court level as well, and greater funding to attract experienced attorneys and investigators is the key to success in this area.

The current state practice of having the least qualified attorneys review the work of other defense practitioners, without the benefit of meaningful investigative resources, is certain to fail as the safeguard against unjust results that post conviction relief is supposed to provide. This problem is exacerbated by attorneys' reliance on the McClure standard, which allows post conviction practitioners to shift the burden to their clients to identify errors that occurred at trial. Under this standard, the attorney is only required to investigate and present the issues identified by the client. Yet, few indigent clients have the legal sophistication, technical knowledge or investigative resources to adequately identify the manner in which their trial level representation may not have been legally adequate. Often, critical issues, concerning the adequacy of representation and fundamental due process rights are not preserved, due to a client's lack of sophistication or awareness. Issues not raised in the state court proceedings are increasingly difficult to raise during later federal review. Constitutional violations not alleged by the state post conviction attorney often are deemed waived by federal courts. Where no one but the often unsophisticated and resourceless client is attempting to identify constitutional violations or serious factual errors, the assumption that an adequate safeguard to wrongful conviction exists is seriously flawed.

Observers note that the need for increased funding is perhaps most significant in the area of post conviction relief, so that the attorneys handling the cases can reduce their caseloads and concentrate on the work that needs to be done. Likewise, observers noted that investigative

resources must be developed in this area, education for providers must be increased, and oversight mechanisms for post conviction contracts must be improved. Particularly in light of the fact that federal courts do not allow review of issues that have not been raised in the state courts and the corollary fact there is no real forum for challenging inadequate post conviction representation, some mechanism must be developed to provide greater assurance that state post conviction clients are receiving meaningful representation. Although it is beyond the scope of the Board's charge to Task Force III, future inquires should be made in this area. One area the Bar might examine is whether the McClure rule meets the Bar's ethical standards: an appellate court's acceptance of this practice is not necessarily determinative of the Bar's position on whether it is ethically appropriate to delegate such fundamental legal preparation and analysis to a client, particularly an appointed, indigent client who has no other resources to utilize in exercising such decision making power. Other specific suggestions include development of a training program provided, in part, by the Federal Defender's Office and the addition of a staff person to the Indigent Defense Services Division's office to provide development, support, oversight and quality review to post conviction attorneys.

Conclusions

The Board of Bar Governors has asked the Task Force to embark upon a second phase of the investigation to consider suggestions and reach conclusions regarding quality control. For that reason, the final version of this report will probably not include the following section. Suggestions and conclusions will be addressed at the completion of Phase II.

We conclude that there is a need for an effective quality control mechanism to be employed by the Indigent Defense Services Division, and that several models currently in use in isolated judicial districts are worthy of consideration. Ultimately, however, we conclude that it is the judiciary itself that should be providing meaningful quality control through case-by-case oversight and reliable post conviction relief proceedings. The Indigent Defense Services Division's former practice of routinely surveying local judges, particularly when contracts are under consideration for renewal, should be reinstituted, and funding should be made available to the Division so that conducting such surveys can be done regularly. The Division, as it is currently administered, evidences a true appreciation for quality representation but lacks sufficient resources.

Second, we conclude that the newly formed Indigent Defense Commission, in combination with the Indigent Defense Services Division, may want to become more actively involved in helping individual judicial districts establish docketing practices that affect case load manageability. Local judges and the Commission members can gain insight into those docketing practices that make it difficult for indigent defense providers to work effectively by soliciting input from providers. As examples, many providers referenced the time consuming process required to apply for extraordinary expense authorizations, and suggested that alternatives to the current practice be developed so as to make it feasible to obtain needed services. Other providers highlighted the difficulty developing meritorious cases fully in the environment of 'fast track' dockets. Both areas appear to provide opportunities for greater exploration of the tensions between cost controls and competent representation.

Third, while the Task Force agrees with the majority of survey participants that indigent defense providers should not be held to higher ethical standards than other members of the Bar, the Board should examine whether practice consistent with that outlined in the McClure opinion (shifting the burden to clients to identify legal issues) is, in fact, consistent with existing ethical requirements and, if so, whether existing ethical standards should be revisited. The Bar should continue its efforts to lobby the Oregon Legislature for increased funding for all aspects of indigent defense services, including increased staff for the Indigent Defense Services Division, increased compensation for defense lawyers, and increased resources for investigators, expert witnesses and other support personnel. Finally, Task Force members recommend that the Bar make training resources and support available to indigent defense practitioners, recognizing this support as a valuable corollary to the widely admired civil Access to Justice campaign.

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Indigent Defense Task Force Report

Principles and Standards for Counsel In Criminal, Delinquency, Dependency and Civil Commitment Cases

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Approved by the Board of Governors
September 25, 1996

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Preface

Like every other modern society, we are a society of laws. And, like every other society, we have law breakers. We demand that law breakers be accountable for their actions but, unlike some modern societies, we also demand that any such accountability be assessed fairly. To that end, we have set up an elaborate justice system to assure both accountability and fairness.

Assessment of accountability within the justice system is assigned to an institution — the courts — that is intended to provide fairness to the individual. But fairness has never been self-executing. In that part of the justice system that we address, society stands arrayed against the individual — the might of all against the lone accused. If the desire for fairness, for justice, is to be matched in reality, the individual accused must have a voice. That voice is the defense counsel.

The task of the defense counsel is never easy. Identified by society with the client, counsel often must endure community condemnation and contempt. Frequently looked down on by others in the profession, counsel nonetheless must adhere to that profession's ethical standards, as well as to an additional set of standards set by state and federal constitutions. Less well rewarded than many who practice other specialties, counsel must be sustained in part by less tangible considerations, such as a dedication to justice for its own sake.

The Task Force has included the foregoing Preface to its work in order to make a small acknowledgment to the dedication, idealism, and high professionalism of the men and women of the defense bar who have helped it with its studies, and to their many colleagues. It would be easy for defense counsel to do as little as possible — hours are long, clients often difficult, pay low, prestige minimal. But defense counsel constantly strive to improve themselves and their part in the justice system. The following Principles and Standards are a reflection of that effort, as the Committee has come to understand it. The Principles and Standards thus are not, in Oregon, an indictment of a branch of the legal profession, coupled with a demand for change. They are, instead, a realization of the high standards that Oregon defense counsel are prepared to set for themselves.

Hon. W. Michael Gillette
Associate Justice
Oregon Supreme Court

Forward

The Principles and Performance Standards herein are meant to apply when a lawyer is appointed or retained to represent an individual client in a criminal, juvenile delinquency, juvenile dependency or civil commitment proceeding. The common denominator in these four types of cases is that the clients are subjected to state action that can deprive them of substantial liberty interests. These standards are not intended to address the representation of clients in appellate, probation violation, post conviction relief and habeas corpus cases. However, the Task Force recommends that appropriate standards for these types of cases be studied and adopted in the future.

The Principles and Standards build upon a number of national and state standards which are intended to establish a framework for improvement of lawyer practice in general and in the specific types of cases they address. They assert the importance of quality representation by competent and diligent lawyers.

The Principles and Standards contain five chapters. Chapter 1 provides *general* standards for counsel who provide representation to individuals in criminal, delinquency, dependency and civil commitment proceedings. Chapters 2 through 4 contain *specific* standards for each of these types of cases. Chapter 5 sets forth ***maximum*** caseload standards for each type of case under optimum circumstances. The Annotations to the Principles and Standards cite standards, caselaw and other reference sources. The Appendix contains summaries and detailed data from surveys the Indigent Defense Task Force conducted and received.

Many of the standards are phrased in terms of counsel "should" do "x". Use of the word "should" rather than "shall" recognizes that the standards are intended to be followed in most instances, but that exceptions may be justified in particular instances. The practice of law varies on a case-by-case basis and the standards may not apply equally to each and every case. A deviation from the standards is not necessarily equivalent to a violation of a lawyer's ethical duties, nor does a deviation from the standards necessarily result in the provision of ineffective assistance of counsel or professional malpractice.

The Standards in Chapters 1 and 2 were adapted primarily from the National Legal Aid and Defender Association *Performance Guidelines for Criminal Defense Representation* (1994), (referred to hereinafter as *NLADA Guidelines)* with the permission of the National Legal Aid and Defender Association (NLADA). Their purpose and intent is perhaps best expressed by the NLADA in its Introduction to the *NLADA Guidelines*:

> Defending criminal cases is an increasingly complex and difficult job.
>
> The unending variety of factual situations presented by criminal cases and the constant changes in criminal law and procedure require that the attorney approach each new case with a fresh outlook. These complexities also make the drafting of general performance guidelines a difficult and challenging task. But there are procedures common to all criminal cases with which the attorney must be familiar in order to be able to incorporate and best utilize the varying facts and law of each individual case. The object of these *Guidelines* is to alert the attorney to possible courses of ac-

> tion that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible. While these *Guidelines* will perhaps be most useful to the new attorney or the attorney who does not have significant experience in criminal cases, they also may be profitably examined by the experienced defense attorney in deciding upon the strategy and approach to a given case. (Footnote omitted.)

The above-stated purpose and intent also underlie the standards set forth in Chapters 3 and 4 regarding representation in juvenile dependency and civil commitment proceedings.

The *NLADA Guidelines*, while cautioning counsel not to become complicit in a system that routinizes questionable practice, state the following with respect to the manner in which the guidelines should be interpreted:

> These *Guidelines* do not say that defense counsel can *never* engage in plea negotiations without the client's prior consent ..., just as they do not say counsel must *always* interview a client prior to bail/bond proceedings concerning the client's release ..., or even before preliminary hearing ....But counsel's paramount obligation ... does require that counsel not merely accept, on behalf of a client, systemic forces that are harmful to the client's interests. (Footnote 12, page 75, *NLADA Guidelines.*)

Finally, simply applying the "Principles and Standards" to counsel will not by itself ensure quality representation, fairness and justice.

First, it is important to recognize that judicial administrators, trial judges, prosecutors and other system components play pivotal roles in the successful implementation of these "Principles and Standards". All justice system "players" need to consider and incorporate the standards into their own practices and policies to enable counsel to meet these standards and to assure the system operates as an integrated whole in the delivery of justice.

Second, in those cases involving indigent persons, sufficient funding must be provided by the state. Without adequate funds, the goals of these "Principals and Standards" will not be reached and the justice system as a whole will suffer.

Principles

General Principles for Counsel In Criminal, Delinquency, Dependency And Civil Commitment Cases

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence (sic).

Article I, Section 11 of the Oregon Constitution

In all criminal prosecutions, the accused shall have the right ... to be heard by himself and counsel.

Fourteenth Amendment to the United States Constitution

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Principles

PRINCIPLE 1

The paramount obligation of counsel is to provide quality representation and diligent advocacy for the client at all stages of the representation.

PRINCIPLE 2

To provide quality representation and diligent advocacy, counsel must preserve, protect and promote the client's rights and interests.

PRINCIPLE 3

To ensure the preservation, protection and promotion of the client's rights and interests, counsel must:

1. be proficient in the applicable substantive and procedural law;
2. abide by the Code of Professional Responsibility and the rules of the court;
3. acquire and maintain appropriate experience, skills and training;

4. devote adequate time and resources to the case;
5. engage in the preparation necessary for quality representation;
6. endeavor to establish and maintain a relationship of trust and open communication with the client;
7. keep the client informed and seek the lawful objectives of the client; and
8. make accommodations where necessary due to a client's special circumstances, such as youth, mental or physical disability, or foreign language barrier.

PRINCIPLE 4

To promote the interests of clients and society at large, counsel must actively seek improvement in the administration of justice, including the provision of adequate resources.

Performance Standards
Chapter 1

General Standards For Representation In *All* Criminal, Delinquency, Dependency And Civil Commitment Cases

STANDARD 1.1 — Prerequisites For Representation

Counsel shall only accept an appointment or retainer if counsel is able to provide quality representation and diligent advocacy for the client.

Implementation

1. Counsel should be proficient in applicable substantive and procedural law and stay current with changes in constitutional, statutory, evidentiary law and local or statewide court rules.
2. Counsel should have appropriate experience, skills and training.
   a. Counsel should obtain formal and informal training in the relevant areas of practice and should consult with others in the field, including non-attorneys.
   b. Less experienced counsel should observe and when possible serve as co-counsel to more experienced attorneys. More experienced counsel should mentor less experienced attorneys.
3. Counsel should have adequate time and resources.
   a. Counsel should not accept caseloads that by reason of excessive size and/or complexity interfere with the provision of quality representation.
   b. Counsel should have access to sufficient support services and physical resources to allow for quality representation.
4. Counsel appointed by a court to represent a client at government expense shall meet and certify compliance with the "Qualification Standards for Court-Appointed Counsel to Represent Indigent Persons at State Expense", promulgated by the State Court Administrator.

STANDARD 1.2 — General Duties And Responsibilities Of Counsel To Clients; Avoiding Conflict Of Interests

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

Implementation

1. As soon as practicable after being retained or appointed, counsel should contact the client and conduct an initial client interview.
2. Counsel should ensure that barriers to communication with the client, such as differences in language or literacy, are overcome. Counsel should make accommodations where necessary due to a client's special circumstances, such as youth, mental or physical disability, or foreign language barrier, including assuring that counsel has sufficient additional time and resources to make those accommodations.

3. Counsel should maintain regular contact with the client and should keep the client informed of the progress of the case, including:
   a. the importance of maintaining contact with counsel and the need to notify counsel of any change of address;
   b. the names and contact information regarding counsel and staff assisting with the case; and
   c. any court dates and significant developments in the case.
4. Counsel should not delegate tasks to others if to do so would compromise the effectiveness of the representation. Counsel should not delegate non-ministerial and non-routine court appearances to other counsel without the consent of the client.
5. Counsel should be alert to all potential and actual conflicts of interest. If counsel identifies an actual conflict of interest, counsel should immediately request permission from the court to withdraw and substitution of qualified counsel. If counsel identifies a potential or likely conflict of interest, counsel should fully disclose the conflict to all affected clients and, if appropriate, obtain informed consent to proceed on behalf of those clients.
6. Counsel should preserve client confidences and secrets and should not knowingly disclose confidential information obtained during the course of representation, unless authorized to do so by the client or the court or as otherwise permitted by law or the Rules of Professional Responsibility.

STANDARD 1.3 — Role Of Counsel

Counsel should seek the lawful objectives of the client and should not substitute counsel's judgment for that of the client in those case decisions that are the responsibility of the client.

Implementation

1. Counsel is ordinarily bound by the client's definition of his or her interests and should not substitute counsel's judgment for that of the client regarding the objectives of the representation.
2. Counsel should advise the client regarding the probable success and consequences of adopting any posture in the proceedings and give the client the information necessary to make an informed decision. Counsel should consult with the client regarding the assertion or waiver of any right or position of the client.
3. Counsel should consult with the client as to the strategy and means by which the client's objectives are to be pursued and exercise his or her professional judgment concerning technical and legal tactical issues involved in the representation.

STANDARD 1.4 — Initial Client Interview

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

Implementation

1. To the extent possible, counsel should prepare for an initial interview with the client by reviewing petitions and/or charging documents, police and other investigative agency reports, and the reports of pretrial detention agencies, where applicable.
2. Counsel should conduct the initial interview with the client as soon as practicable and sufficiently before any court proceeding so as to be prepared for that proceeding. In instances where the client is detained or in custody, counsel should make every effort to conduct an initial

interview within 48 hours of acceptance of a retainer or court appointment.

3. At the initial interview, counsel should obtain the following types of information from the client:
   a. the facts surrounding the allegations against or affecting the client;
   b. any possible witnesses who should be located;
   c. any evidence of improper conduct by police or other investigative agencies, juvenile or mental health departments or the prosecution which may affect the client's rights;
   d. any evidence that should be preserved; and
   e. evidence of the client's competence to stand trial and/or mental state at the time of the offense.
4. Counsel should convey the following types of information to the client:
   a. the nature of the allegations, what the state must prove, and the likely and maximum potential consequences;
   b. the role of counsel and the defense function;
   c. an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;
   d. a general procedural overview of the likely progression of the case;
   e. the procedures that will be followed in setting the conditions of pretrial release, if applicable to the type of proceeding and the particular client;
   f. an explanation of the type of information that will likely be requested in any interview that may be conducted by pretrial release, juvenile court counselors, children's services personnel, or civil commitment investigators or doctors and what information the client should and should not provide;
   g. how and when counsel can be reached;
   h. when counsel will see the client next;
   i. realistic answers, where possible, to the client's most urgent questions; and
   j. what arrangements will be made or attempted for the satisfaction of the client's most pressing needs; e.g., medical or mental health attention, contact with family or employers.

STANDARD 1.5 — Theory Of The Case

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case.

Implementation

1. Counsel should develop an overall theory of the case that encompasses the best interests of the client and the realities of the client's situation in order to assist counsel in evaluating choices throughout the course of the representation.
2. Counsel should allow the case theory to focus the investigation and trial preparation of the case, seeking out and developing the facts and evidence that the theory makes material, but counsel should not become a "prisoner" of his or her theory.

Performance Standards
Chapter 2

Specific Standards For Representation In *Criminal* And *Juvenile Delinquency* Cases

This chapter pertains to representation in both adult *criminal* and *juvenile delinquency* cases. The two types of proceedings are grouped together in one chapter because they have many similarities. Any differences in representation are indicated where appropriate. This grouping recognizes that counsel must employ the same general standards of practice in providing representation to youth in juvenile delinquency proceedings and to adult defendants in criminal cases, with special accommodation for the needs of juvenile clients. Efforts have been made to use generic terms that apply to both types of proceedings to the extent possible. For example, the term "disposition" refers to sentences in adult criminal cases and to juvenile dispositions, and the term "admission" includes guilty and nolo contendere pleas in criminal proceedings and admissions to allegation(s) in juvenile delinquency petitions. "Admission agreements" include plea agreements and agreements to admit jurisdiction in delinquency cases.

STANDARD 2.1 — Prerequisites For Representation

Counsel should be proficient in applicable substantive and procedural law and should have appropriate experience, skill and training for the type of representation required.

Implementation

1. In addition to meeting the requirements for experience and training in Standard 1.1, *supra*, counsel should have at least fifteen (15) hours of mandatory continuing legal education training each year, at least ten (10) of which should relate to the practice of criminal defense or juvenile law.
2. Counsel for juveniles should develop a basic knowledge of child development and adequate communication skills to communicate effectively with child clients.
3. Counsel should visit at least two correctional, juvenile or treatment facilities.

STANDARD 2.2 — General Duties And Responsibilities Of Counsel; Avoiding Conflicts Of Interest

In adult criminal and juvenile delinquency matters, counsel or counsel associated in practice should avoid representing two or more clients who have been jointly charged or whose cases have been consolidated.

Implementation

1. Counsel should follow Standard 1.2 Implementation 5 with regard to potential and actual conflicts of interest. In both adult criminal and juvenile delinquency matters, counsel and counsel associated in practice should avoid representing two or more clients who have been jointly charged or whose cases have been consolidated for trial or hearing.

STANDARD 2.3 — Role Of Counsel

Counsel should seek the lawful objectives of the client and should not substitute counsel's judgment for that of the client in those case decisions that are the responsibility of the client.

Implementation

1. Counsel should follow Standard 1.3, Implementations 1 and 2.
2. Decisions as to whether to enter an admission, accept diversion or other pretrial early disposition, testify, or waive any right with respect to jurisdiction, trial, or waiver, are ultimately for the client to determine.
3. In juvenile delinquency and status offense proceedings as in adult criminal matters, counsel is ordinarily bound by the client's definition of his or her interests and should not substitute counsel's judgment for that of the client regarding the objectives of the representation. See Standard 3.3, *infra.*

STANDARD 2.4 — Obligations Of Counsel Regarding Pretrial Release

When a client is in custody, counsel should explore with the client the pretrial release of the client under the conditions most favorable to the client and attempt to secure that release.

Implementation

1. Counsel should obtain information regarding the client's ties to family, the community, immigration status, school or employment records, physical and mental health, participation in community programs, past criminal and delinquency record, the ability of the client, relatives or third parties to meet any financial conditions of release and the names of individuals or other sources that counsel can contact to verify the information provided by the client.
2. Counsel should present to the appropriate judicial officer information about the client's circumstances and the legal criteria supporting release. Where appropriate, counsel should make a proposal concerning conditions of release that are least restrictive with regard to the client. Counsel should arrange for contact with or the appearance of parents, spouse, relatives of other persons who may take custody of the client or provide third party surety.
3. Counsel for juveniles should seek to have a minister, teacher, relative or other mentor come to the detention hearing to offer to provide extra guidance and positive activities for the youth during release. Counsel for juveniles should be aware of the alternatives to secure detention, including group homes, residential treatment, drug and alcohol treatment facilities, house arrest or other non-secure community based alternatives.
4. If a juvenile client is released, counsel should assure that the client's needs for safety and right to receive treatment are met by agencies responsible for the client's care.
5. Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under available procedures.
6. If the court sets conditions of release, counsel should explain to the client and any third party the conditions of release and potential consequences of violating such conditions. If the court sets as a condition of release that security be posted, counsel should explain to the client and any third party the available options, procedures, and risks in posting security.
7. Where the client is unable to obtain pretrial release, counsel should inform the court and the jail or juvenile detention facility personnel about any medical, psychiatric, or security needs of the client. Juvenile clients in detention or shelter care should be advised of the right to have the placement decision reviewed every ten days, and counsel should seek review if requested by the client.

STANDARD 2.5 — Initial Court Appearances

Counsel should preserve all of the client's constitutional and statutory rights at initial court appearances.

Implementation

Counsel should:

1. Promptly advise the client of and take action to preserve all constitutional and statutory rights of the client, including the right to remain silent, to file motions challenging the charging instrument, and to enter a plea of not guilty or deny the allegations contained in a delinquency petition and to request a jury trial, where failure to do so may result in the client being precluded from later obtaining such rights.
2. Request a timely preliminary hearing, if it is provided for under the rules of the court, unless there is a sound tactical reason not to do so.
3. If a preliminary hearing is held, review the allegations, marshall the evidence, and prepare to challenge the state's evidence and arguments.
4. Review probable cause documents and any probable cause arguments, and, if no probable cause is established or other grounds for dismissal exist, ask the court to dismiss the charges.
5. Ensure that bail has been set, seek reductions in bail if appropriate, and initiate alternative release options.

STANDARD 2.6 — Independent Investigation

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

Implementation

Counsel should:

1. Obtain and examine all charging documents, pleadings and discovery.
2. Research and review the relevant statutes and caselaw to identify:
   a. the elements of the charged offense(s);
   b. any defects in the charging instrument, such as statute of limitations or double jeopardy; and
   c. the available defenses, ordinary and affirmative, and whether notice of any defense is required and any specific timelines for giving such notice.
3. Conduct an in-depth interview with the client covering:
   a. the events giving rise to the allegation(s);
   b. the existence of witnesses or other potential sources of information;
   c. any evidence of improper conduct by police or other investigative agencies, juvenile or mental health departments or the prosecution which may affect the client's rights; and
   d. information relevant to pretrial/prehearing release and possible disposition.
4. Attempt to have all potential witnesses (adverse, neutral and favorable) located, interviewed, and, if appropriate, subpoenaed by an investigator or other appropriately trained person. If counsel conducts a witness interview, counsel should do so in the presence of a third person who is available to appear as a witness at trial or hearing.
5. Request and secure discovery including:
   a. potential exculpatory information;
   b. names and addresses of all prosecution witnesses, their prior statements, and criminal records;
   c. oral and written statements by the client and details of the circumstances under which the statements were made;
   d. the client's prior delinquency and/or criminal record and evidence of other misconduct that the prosecutor may intend to use against the client;
   e. books, papers, documents, photographs, audio and videotapes, computer discs, tan-

gible objects, buildings or other materials relevant to the case;

f. statements and reports of experts, including data and documents upon which they are based;

g. reports of and underlying data for relevant physical or mental examinations, scientific tests, experiments and comparisons;

h. statements of co-defendants;

i. inspection of physical evidence; and

j. reports or notes of searches or seizures and the circumstances of any searches or seizures.

6. When appropriate, request the opportunity to inspect the District Attorney's file, if the procedure in the local jurisdiction so provides.

7. Request and secure other information relevant to the case, including:

   a. law enforcement notes (field notes);

   b. client, victim or witness records, such as school, mental health, drug and alcohol and criminal records, with appropriate releases;

   c. 911 tapes, interofficer radio transmissions and dispatch reports; and

   d. internal affairs files and investigation records.

8. Inspect the scene of the alleged offense under circumstances similar to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).

9. Be familiar with and where appropriate obtain the assistance of experts and other professionals to provide consultation and testimony regarding issues in the case, evaluations of clients and others, and testing of physical evidence.

STANDARD 2.7 — Pretrial Motions; Hearings Regarding Ability To Aid And Assist And Waiver Of Juvenile Court Jurisdiction

Counsel should research, prepare, file and argue appropriate pretrial motions whenever there is reason to believe the client is entitled to relief. Counsel should be prepared to provide quality representation and advocacy for the client at any hearings regarding the client's ability to aid and assist and waiver of juvenile court jurisdiction.

Implementation

1. Counsel should research, prepare, file and argue pretrial motions and notices if appropriate to address issues such as:

   a. Constitutionality of relevant statute(s);

   b. Defects in the charging process or instrument;

   c. Severance of charges and/or co-defendants for trial;

   d. *Brady v. Maryland* motions;

   e. Motions to compel discovery;

   f. Motions for sanctions because of discovery violations;

   g. Violations of federal and state constitutional and statutory provisions, including but not limited to:

      i. illegal searches and/or seizures;

      ii. statements obtained in violation of the client's right to counsel or privilege against self-incrimination;

      iii. unreliable identification evidence;

      iv. speedy trial; and

      v. double jeopardy.

   h. Motions or requests for extraordinary expenses, such as:

      i. interpreters;

ii. experts for psychological evaluation for the purpose of aid and assist, diminished capacity, guilty but insane, waiver or disposition; and

iii. forensic services.

i. Matters of trial evidence which may be appropriately litigated by means of a motion in limine.

j. Notices of affirmative defenses.

k. Motions to dismiss based on civil compromise, "best interests of the youth", "in the furtherance of justice" and "general equitable powers of the court".

2. Counsel should take the following steps with regard to seeking a determination of the client's ability to aid and assist:

a. Whenever counsel has a good faith doubt as to the client's ability to aid and assist in the proceedings, counsel should fully advise the client concerning the consequences of a determination that the client is unable to aid and assist and should move for an evaluation of the client, if the client so agrees. If the client opposes such an evaluation, counsel should inform the court that counsel has a good faith doubt of the client's ability to aid and assist in the matter, but should not divulge the client's confidences and secrets.

b. If the client agrees, counsel should obtain an independent evaluation of the client or should advocate that evaluators appointed by the court are qualified by training and experience to testify concerning the client's ability to aid and assist. If the client and prosecutor concur, counsel may stipulate that the client is unable to aid and assist counsel in the proceedings.

c. At the hearing to determine whether the client is able to aid and assist, counsel should protect and exercise the client's constitutional and statutory rights, including cross-examining the state's witnesses, calling witnesses on behalf of the client such as independent experts, and making appropriate evidentiary objections.

d. Counsel may elect to relate to the court personal observations of and conversations with the client to the extent that counsel does not disclose client confidences and secrets. Counsel may respond to inquiries about the attorney-client relationship and the client's ability to communicate effectively with counsel to the extent that such responses do not disclose the client's confidences and secrets.

e. If an adult client is found to be unable to aid and assist, counsel should advocate for the least restrictive level of supervision and the least intrusive treatment. If a juvenile client is found to be unable to aid and assist in a juvenile court proceeding, counsel should seek to resolve the delinquency matter by having the petition converted to a dependency petition. An appropriate disposition should be sought as in a dependency case. (See Standard 3.10, *infra.*)

f. If the client is found able to aid and assist, counsel should recognize a continuing obligation during the course of the proceedings to raise good faith concerns about the client's ability to aid and assist.

3. Counsel should do the following with regard to opposing waiver of juvenile court jurisdiction in juvenile proceedings:

a. Counsel should investigate and become knowledgeable about the consequences of waiver of juvenile court jurisdiction in the particular client's case and should thoroughly explain the consequences to the client.

b. If the client decides to oppose waiver of the juvenile court's jurisdiction, counsel should be fully prepared to present evidence and argument against the waiver, including that the client is still a child, would benefit from

services in the juvenile system, has not had sufficient opportunity to be rehabilitated, would likely be harmed in the adult system and that the community could be adequately protected from the youth during treatment as a juvenile.

c. At the waiver hearing, counsel should address all the requirements of ORS 419C349. To make an "amenability" argument, counsel should at a minimum:

   i. describe the youth's background, including attachment to family and positive statements from individuals who believe the youth has potential;

   ii. show that the youth was not thinking as an adult at the time of the offense;

   iii. describe the youth's moral development and remorse;

   iv. document successful juvenile interventions that have been used for similar youth; and

   v. describe how the youth's delinquent behavior could change if services met his or her needs.

d. If juvenile court jurisdiction is waived, counsel should make effort to have the client released pending trial or held in a juvenile facility. If the client is transferred to an adult facility, counsel should advocate for measures that will protect the client and provide age appropriate services including mental health and educational or special education services.

STANDARD 2.8 — Pretrial Negotiations And Admission Agreements

Counsel should:

1. **with the consent of the client explore diversion and other informal and formal admission or disposition agreements with regard to the allegations;**

2. **fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;**

3. **keep the client fully informed of the progress of the negotiations;**

4. **convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers;**

5. **continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and**

6. **not enter into any admission or disposition agreement on behalf of the client without the client's authorization.**

Implementation

1. Counsel should be fully aware, and ensure the client is fully aware, of:

   a. rights the client will waive by entering into a pretrial admission or disposition agreement;

   b. conditions and limits of the agreement;

   c. nature of the admission hearing and the role the client will play in the hearing, including answering questions of the judge and in many instances, providing a statement concerning the offense;

   d. deferred sentences, conditional discharges and diversion agreements;

   e. the likely disposition, including what is required by the sentencing guidelines and the effect of the admission agreement on the client's criminal history;

   f. possible and likely sentence enhancements, and probation or post-incarceration supervision consequences;

   g. available drug rehabilitation programs, psychiatric treatment, and health care;

h. incarceration including any mandatory minimum requirements and maximum terms;

i. the possible and likely place and manner of confinement;

j. credit for pretrial detention;

k. the effect of good-time credits on the client's release date and how those credits are earned and calculated;

l. self-surrender to place of custody;

m. eligibility for correctional programs, work release and conditional leaves;

n. probation or suspension of sentence and permissible conditions of probation;

o. restitution, fines, assessments and court costs;

p. if applicable, parole or post-prison supervision eligibility, applicable ranges, and likely post-prison supervision conditions;

q. asset forfeiture;

r. collateral consequences of conviction, e.g. deportation, civil disabilities, and enhanced sentences for future convictions;

s. restrictions on, loss of, or other potential consequences affecting the client's driver's or professional license; and

t. possibility of later expungement and sealing of records.

2. In conducting negotiations, counsel should be familiar with the various types of admissions or pretrial dispositions that may be agreed to, including a plea of guilty, a plea of nolo contendere, a conditional plea of guilty, a plea in which the defendant is not required to personally acknowledge his or her guilt (Alford plea), and an admission to juvenile court jurisdiction.

3. The decision to enter an admission rests solely with the client and the client's decision must be knowing, voluntary and intelligent.

4. When the client enters an admission, counsel should make sure the full content and conditions of the admission agreement are placed on the record before the court.

5. If the client is in custody or may be taken into custody after entry of the admission, counsel should seek release pending formal disposition.

STANDARD 2.9 — Trial

Counsel should be prepared to provide quality representation and advocacy for the client at any court or jury trial.

Implementation

1. Preparation for Trial

   a. In an adult criminal case, counsel should discuss with the client the relevant strategic considerations of waiving a jury trial in favor of a bench trial or plea;

   b. Counsel should have the following materials available at the time of trial:

      i. copies of all relevant documents filed in the case;

      ii. relevant documents prepared by investigators;

      iii. voir dire questions;

      iv. outline or draft of opening statement;

      v. cross-examination plans for all possible prosecution witnesses;

      vi. direct examination plans for all prospective witnesses for the client;

      vii. copies of subpoenas;

      viii. prior statements of all the prosecution's witnesses (e.g., transcripts, police reports);

      ix. prior statements of all the client's witnesses;

      x. reports from experts;

xi. a list of exhibits, and the witnesses through whom they will be introduced;

xii. originals and copies of all documentary exhibits;

xiii. proposed jury instructions with supporting authority;

xiv. copies of all relevant statutes and cases;

xv. evidence codes and relevant statutes and/or compilations of evidence rules and criminal or juvenile law most likely to be relevant to the case;

xvi. outline or draft of closing arguments.

c. Counsel should decide whether to file a motion in limine to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the client) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.

d. Throughout the trial process, counsel should ensure all legal issues are preserved and an adequate record is made for appellate review. Counsel should assure that all proceedings are on the record.

e. Counsel should be prepared to make all appropriate evidentiary objections and offers of proof, and should vigorously contest the state's evidence through objections and cross-examination of state's witnesses.

f. Counsel should advise the client and the client's witnesses as to suitable courtroom dress, decorum, and demeanor, and should counsel the client and witnesses concerning timeliness and sobriety issues. If the client or the client's witness is incarcerated, counsel should ensure that the client or witness does not appear before the jury in jail clothing.

g. Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a court order to have the client available for conferences.

h. Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon disposition if there is a finding of guilt or in a juvenile proceeding that the youth is within the jurisdiction of the court.

2. Jury Selection in Adult Criminal Cases

a. Counsel should be familiar with the procedures by which a jury venire is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.

b. Counsel should develop voir dire questions in advance of trial.

c. Counsel should tailor voir dire questions to the specific case. Among the purposes voir dire questions should be designed to serve are the following:

i. to elicit information about the attitudes of individual jurors, which will inform counsel about peremptory challenges and challenges for cause;

ii. to convey to the panel certain legal principles which are critical to the case;

iii. to preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;

iv. to present the client and the client's case in a favorable light, without prematurely disclosing information about the case to the prosecutor; and

v. to establish a relationship with the jury.

d. Counsel should be familiar with the law concerning mandatory and discretionary voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.

e. Counsel should be familiar with the law concerning challenges for cause and peremptory challenges.

f. If the voir dire questions may elicit sensitive answers, counsel should request that questioning be conducted outside the presence of the remaining jurors.

g. In a group voir dire, counsel should avoid asking questions which may elicit responses which are likely to prejudice other prospective jurors.

h. Counsel should challenge for cause all persons about whom a legitimate argument can be made for actual prejudice or bias if it is likely to benefit the client.

3. Opening Statements

a. Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.

b. Counsel's objective in making an opening statement may include the following:

i. provide an overview of the defense case;

ii. identify the weaknesses of the prosecution's case;

iii. emphasize the prosecution's burden of proof;

iv. summarize the testimony of witnesses and their roles in relationship to the entire case;

v. describe the exhibits which will be introduced and the role of each in relationship to the entire case;

vi. clarify the juror's responsibilities; and

vii. state the ultimate inferences which counsel wishes the jury to draw.

c. Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.

d. Whenever the prosecution oversteps the bounds of a proper opening statement, counsel should object, request a mistrial, or seek cautionary instructions, unless tactical considerations weigh against any such objections or requests.

4. Proof

a. Counsel should anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.

b. Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.

c. In preparing for cross-examination, counsel should:

i. be prepared to question witnesses as to the existence of prior statements which they may have made or adopted;

ii. consider the need to integrate cross-examination, the theory of the defense and closing argument;

iii. consider whether cross-examination of each individual witness is likely to generate helpful information;

iv. anticipate those witnesses the prosecution might call in its case-in-chief and in rebuttal;

v. consider a cross-examination plan for each of the anticipated witnesses;

vi. be alert to inconsistencies or variations in a witness testimony;

vii. review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;

viii. review relevant statutes and local police regulations for possible use in cross-examining police witnesses;

ix. be alert to issues relating to witness credibility, including but not limited to background, bias and motive for testifying.

d. Counsel should be aware of the applicable law concerning competency of witnesses and admission of expert testimony in order to raise appropriate objections.

e. Before beginning cross-examination, counsel should ascertain whether the prosecution has provided copies of all prior statements. If counsel does not receive prior statements of prosecution witnesses until the prosecution has completed direct examination, counsel should, at a minimum, request adequate time to review these documents before commencing cross-examination.

f. At the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of acquittal on each count charged. Counsel should request, when necessary, that the court immediately rule on the motion in order that counsel may make an informed decision whether to present a defense.

g. Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case and instead relying on the prosecution's failure to meet its constitutional burden.

h. Counsel should discuss with the client all of the considerations relevant to the client's decision to testify.

I. Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

j. In preparing for presentation of a defense case, counsel should:

i. develop a plan for direct examination of each potential defense witness;

ii. determine the order of witnesses;

iii. consider the possible use of character witnesses; and

iv. consider the need for expert witnesses.

k. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecution.

l. Counsel should prepare all witnesses for direct and possible cross-examination. Counsel should also advise witnesses of suitable courtroom dress and demeanor.

m. Counsel should conduct redirect examination as appropriate.

n. At the close of the defense case, counsel should renew the motion for judgment of acquittal (or directed verdict) on each charged count.

5. Closing Argument

a. In developing closing argument, counsel should review the proceedings to determine:

i. what aspects can best be used in support of the defense, for example:

(a) weaknesses in the prosecution's case; and

(b) favorable inferences to be drawn from the evidence.

ii. what to incorporate into the argument, for example:

(a) helpful testimony from direct and cross-examinations;

(b) verbatim instructions drawn from the jury charge; and

(c) responses to anticipated prosecution arguments;

iii. what the possible effects of the defense arguments are on the prosecution's rebuttal argument.

b. Whenever the prosecution exceeds the scope of permissible argument, counsel should object, request a mistrial, or seek cautionary instructions unless tactical considerations suggest otherwise.

c. Where appropriate, counsel should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense.

d. Counsel should object to and argue against improper instructions proposed by the prosecution.

e. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record.

f. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

g. If the court proposes giving supplemental instructions to the jury, counsel should request that the judge state the proposed instructions to counsel before they are delivered to the jury and, if appropriate, take all steps necessary to preserve the record.

STANDARD 2.10 — Sentencing Or Disposition

Counsel should:

1. **be knowledgeable in disposition provisions and alternatives;**
2. **ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the disposition to be imposed;**
3. **ensure all reasonably available mitigating and favorable information is presented to the court.**
4. **in delinquency cases and in adult criminal cases as appropriate, be prepared to present a disposition plan on behalf of the client, as well as to respond to inaccurate or unfavorable information presented by other parties.**
5. **in delinquency cases, advocate for or develop dispositional resources that will aid the client in obtaining the least restrictive disposition, and obtain all appropriate orders to protect the youth's rights and interests.**

Implementation

1. Counsel should be fully aware, and make sure the client is fully aware of:

   a. sentencing guideline structure, if applicable, or the maximum, mandatory, minimum and likely sentence or disposition, including likely jail, detention or prison time, or training school commitment;

   b. the statutory and philosophical differences in juvenile court disposition and adult sentencing. The global focus of juvenile court dispositions include planning to meet the youth's educational, emotional and physical needs while protecting the public from future offenses;

   c. imprisonment or incarceration, including any mandatory minimum requirements and maximum terms;

   d. restitution, fines, unitary assessments and court costs;

   e. possible and likely sentence enhancements, and probation, parole, or post-prison supervision consequences;

f. asset forfeiture;

g. deferred sentences, conditional discharges, informal disposition, or conditional postponement and diversion agreements;

h. probation or suspension of sentence and permissible conditions of probation;

i. possibility of later expungement and sealing of records;

j. the possible and likely place and manner of confinement;

k. credit for pretrial detention;

l. the effect of good-time credits on the client's release date and how those credits are earned and calculated;

m. if applicable, parole or post-prison supervision eligibility and applicable release ranges;

n. self-surrender to place of custody;

o. likely post-prison or training school supervision conditions;

p. eligibility for correctional programs, work release and conditional leaves;

q. available drug rehabilitation programs, psychiatric treatment, and health care;

r. collateral consequences of conviction, e.g. deportation, civil disabilities, sex offender registration, DNA and AIDS testing, and enhanced sentences for future convictions;

s. restrictions on, loss of, or other potential consequences affecting the client's driver's or professional license;

t. the purpose of the interview for the Pre-Sentence Investigation (PSI) or the interview of the juvenile court counselor for disposition, including that the client's attitude may be a critical factor in obtaining a favorable recommendation for sentencing or disposition and that clients who appear cooperative, concerned, remorseful, and responsible will fare better;

u. the juvenile court's very broad discretion in ordering dispositions that may range from fines, restitutions, community service or unsupervised probation (bench probation), in which the youth is placed at home, to closely supervised probation at home, placement in a group home in the community, placement in a highly structured residential treatment program, placement in a staff secure or locked program, commitment to a locked psychiatric hospital, or commitment to a locked juvenile institution (training school).

2. Counsel should be familiar with the sentencing and dispositional hearing procedures, including:

a. effect that plea negotiations may have upon the sentencing discretion of the court;

b. procedural operation of any sentencing guideline system;

c. effect of a judicial recommendation against deportation;

d. access to the presentence or dispositional report by counsel, the client, and others;

e. availability of assessments such as psychiatric, psychological, educational or neurological evaluations to both the PSI investigator or juvenile court counselor and client's counsel in preparing sentencing or dispositional recommendations;

f. prosecution's practice in preparing sentencing or dispositional recommendations;

g. use of a sentencing or dispositional memorandum by counsel;

h. opportunity to challenge information presented to the court for sentencing or dispositional purposes;

i. availability of an evidentiary hearing to challenge information and the applicable rules of evidence and burdens of proof at such a hearing;

j. disposition alternatives available to the juvenile court and the various agencies that serve youth and families that can provide treatment, placement and other dispositional services that may be required, such as anger management counseling, individual therapy, and sex offender treatment;

k. that the youth's parents may be court ordered to participate in the youth's counseling or attend counseling or drug or alcohol treatment themselves, as well as being required to pay support for the youth while in out-of-home care or incarceration;

l. participation that victims and prosecution or client's witnesses may have in the sentencing or dispositional proceedings;

m. witnesses that may be called by counsel, such as family members, teachers, ministers or others who have worked with the client;

n. the admissibility of other evidence, such as letters of support, education or medical records, or evidence of participation in community or church activities.

3. Counsel should:

a. inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences thereof;

b. maintain regular contact with the client prior to the sentencing hearing and keep the client informed of the steps being taken in preparation for sentencing;

c. obtain from the client information such as the client's background and personal history, prior criminal record, employment history and skills, education, medical history and condition, financial status, and sources through which the information can be corroborated;

d. determine with the client whether to obtain an independent psychiatric, psychological, educational or neurological or other evaluation for sentencing or dispositional purposes;

e. if the client is being evaluated, whether by the state or at counsel's request, counsel should call or write the evaluator in advance to provide favorable background information for the evaluator's use and to request that the evaluator address the client's emotional, educational and other needs as well as alternative dispositions that will best meet those needs and society's needs for protection;

f. ensure that the client who is being evaluated understands the process, is not frightened, and is encouraged to cooperate;

g. prepare the client to be interviewed for a presentence or dispositional report;

h. inform the client of the client's right to address the court at sentencing or disposition and inform the client of the possible consequences that admission of guilt may have upon an appeal, retrial or trial on other offenses;

i. ensure that the client has adequate time to examine the presentence report or dispositional report;

j. inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;

k. collect documents and affidavits to support the client's position, prepare witnesses to testify at the sentencing or disposition and request the opportunity to present tangible and testimonial evidence.

4. Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or dispositional report. In addition, counsel should:

a. provide to the official preparing the report relevant information favorable to the client, including the client's version of the offense;

b. take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;

c. request permission to see copies of the report prior to transmittal to the court to be sure that the information challenged has actually been removed from the report.

5. Counsel should determine whether the prosecution will advocate that a particular type or length of sentence or disposition be imposed.

6. If a written sentencing or disposition memorandum is submitted by the prosecution, counsel should verify that the information presented is accurate; if the memorandum contains erroneous or misleading information, counsel should take appropriate steps to correct the information unless there is a sound strategic reason for not doing so.

7. When the court has found evidence sufficient to support jurisdiction in a delinquency case, counsel should, when appropriate, ask the court not to exercise jurisdiction and move to dismiss the petition on the ground that jurisdiction is not in the best interests of the youth or society.

8. Counsel should prepare and present to the court a sentencing or disposition memorandum where there is a strategic reason for doing so.

9. Counsel should be prepared at the sentencing or disposition proceeding to take the steps necessary to advocate fully for the requested sentencing or disposition and to protect the client's interest.

10. Counsel in delinquency cases should be prepared to present evidence on the reasonableness or unreasonableness of OVA or SOSCF's efforts and alternative efforts that could have been made, and where appropriate request a "no reasonable efforts" finding by the court.

11. In the event facts will be disputed at sentencing or disposition, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the defendant, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.

12. Where information favorable to the client will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses.

13. Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, permission for the client to surrender directly to the place of confinement, credit for time served, good time credits, and against the deportation of the defendant.

14. Where appropriate, counsel should prepare the client to personally address the court.

STANDARD 2.11 — Post-disposition Procedures

Counsel should be familiar with the procedures available to the client after disposition.

Implementation

1. Counsel should be familiar with the procedures to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.

2. Counsel should inform the client of his or her right to appeal the judgment and/or the sentence or disposition of the court and the action that must be taken to perfect an appeal. In circumstances where the client wants to file an appeal but is unable to do so without the assistance of

counsel, the attorney should file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the client's right to appeal.

3. Where a client indicates a desire to appeal the judgment and/or sentence or disposition of the court, counsel should inform the client of any right that may exist to be released pending the disposition of the appeal.

4. Where a custodial sentence has been imposed, counsel should consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement.

5. Counsel should inform the client of procedures available for requesting a discretionary review of or reduction in the sentence imposed by the trial court, including any time limitations that apply to such a request.

6. Counsel should inform the client of any procedures available for requesting that the record of conviction be expunged or sealed.

Performance Standards
Chapter 3

Specific Standards For Representation In *Juvenile Dependency* Cases

This Chapter pertains to representation of children and parents in juvenile dependency cases. These cases are primarily civil in nature and procedure, but are often referred to as "quasi-criminal" because of the significance of the rights and deprivations involved. At stake for children is their liberty, their right to membership in their family of origin and their right to be safe, healthy and protected. At stake for parents is their right to raise their children as they think best without state interference, and ultimately, the absolute and final termination of their parental rights.

Practice in juvenile dependency cases is unique and challenging, requiring continual training to assure the best legal representation of clients. Juvenile dependency cases may be as different and varied as the children and families involved in them. These training and practice standards are intended to help attorneys better meet the needs of their clients in juvenile dependency cases, and to improve the level of practice in these cases. The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings. These Standards recognize the importance of independent representation for children in juvenile dependency cases, and advocate for counsel to represent the child's articulated position in all but the exceptional case.

STANDARD 3.1 — Prerequisites For Representation

Counsel should be proficient in applicable substantive and procedural juvenile law and should have appropriate experience, skill and training for the type of representation required.

Implementation

1. Every dependency case is different and varied approaches may be required in the legal representation of a child or parent. Effective legal practice in dependency cases requires a wide variety of skills unique to this practice.
2. In addition to meeting the requirements for experience and training contained in Standard 1.1, *supra*, counsel for children, parents or guardians in dependency cases should:
   a. meet the requirements of the QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT INDIGENT PERSONS AT STATE EXPENSE, Oregon Judicial Department (1990), Standard 3.1 G, which provides, *inter alia*, that an attorney is qualified for appointment to juvenile cases, under ORS Chapter 419, if he or she:
      i. For all cases, has knowledge of juvenile justice statutes, case law, standards, and procedures; has observed at least one contested juvenile court case; is generally familiar with services available to children and parents in the juvenile system; and has reviewed and is familiar with the following materials:

         1) *Oregon Revised Statutes*, Chapter 419, Oregon Juvenile Code.

2) *Oregon Revised Statutes*, Chapter 417, Interstate Compact on Juveniles and the Community Juvenile Services Act.

3) *Oregon Revised Statutes*, Chapter 418, Child Welfare Services and Reporting of Child Abuse.

4) *Oregon Revised Statutes*, Chapter 420, Juvenile Training Schools and Youth Care Centers.

5) Oregon State Bar, *Juvenile Law* (1984, Supp. 1988).

6) Pub. L. 96-272, Adoption Assistance and Child Welfare Act of 1980.

7) Pub. L. 95-608, Indian Child Welfare Act of 1978, 25 USC secs. 1901-1963 (1982).

8) Education of the Handicapped Act of 1975, 20 USC secs. 1400-1485 (1982, Supp. 1987).

9) Pub. L. 93-112, Title V, sec 504, Rehabilitation Act of 1975, 20 USC sec. 794 (1982).

b. be familiar with:

i. the causes and available treatment for child abuse and neglect;

ii. the child welfare and family preservation services available through State Offices for Services to Children and Families (formerly Children's Services Division (CSD) referred to hereinafter as SOSCF) and available in the community and the problems they are designed to address;

iii. the basic structure and functioning of SOSCF and the juvenile court, including court procedures, the functioning of the Citizen Review Boards (hereinafter referred to as CRB) and Court Appointed Special Advocates (hereinafter referred to as CASA) programs.

c. Counsel new to dependency cases are encouraged to work with a mentor for the first three months and at a minimum should observe or co-counsel each type of dependency hearing from shelter care through review of permanent plan prior to accepting appointments.

d. In termination of parental rights cases, counsel for children or parents must meet the standards for dependency cases and have handled dependency cases for a minimum of six months as a full-time juvenile defender or must have handled at least 25 juvenile dependency cases that have gone past the jurisdictional phase.

3. Counsel should develop a basic knowledge of child development and adequate communication skills to communicate with child clients and witnesses.

a. Interviewing techniques should be age appropriate and take into consideration the type of abuse the child is alleged to have suffered.

b. Communicating with a child client, especially with regard to legal matters, may require efforts beyond those normally required for effective communications with adult clients. Counsel for children should therefore be especially sensitive to the child's stage of development, including:

i. cognitive, emotional and social growth stages;

ii. level of education;

iii. cultural context; and

iv. degree of language acquisition.

c. Knowledge of the basic stages of child development will help counsel develop sensitivity and age-appropriate communication skills.

d. As with any client, counsel may advise the child client about their position in the case, but counsel should recognize that the child

client may be more susceptible to intimidation and manipulation, and should ensure that the client's ultimate decision actually reflects the child's actual desires.

4. Counsel for children, parents or guardians in dependency cases should also visit at least two of the following:
   a. a shelter home or facility;
   b. a foster home;
   c. a group home;
   d. a residential treatment facility;
   e. the Oregon State Hospital Child or Adolescent Psychiatric Ward; or
   f.an outpatient treatment facility for children.
5. All attorneys representing children, parents or guardians in dependency cases should average at least 15 hours of Continuing Legal Education (CLE) each year, at least 8 hours of which should relate to the practice of juvenile law.
   a. Counsel are encouraged to seek training in the subject areas listed in Implementation 2, 3 and 4 *supra*.
   b. Counsel are also encouraged to seek training in the following areas:
      i. substance abuse and resources for substance abusing families;
      ii. cultural and ethnic differences as they relate to child rearing;
      iii. government benefits available in dependency cases, such as Social Security payments including non-needy relative grants, AFDC and AFDC-FC, Adoption Assistance Programs, and crime victims programs;
      iv. Independent Living Programs;
      v. emancipation laws and programs;
      vi. Family Preservation Services;
      vii. resources for the diagnosis and treatment of sexual abuse, physical abuse, and emotional abuse;
      viii. patterns of child growth as related to neglect;
      ix. resources for the treatment and recognition of non-organic failure to thrive;
      x. Educational, mental health and other resources for special needs children;
      xi. the use and appropriateness of psychotropic drugs for children;
      xii. domestic violence, its effect on children and appropriate resources;
      xiii. immigration law issues in juvenile court;
      xiv. transitional aspects of placement and the child's return home;
      xv. the importance of placing siblings together when appropriate;
      xvi. the appropriateness of various types of placement;
      xvii. the efforts that should be made to ensure a smooth, timely transition;
      xviii. the effect of the placement on visitation by parents, siblings and other relatives;
      xix. the effect of the placement on the service needs of the child;
      xx. the transracial, transcultural and language aspects of the placement;
      xxi. risk assessment prior to reunification;
      xxii. the basics of case planning;
      xxiii. accessing private insurance for services;
      xxiv. consolidated cases in the family court;
      xxv. the Indian Child Welfare Act, Native American families and appropriate resources;
      xxvi. the Uniform Child Custody Jurisdiction Act (UCCJA);

xxvii. the Parental Kidnapping Protection Act;

xxviii. the Interstate Compact for the Placement of Children;

xxvix. the Interstate Compact on Juveniles;

xxx. guardianships;

xxxi. adoption placement preferences.

STANDARD 3.2 — General Duties And Responsibilities Of Counsel To Client; Avoiding Conflict Of Interests

Counsel or counsel associated in practice should not represent two or more clients who are parties to the same or consolidated juvenile dependency cases unless it is clear there is no conflict of interest between the parties. Counsel should act in a professional manner in zealously advocating the client's position.

Implementation

1. Counsel should comply with Standard 1.2, Implementation 5, *supra*. Counsel should be especially cautious when accepting representation of more than one parent, guardian or child. Counsel should avoid representing both parents in dependency cases and should never represent both parents in cases that involve allegations of sexual, physical or emotional abuse, or when the interests of the parents may be adverse. Counsel should avoid representing multiple siblings when their interests may be adverse and should never represent siblings where it is alleged that one sibling has physically or sexually abused another sibling. Child clients may not be capable of consenting to multiple representation even after full disclosure.
2. Counsel should preserve the attorney-client privilege and not disclose, without the client's permission or as otherwise provided by law, confidential information. Counsel should try to avoid publicity connected with the case. Counsel should be cognizant of the emotional nature of these cases, the confidential nature of the proceedings and the privacy needs of the client.
3. Counsel should initiate and answer all correspondence and telephone calls which are necessary to the effective representation of the client.
4. Counsel should avoid ex parte communication regarding pending cases with the judicial officer before whom the case is pending.
5. Counsel should maintain professional decorum when appearing before the juvenile court. Counsel should identify for the record any person who is present in the courtroom on behalf of a client.
6. Counsel may not contact represented parties without the consent of their counsel.

STANDARD 3.3 — Role Of Counsel

It is the duty of counsel to determine whether a child client is capable of considered judgment. If counsel determines that the child is not capable of considered judgment, counsel should advocate what is in the client's best interests.

When representing parents and children capable of considered judgment, counsel should seek the lawful objectives of the client and should not substitute counsel's judgment in those case decisions that are the responsibility of the client.

Implementation

1. In determining whether a child is capable of considered judgment, counsel should consider:
   a. the child's chronological and intellectual age;
   b. the child's developmental stage;
   c. the child's sophistication and experience;
   d. whether the child is articulating a position concerning the issues of the case; and
   e. the presence of undue influence.
2. Whether a child is capable of considered judgment and able to contribute to a determination of their position in the case depends on the

context and circumstances at the time the position must be determined. A child may be able to determine some positions in the case but not others.

3. Ideally, a guardian ad litem should be appointed in every case in which the child is incapable of considered judgment. These standards suggest, but do not require such appointments because of the expense associated with such appointments and the long-term practice in Oregon courts of not appointing guardians ad litem in juvenile court cases.

   a. Where a guardian ad litem has been appointed, primary responsibility for determination of the posture of the case rests with the guardian ad litem and the child.

   b. Where a guardian ad litem has not been appointed, counsel should consider asking that one be appointed and consideration should be given to appointment of an appropriately trained CASA or other qualified volunteer as guardian ad litem.

4. When representing parents and children capable of considered judgment, decisions that are ultimately the client's to make include whether to:

   a. admit the allegations of the petition;

   b. agree to jurisdiction, wardship and temporary commitment to SOSCF;

   c. accept a conditional postponement; or

   d. agree to specific services or placements.

5. Counsel should advise the client concerning the probable success and consequences of adopting any posture in the proceedings. It is the duty of counsel to give the client the information necessary to make an informed decision, including advice and guidance, but to not overbear the will of the client. Counsel may not advocate a position contrary to the client's expressed position.

6. When representing parents and children capable of considered judgment, counsel is bound by and should advocate for the client's definition of his or her interests, and may not substitute counsel's judgment for the client's, nor ignore the client's wishes because they are perceived not to be in the best interests of the child.

7. If the client is not capable of considered judgment and a guardian ad litem has not been appointed, counsel should inquire thoroughly into all circumstances that a careful and competent person in the child's position should consider in determining the child's best interests with respect to the proceeding. After consultation with the child, the parents (where their interests do not appear to conflict with the child's), and any other family members or interested persons, such as the caseworker or child's therapist, counsel shall advocate what counsel determines to be the best interests of the child.

8. Where there is a conflict between what counsel has determined would be in the best interests of a child who is not capable of considered judgment, and the child's stated desires, counsel must to the greatest extent possible resolve the conflict by working with the young client, although this sensitive issue cannot always be avoided or completely resolved. If unable to resolve the conflict, counsel should communicate the child's wishes to the court but advocate for what counsel determines to be the best interests of the child.

9. Unless inconsistent with the client's interests, counsel should cooperate with other parties to the case.

STANDARD 3.4 — Obligations Of Counsel Regarding Pre-trial Placement

When a child has been removed from the parent's home and placed in shelter care, counsel should advocate for the placement order and other temporary orders the client desires, unless the client is a child incapable of considered judgment, in which case, counsel should advocate for the placement order and other temporary orders that are in the best interests of the child.

Implementation

1. Counsel should be familiar with statutory and case law that requires SOSCF to make reasonable efforts to prevent removal of a child and that removal is only allowed in cases of imminent danger.
2. Counsel should be familiar with the types of placements available to children and placement issues including:
   a. the necessity of placement;
   b. alternatives to placement;
   c. relative placement;
   d. the impact of removal and placement on the child;
   e. the importance of placing sibling together when appropriate;
   f. the appropriateness of the placement;
   g. efforts that can be made to ensure a smooth transition to a new placement;
   h. the effect of the placement on visitation;
   i. the effect of the placement on service needs of the child or family; and
   j. the transracial, transcultural and language aspects of the placement.
3. At the shelter care hearing, counsel should:
   a. obtain copies of all relevant documents;
   b. take time to talk to the client, asking for a recess or continuance if necessary;
   c. assist the client in exercising his or her right to an evidentiary hearing to demonstrate to the court that the child can be returned home without further danger of suffering physical injury or emotional harm, endangering or harming others, or not remaining within the reach of the court process prior to adjudication;
   d. where appropriate, present facts and arguments regarding:
      i. jurisdictional sufficiency of the petition;
      ii. adequacy of notice provided to parties, particularly if they are not present;
      iii. the necessity of shelter care;
      iv. why continuation of the child in the home would be contrary to the child's welfare or why it is in the best interest and for the welfare of the child that the child be removed from home or continued in care;
      v. whether reasonable efforts were made to prevent removal;
      vi. whether reasonable and available services can prevent or eliminate the need to separate the family;
      vii. whether the placement proposed by SOSCF is the least disruptive and most family-like setting that meets the needs of the child;
      viii. the possibility of placement with appropriate non-custodial parents and relatives;
      ix. a plan for release of the child prior to the jurisdictional hearing;
      x. if the child remains in shelter care, arrangements for visits and alternatives to shelter care to be explored such as relative placement, intensive in-home services and mediation.
   e. propose return to parents or placement that is the least restrictive with regard to the client.
4. If a child is returned to parents or placed in shelter care or other state placement, counsel for the child should assure that the child's needs for safety and right to receive treatment are met by the child's caretakers or agencies responsible for the child's care. Counsel should inform the Court, SOSCF and the caretakers for the child about any medical, psychiatric, or security needs of the client.

5. Counsel should request any temporary orders which the client desires or, if representing a child not capable of considered judgment, which are in the best interests of the child, including:
   a. temporary restraining orders including orders expelling an allegedly abusive parent from the home;
   b. orders governing future conduct of the parties, i.e. remaining clean and sober while the child is present, etc.;
   c. orders for any services agreed upon prior to adjudication;
   d. visitation orders that are reasonable and flexible and take into consideration the parties' work and counseling schedules and available transportation and that specify the terms and conditions of visitation;
   e. orders for the parent(s) to pay child support if appropriate;
   f. orders for SOSCF to investigate relatives and friends of the family as potential placements, or to place sibling groups together; and
   g. Orders for the agency to provide appropriate treatment for the child.
6. Counsel should inform the client of the possibility for rehearing of the shelter care order or appeal from a shelter care order of a referee to a judge and the possibility of pursuing a *writ of habeas corpus.*
7. If the court sets conditions of the child's placement, counsel should explain to the client and any third party the conditions and potential consequences of violating such conditions. Counsel should seek review of shelter care decisions every ten days or as appropriate and advise clients or any third parties of changes in conditions for pre-trial placement that would be likely to get the Court to agree with the client's plan.
8. Counsel should ask the court to inquire of parties concerning the paternity of the child and the applicability of the Indian Child Welfare Act (ICWA) or the Uniform Child Custody Jurisdiction Act (UCCJA).

STANDARD 3.5 — Initial Client Interview And Client Contact

Establishing and maintaining a relationship with the client is the foundation of the attorney-client relationship. Counsel should conduct an initial interview of the client within 72 hours and maintain regular contact with the client throughout the case.

Implementation

1. Counsel should comply with Standard 1.2, Implementations 1, 2 and 3, and Standard 1.3, *supra,* and in addition, upon being retained or appointed, counsel should make an initial contact with the client or the client's caretaker within 24 hours and, where appropriate conduct an initial interview within 72 hours. At the initial interview, counsel should explain to the client in age appropriate language:
   a. juvenile court and SOSCF procedures;
   b. the client's rights;
   c. the role and responsibilities of the attorney;
   d. the role of each player in the system;
   e. alternatives and options available to the client;
   f. the consequences of selecting one option over another.
2. Counsel should give the client time to ask questions and consider the alternatives. Counsel should obtain information from the client about:
   a. the client's prior contacts with SOSCF;
   b. the client's knowledge about the allegations of the petition;
   c. the accuracy of information provided by the state supporting the petition;
   d. alternative or additional allegations that should be added to the petition;

e. services provided prior to removal or intervention;

f. reasons for removal or intervention;

g. services the client feels would have avoided the need for removal;

h. alternatives to removal including relative placements, in-home services or removal of the perpetrator;

i. current efforts to reunify the family;

j. family history including identity of prior caretakers of the child;

k. services needed by the child, parents or guardians;

l. the client's concerns about placement;

m. the client's long and short-term goals;

n. current visitation and the client's desires concerning visitation;

o. whether the client wishes to attend the hearing and if the client is a child, whether the client wishes to address the court outside the presence of the other parties;

p. the applicability of the Indian Child Welfare Act and relevant other cultural, religious, social and sexual preference issues; and

q. any other relevant information.

3. Counsel representing a child should gather information from the child and the child's caretakers, caseworker and therapist, if any, to assist in determining whether the child is capable of considered judgment.

4. All child clients should, at a minimum, be personally contacted by counsel and/or counsel's trained and qualified staff to determine the client's wishes, if possible, and to assess the client's well-being. It is important for counsel or counsel's staff to observe the child, the child's interactions with others in the home or foster home, and to assess the severity of the injuries and the child's general health and condition. Children four years of age or old enough to communicate should be personally interviewed in private by counsel. Interviews of children should occur away from court.

5. Counsel should have contact with clients:

   a. prior to court hearings and CRB reviews;

   b. whenever notified that the child's placement is changed; or

   c. when counsel is apprised of emergencies or significant events impacting the child.

6. For younger children, counsel, personally or through their staff, are encouraged to have regular face-to-face contact with the client in the child's home or foster home every three months or as needed. Older children should be contacted by phone, in their homes, at school or at the attorney's office with a similar frequency.

7. Counsel should confer with their clients as often as necessary after the initial interview to ascertain all relevant facts and otherwise necessary information. After counsel is fully informed on the facts and the law, counsel should advise the client concerning all aspects of the case.

STANDARD 3.6 — Independent Investigation

Counsel should conduct a thorough, continuing and independent review and investigation of the case, including obtaining information, research and discovery in order to prepare the case for trial. Counsel should not rely solely on the report of the caseworker.

Implementation

1. Counsel should, where appropriate, conduct an in-depth interview with the client covering:

   a. the events giving rise to the allegations in the petition;

   b. the existence of witnesses or other potential sources of information; and

   c. information about the child's current placement, condition and needs.

2. Counsel should be familiar with, and where appropriate, obtain the assistance of, local juvenile and mental health experts who can provide attorneys with consultation, evaluation of their clients or other parties, including parent-child interaction assessments, and testimony on issues in the case.

3. Counsel should have potential witnesses, including adverse witnesses interviewed, and where appropriate subpoenaed by an investigator or other appropriately trained person. If counsel conducts a witness interview, counsel should do so in the presence of a third person who can be available to appear as a witness at trial. Potential witnesses may include:

   a. school personnel;

   b. neighbors;

   c. relatives;

   d. caseworkers;

   e. foster parents and other caretakers;

   f. mental health professionals;

   g. physicians; and

   h. law enforcement personnel.

4. Counsel should confer with the attorneys for the other parties, and request permission to interview their clients with them present. When possible, counsel should interview parents and children in their home. Where appropriate, counsel or counsel's trained and qualified staff should observe visitations between parent and child.

5. When necessary, counsel should conduct or participate in depositions of witnesses.

6. Counsel should obtain information from representatives of other agencies with whom the family has been involved, either through SOSCF referral or on the family's own initiative, such as:

   a. Community Health Nurses;

   b. school personnel;

   c. homemaker services;

   d. family counselors;

   e. parenting instructors;

   f. drug or alcohol counselors;

   g. neighbors;

   h. ministers, priests, church members, etc.;

   i. baby-sitters; and

   j. other persons who have had significant contact with the child or family and may have relevant information.

7. Counsel should comply with discovery statutes and use the same to obtain names and addresses of witnesses, witness statements, results of evaluations or other information relevant to the case. Counsel should obtain and examine all available discovery and other relevant information, including:

   a. the petition and juvenile court legal and social files;

   b. information that is obtained through requests for discovery;

   c. information from the SOSCF caseworker and from reviewing agency records for information about:

      i. services provided by the agency in the past;

      ii. visitation arrangements;

      iii. the plan for reunification; and

      v. current and planned services.

8. Counsel should obtain records concerning the family from other relevant sources such as:

   a. schools;

   b. hospitals and other medical records sources;

   c. law enforcement agencies;

   d. treatment agencies, including mental health and drug and alcohol treatment agencies; and

e. psychiatrists, psychologists, therapists and counselors.

9. Where the client's participation in psychiatric, medical or other diagnostic or treatment program is significant in obtaining the client's desired result, counsel should so advise client.

10. Counsel should research and review relevant statutes and case law to identify defenses and legal arguments to support the client's case.

STANDARD 3.7 — Pretrial Motions

Counsel should research, prepare, file and argue appropriate pretrial motions or responses whenever there is reason to believe the client is entitled to relief. Counsel should file briefs or memoranda in support of such motions or responses.

Implementation

1. Counsel should make appropriate pretrial motions including:

   a. discovery motions;

   b. motions for medical, psychological or psychiatric evaluation, parent-child interaction, developmental or neurological assessment;

   c. motions challenging the constitutionality of statutes and practices;

   d. motions to strike, dismiss or amend the petition;

   e. motions for interpreters;

   f. evidentiary motions and motions in limine; and

   g. motions to consolidate.

3. Counsel should seek protective orders, make appropriate motions in limine and other evidentiary motions.

4. Counsel should make motions to meet the client's needs pending trial, including:

   a. restraining orders;

   b. orders for family reunification services;

   c. orders for medical or mental health treatment;

   d. orders for change of placement;

   e. motions to increase, decrease or limit parental or sibling visitation;

   f. motions seeking child support; and

   g. motions seeking contempt for violations of court orders.

STANDARD 3.8 — Negotiating A Settlement

Counsel should participate in settlement negotiations to seek expeditious resolution of the case and to obtain petition and disposition terms favorable to the client.

Implementation

1. If the attorney concludes, after sufficient investigation, that the petition will probably be sustained, the attorney should so advise the client and request consent to discuss settlement of case. Counsel should seek petition terms that cast the client in the most favorable light.

2. Counsel should fully explain to the client the rights that would be waived by a decision to admit to jurisdiction, and keep the client fully informed of settlement negotiations. Counsel must convey to the client any offers made for settlement and the advantages and disadvantages of accepting the offers. Counsel may not accept any settlement without the client's authorization.

3. Counsel should be familiar with available mediation services and should consider whether the client's interests could best be served and whether the case could be more appropriately resolved by mediation or other settlement meetings.

4. Counsel should explain to the client the conditions and limits of the settlement, and the effect of the settlement on future actions such as criminal actions or termination of parental rights petitions.

STANDARD 3.9 — Hearings

Counsel should be prepared before and during hearings to provide quality representation and advocacy for the client.

Implementation

1. In most circumstances, counsel should have the client present at significant court hearings and reviews. However, in determining whether to have a child present at a hearing or review, counsel should carefully consider the impact of the hearing on the child. If a parent or child over twelve years of age is waiving their appearance, counsel should have them execute a written waiver. Counsel should prepare the client for their role in the hearing or review.
2. A decision to exclude a young child from a hearing or review is appropriate if the child does not want to attend, is too young to sit through the hearing, would be significantly traumatized by such attendance, or for other good reasons. Concerns about the child being exposed to some of the testimony can be addressed by having the child temporarily excluded from the courtroom.
3. Counsel should avoid unnecessarily requiring young children to testify in dependency adjudication, review or termination of parental rights hearings. If testimony is necessary, counsel should, where appropriate, agree to steps to reduce the trauma to the child, such as having the child testify in chambers.
4. In determining whether to have the child testify, the child's counsel should consider:
    a. the child's need or desire to testify;
    b. any likely repercussions of testifying;
    c. whether the child is likely to be found competent to testify;
    d. the necessity of the child's direct testimony;
    e. the availability of other evidence which may substitute for the child's testimony; and
    f. the child's developmental ability to testify and withstand cross-examination.
5. If the child is capable of considered judgment, counsel is bound by the client's decision concerning testifying.
6. Counsel should be familiar with current law and empirical knowledge about children's competency, memory and suggestibility as they relate to the child's competence to testify or the reliability of testimony or out-of-court statements.
7. Counsel for the child should prepare the child to testify including:
    a. familiarizing the child with the courtroom and court procedures;
    b. advising the child what to expect during direct and cross-examination;
    c. ensuring that testifying will cause minimum harm to the child by:
        i. seeking modification in the location of the testimony;
        ii. limiting who will be present;
        iii. restricting the manner and phrasing of questions posed to the child; and
        iv. objecting to questions to the child that are not phrased in a syntactically and linguistically appropriate manner.
8. At the hearing counsel should be fully prepared by:
    a. having all relevant materials available at the trial, including all pleadings, discovery and investigative reports, as well as, relevant statutes, caselaw, and the evidence code;
    b. having marshaled facts and legal arguments to prove or disprove the allegations of the petition, assuring that there is factual support for each service element being sought.
    c. having a draft or outline of:
        i. opening and closing statements;

ii. direct and cross-examination plans for all witnesses;

iii. amendments to the petition to be requested to conform the petition to the findings; and

iv. findings of fact and conclusions of law to be requested at the conclusion of the hearing.

9. Counsel should make appropriate motions, present and cross examine witnesses, offer exhibits, and provide independent evidence as necessary. During all hearings counsel should preserve legal issues for appeal, as appropriate.

STANDARD 3.10 — Disposition

Counsel should be prepared to present a disposition plan on behalf of the client, as well as to respond to inaccurate or unfavorable information presented by other parties, ensuring that all reasonably available mitigating and favorable information is presented to the court and obtaining all appropriate orders to protect the client's rights and interests.

Implementation

1. Counsel should be prepared to participate fully in the dispositional hearing, which sets a course for the future of the case that will either result in reunification of the family or a severance of family ties. The attorney should counsel the client concerning the disposition prior to the hearing, including, explaining to the client the nature of the hearing, the issues involved, and the alternatives open to the court. Counsel should also explain fully the nature, obligations and consequences of any proposed dispositional plan.

2. Counsel should investigate all sources of evidence that will be presented at the hearing and interview material witnesses. Counsel also has an independent duty to investigate the client's circumstances, including such factors as previous history, family relations, economic condition and any other information relevant to disposition.

3. When the court has found evidence sufficient to support jurisdiction, counsel should, when appropriate, ask the court not to exercise jurisdiction and move to dismiss the petition on the ground that jurisdiction is not in the best interests of the child because the child and family do not require supervision, treatment or placement.

4. Counsel should advocate the least restrictive disposition possible which can be supported and is consistent with the client's needs and desires. Although a child's position may overlap with the position of one or both parents, third-party caretakers, or SOSCF, the child's counsel should be prepared to participate fully in any proceedings and not merely defer to the other parties. Any identity of position should be based on the merits of the position, and not be a mere endorsement of another party's position.

5. Counsel for the child should ensure that the court recognizes the need to speedily promote permanency for the child.

6. Counsel should, where appropriate, examine fully any witness whose evidence is damaging to the client's interests and challenge the accuracy, credibility and weight of any reports or other evidence before the court.

7. Counsel should be prepared to present a disposition plan that will achieve the client's desired ends. Counsel should be familiar with the dispositional alternatives available to the court and the various agencies that serve children and families that can provide placements, treatment, and other dispositional services and should fully discuss dispositional options, consequences and procedures with the client.

8. Counsel should secure the assistance of psychiatric, psychological, medical or other experts needed for purposes of evaluation, consultation or testimony about the dispositional plan. Counsel should obtain reports or subpoena evaluators or other expert witnesses to testify. Counsel

should prepare the client for any evaluation by explaining the nature of the procedure and encouraging the client's cooperation.

9. Counsel should obtain the written Reports of the Juvenile Department, SOSCF, and the CASA sufficiently in advance of the dispositional hearing to prepare a response. Counsel should consider submitting a written dispositional report on behalf of the client to set out the client's plan and to counter information provided in other reports received by the court.

10. At the hearing, counsel should, where appropriate:

    a. request orders that benefit the client;

    b. be prepared to present evidence on the reasonableness or unreasonableness of SOSCF's efforts and alternative efforts that could have been made;

    c. request that a "no reasonable efforts" finding be made by the Court;

    d. request an order specifying what future services will make the changes in the family needed to correct the problems necessitating intervention and constituting "reasonable efforts" by SOSCF;

    e. request orders for services or service agreements that include:

        i. family preservation services;

        ii. medical and mental health care;

        iii. drug and alcohol treatment;

        iv. parenting education;

        v. housing;

        vi. recreational or social services;

        vii. domestic violence counseling;

        viii. anger management counseling;

        ix. independent living services; and

        x. other individualized services.

11. Counsel should assure that the order includes a description of actions to be taken by parents to correct the identified problems. Counsel should request that the Court include in its order a timetable for accomplishing the changes required. Counsel should, where appropriate, seek Court approval of a written service agreement prepared by Counsel or SOSCF.

12. Counsel should also request specific visitation orders covering visitation between child and parent, between siblings and between the child and other significant persons.

13. Counsel should, where appropriate, request that the Court appoint counsel, a Court Appointed Special Advocate (CASA) or an educational advocate (Surrogate Parent) for the child. Where appropriate counsel should seek child support orders.

14. Counsel should seek to ensure continued representation of the client at all further hearings and reviews. Counsel should request that the Court set the next date for the case to be reviewed.

15. Counsel should assure that the client is informed of and understands the nature, obligations and consequences of the dispositional decision, and the need for the client to cooperate with the dispositional orders. Counsel should also explain the client's rights and possibilities of post-trial motions to reconsider, set aside, modify or review the disposition, as well as the right to appeal. Counsel should explain the consequences of violating the dispositional order and the continuing jurisdiction of the court.

STANDARD 3.11 — Post-disposition

The lawyer's responsibility to the client does not end with dismissal of the petition or entry of a final dispositional order. Counsel should be prepared to counsel the client and provide or assist the client to secure appropriate legal services in matters arising from the original proceeding.

1. Counsel should counsel the client and file any post-disposition motion or appeal that is needed.

2. Counsel should review the court's order to insure that it conforms with the findings and disposition.

3. Counsel should file, litigate or respond to any motions to reconsider, set aside, or modify the jurisdictional finding or disposition, as well as any appeals of referees' orders. Counsel should, as directed by the client, also file notice of appeal and either provide representation on appeal or assist the client in referral to other appellate counsel. Counsel should participate in an appeal filed by another party or assist the client in referral to other appellate counsel.

4. Counsel should monitor implementation of the caseplan and progress in the case, requesting additional services, seeking review or other relief, such as contempt, as appropriate. Counsel should be familiar with the procedures available to the client after disposition.

5. Counsel should monitor the case plan for implementation and maintain contact with both the client and the agency or institution involved in the disposition plan in order to ensure that the client's rights are respected and where necessary, to counsel the client concerning the dispositional plan.

6. Counsel should confer periodically with their client and the caseworker to review the service plan and service agreement, the extent of compliance with the plan by both the agency and the client, and the continued appropriateness of the plan. Where needed, counsel should request additional services for the client or family.

7. In monitoring the provision of dispositional services, counsel should request a review or permanent planning hearing if necessary to protect the client's interests. Counsel should investigate and prepare for review or permanent planning hearings as for adjudicatory hearings to the extent that is necessary. *See* Standards 3.6 and 3.9, *supra*.

8. Counsel for the child should file a petition for termination of parental rights when necessary or advocate for the district attorney or attorney general to do so.

9. When the representation ends, counsel should explain why the representation is ending and how the client can obtain assistance in the future should it become necessary.

STANDARD 3.12 — Review Permanent Planning And Termination Of Parental Rights Hearings

Counsel's role is most critical at the review, permanent planning and termination of parental rights hearings, where decisions of whether the family will be reunited or permanently severed are made. Counsel should be fully prepared to represent the client at all reviews and must provide the most zealous and meticulous representation at the termination of parental rights stage of the proceedings.

Implementation

1. State and federal law requires that review hearings or CRB reviews occur at regular intervals. Clients are also entitled to request reviews, to assist them in moving the case along or addressing problems with the caseworker or caseplan. Counsel should seek a review to request return of the child when any event happens that may significantly affect the need for continued placement. Counsel should also request a review when court intervention is necessary to resolve a dispute over such matters as visitation, placement or services.

2. Whether a review is periodic or at the request of one of the parties, counsel should conduct appropriate investigation to prepare for the review, which may include:

   a. reviewing the SOSCF file and the report prepared for the review and obtaining all relevant discovery;

   b. interviewing the caseworker to determine his or her assessment of the case, the caseplan, the child's placement and progress, and the parent's cooperation and progress;

c. contacting other agencies and professionals who are providing services to the child or parents;

d. interviewing other potential witness, which may include relatives, neighbors, school personnel and foster parents;

e. seeking evaluation of the client or other parties; and

f. subpoenaing needed witnesses.

3. At all review hearings and CRB reviews counsel should be prepared to present information on what the long-term plan for the child should be and whether SOSCF and the parents are taking the necessary steps to achieve the chosen plan in a timely fashion. Counsel should consider submitting a written report on behalf of the client. Counsel should specifically address:

a. whether there is a need for continued placement of the child;

b. reasons the child can or cannot presently be protected from the identified problems in the home even if services are provided;

c. whether SOSCF is making reasonable efforts to rehabilitate the family and eliminate the need for placement of the child;

d. why services have not been successful to date;

e. whether the court-approved plan for the child remains the best plan;

f. whether the caseplan or service agreement need to be clarified or modified;

g. the appropriateness of the child's placement; and

h. whether visitation or other orders should be made or modified.

4. At all review hearings, CRB reviews and permanent planning hearings, counsel should request specific findings and orders that advance the client's case. Where appropriate, counsel should ensure that parents receive a clear and authoritative statement of what is expected of them, the time they have, the possibility of return of the child if sufficient progress is made, and the risk of termination if not. Counsel should ask the Court to set the time frame for the next hearing, if needed.

5. Permanent planning hearings require the same preparation as other reviews, but counsel should, in addition, be prepared to address what the long-term plan for the child should be, including:

a. a specific date on which the child is to be returned home, or

b. a date on which the child will be placed in an alternative permanent placement;

c. whether the child will remain in foster care on a permanent or long-term basis, and

d. whether foster care will be extended for a specific time, with a continued goal of family reunification.

6. Counsel for the child should consider whether to file a termination petition on behalf of the child, or to join the state in prosecuting such a petition or the parent in defending such a petition. Because termination of parental rights is a drastic and permanent deprivation of the fundamental right of family membership, and only the death penalty is a more severe intrusion into personal liberty, counsel should be zealous and meticulous in investigating and preparing for termination of parental rights hearings. Counsel should prepare for and try termination of parental rights hearings as for adjudicatory hearings. See Standards 3.6, 3.7, 3.8, 3.9 and 3.11 supra. In addition, counsel should:

a. thoroughly review the record of the case, carefully analyzing court orders and CRB findings and recommendations;

b. completely investigate the case especially issues unique to termination, such as the adoptability of the child and the child's ability to bond to new caretakers;

c. prepare a detailed chronology of the case to use in case presentation and in developing a theory and strategy for the case;

d. research termination statutes and case law with particular attention to constitutional issues and prepare trial memoranda if necessary;

e. obtain and review records to be submitted to the court and prepare objections or responses to objections to these documents;

f. subpoena and carefully prepare witnesses;

g. be aware of the heightened standard of proof in termination cases -clear and convincing evidence for most cases and beyond a reasonable doubt in cases covered by the Indian Child Welfare Act;

h. be prepared to present evidence of or address SOSCF's failure to adequately assist parents.

Performance Standards
Chapter 4

Specific Standards For Representation In *Civil Commitment Proceedings*

This chapter pertains to cases of involuntary commitment of the mentally ill. Under Oregon law, a mentally ill person is a person who, because of a mental disorder, is either dangerous to self or others or unable to provide for basic personal needs and is not receiving such care as is necessary for health or safety. The types of cases referred to in this chapter as "commitment proceedings" include initial commitment, re-commitment, conditional release, trial visit revocation, outpatient commitment, and "diversion" (a 14 day period of intensive treatment). Because it is generic, the term "commitment client" is used in this chapter in lieu of the term "allegedly mentally ill person."

Not addressed in this chapter are any specific standards that may apply to civil commitment of the mentally retarded. Nonetheless, counsel will find this chapter useful in cases involving involuntary commitment of the mentally retarded.

STANDARD 4.1 — Pre-requisites For Representation

In addition to being proficient in substantive and procedural law, counsel should possess knowledge, skill, training and experience commensurate with the nature of the allegations and the complexity of the case.

Implementation

1. At a minimum, counsel should meet the requirements of the Qualification Standards for Court Appointed Counsel to Represent Indigent Persons at State Expense, Oregon Judicial Department (1990), Standard 3.1 F.
2. Counsel should have basic knowledge of the classification of mental disorders (*Diagnostic and Statistical Manual of Mental Disorders [Fourth Edition Revised]*) and the ability to read and understand medical terminology related to mental disorders and the treatment of the mentally ill.
3. Counsel should be familiar with the medications used to treat mental disorders and, in particular, the effects of those medications on the client's participation.
4. Counsel should be aware of how a particular mental disorder will affect attorney/client communications. Counsel should recognize communications may require special efforts on the part of counsel.
5. Counsel should have familiarity with mental health resources and other resources available in the community that will provide an alternative to involuntary hospitalization.
6. Counsel should be familiar with the facilities, both inpatient and outpatient, that provide services to the mentally ill.
7. Counsel should frequently represent clients in commitment proceedings. If counsel is not frequently before the court representing commitment clients, counsel should observe local court proceedings and/or consult with counsel experienced in local commitment proceedings. Counsel should be familiar with local court practices.
8. Counsel should avail oneself of any CLE's or specialized training to further educate counsel on substantive issues, substantive law, statutory

law and procedures, local court rules, and local practices as they relate to commitment proceedings.

STANDARD 4.2 — Counsel's Role

It is counsel's role to act as a zealous advocate for the client's ultimate goals and objectives in the commitment proceedings and to advise the client on how best to achieve them.

Implementation

1. It is counsel's duty to ascertain the client's ultimate goals and objectives in the proceedings.
   a. It is the unusual circumstance where the client cannot express the ultimate goal, i.e., "I want out of this hospital, jail, custody situation." Counsel should nearly always be able to ascertain if the client's desire is "liberty". If the client desires liberty, then counsel should work to achieve liberty.
   b. Counsel should assume the role of advocate for the client's rights and not attempt to take on an additional role. Counsel is not the judge, the consensus of the community, the client's family member, the prosecutor or the mental health provider.
   c. In those rare instances when a client, because of mental status, cannot express his or her ultimate goals and objectives in the commitment proceedings, it is the role of counsel to protect the client's constitutional and statutory rights.
2. Counsel should advise the client of probable successes and consequences of adopting any posture in the proceedings.
3. Counsel should assess whether counsel has the requisite training, skill, knowledge and experience to represent a commitment client in other types of legal matters before undertaking representation in such matters.
4. If counsel represents the commitment client in other types of proceedings, such as guardianship, conservatorship, or criminal proceedings, counsel should assess how the client's participation and position in one proceeding may potentially affect the client's participation and position in other proceedings and advise the client accordingly. For example, if counsel represents a client in both a civil and criminal matter, it may potentially pose problems if counsel asserts a claim of mental disorder exculpating culpability in the criminal matter while on behalf of the same client counsel argues against a civil commitment because the client denies a mental disorder.

STANDARD 4.3 — Initial Client Interview

Upon being retained or appointed by the court, counsel should conduct an initial interview with the client as soon as possible, in most cases within 24 hours, but in all cases prior to the hearing.

Implementation

1. Counsel should ascertain where the client is located and visit personally. In many instances, the client will be detained in a hospital, jail, or locked care facility. In the remaining cases, the client will be located via the information contained in the citation or delivery warrant.
2. In the initial interview, counsel should:
   a. clearly introduce herself to the client and make sure the client understands the role counsel plays in the civil commitment process and the difference between counsel's role and that of the state's attorney;
   b. discuss the issue of client confidentiality and secure the client's oral and written permission to obtain access to relevant records;
   c. explain the reason for the commitment proceedings and the possible results;
   d. ascertain the client's desired resolution;
   e. explain legal rights;
   f. provide legal advice;
   g. describe the likely course of events;

h. prepare the client for a mental status exam by examiners appointed to aid the judge; and

i. describe the burden of proof and the findings the court must make in order to further deprive the client of liberty.

3. When counsel has ascertained the client's ultimate goal, counsel should advise the client of the available options and the probable success and consequences of choosing a particular option. For example, if the client wants discharge but in counsel's estimation is likely to be more successful in presenting a conditional release, that alternative should be presented to the client. Counsel should follow the client's desires as to which option to pursue.

4. Counsel should inform the client of:

a. the right to a postponement and the likelihood of continued detention during the postponement;

b. the right to subpoena witnesses, including expert witnesses;

c. the right to subpoena any physician who is, or has been, treating the client at the client's request and counsel's statutory obligation to do so under ORS 426.075(4);

d. the right to assert applicable privileges regarding confidential communications with a psychologist, psychiatrist, caseworker, physician, social worker or others, and the likely results of waiver of that privilege;

e. the right to have the investigator personally present at the hearing as a pre-requisite to admissibility of the investigator's report;

f. the right to object to the admissibility of hearsay in the investigator's report; and

g. the right to request a qualified examiner in addition to the one the Court is required to appoint.

7. If the proceedings are for a violation of trial visit or a violation of conditional release, counsel should describe the proceeding, the standard of proof required, the allegations before the Court, and advise the client of the consequences of a revocation.

8. If the proceeding is a re-commitment proceeding, counsel should inform the client of the right to protest re-commitment and require an independent medical examination.

9. If the client is detained because of a certificate for a 14 day period of intensive treatment, "diversion", counsel shall meet with the client and review the certificate within 24 hours of the filing of the certificate. Counsel shall inform the Court whether the client consents to or protests the certificate within one judicial day of the time the certificate is delivered to the Court. ORS 426.237(3)(c)

10. Counsel should inform the client in the applicable case of the fact that the Court may prohibit the client from possession of a firearm in the future.

11. Counsel should advise the client of the legal basis under which the Court will order:

a. discharge;

b. commitment;

c. conditional release;

d. revocation or modification of a trial visit;

e. outpatient commitment;

f. recommitment; and

g. the length of commitment.

STANDARD 4.4 — Obligations Of Counsel Pre-hearing

Counsel should obtain documents filed in the case, review reports and records of relevance, prepare pre-trial motions and engage in negotiations at the client's direction.

Implementation

1. Counsel should obtain and review where relevant the:

a. court file;

b. investigation report;

c. medical records;

d. police reports; and

e. evidence offered by opposing counsel.

2. Counsel should conduct interviews with relevant witnesses prior to the hearing.

3. Counsel should research, prepare, file and argue pre-trial motions to protect the client's statutory and constitutional rights:

   a. counsel should review and challenge the substance and process of the initiation of the commitment proceedings:

      i. counsel should ascertain if the notification of mental illness meets the statutory criteria for substance and process, including whether the notification is under oath, contains the factual basis for a commitment proceeding, meets the statutory requirements for a commitment proceeding, and comports with the timeliness provisions of the statute;

      ii. counsel should review the notice and content of the investigator's report to see if they comport with the statutory requirements;

      iii. counsel should review the notice and filing of medical records sought to be introduced; and

      iv. counsel should review the basis for a warrant of detention and determine if the warrant is sufficient in its substance, execution and return.

   b. counsel should challenge for bias the judge or mental health examiners, where appropriate.

   c. counsel should be aware of the basis for and file a motion to seek release from custody in the form of a Petition for Writ of Habeas Corpus when appropriate.

   d. counsel should be aware of the application of the rules of evidence in the commitment proceedings and litigate matters of admissibility of evidence by means of a motion in limine when appropriate.

   e. counsel should make appropriate requests for extraordinary expenses for the services of experts when necessary.

4. Counsel should ascertain whether the client may achieve the ultimate goal without the necessity of a contested commitment hearing. If appropriate in furtherance of that goal, counsel should:

   a. seek to negotiate a satisfactory outcome with opposing counsel;

   b. approach the mental health investigator about a dismissal or less restrictive resolution without the necessity of a hearing;

   c. prepare and present a conditional release alternative;

   d. prepare and present a stipulation to the basis for a commitment to the court; and

   e. determine if a postponement will assist in achieving the client's desired resolution. counsel should seek the postponement at the client's request.

STANDARD 4.5 — Commitment Proceedings

Counsel should provide quality representation and advocacy for the client at commitment proceedings.

Implementation

1. At a hearing, counsel should be prepared to:

   a. raise procedural motions, including the exclusion of witnesses at the client's request;

   b. assert privileges, including the physician/patient, psychotherapist/patient, social worker/patient and other privileges;

   c. protect against self-incrimination;

   d. make an effective opening statement as to the client's ultimate goal and the facts that will be presented to support that goal;

e. cross-examine and present expert and lay witnesses;

g. present a plan for discharge;

h. present alternatives, including conditional release, voluntary commitment and outpatient commitment, where appropriate; and

i. present stipulations.

2. In closing, counsel should argue strict application of the burden of proof and the law.

3. At all times, counsel should endeavor to preserve the record for appeal.

STANDARD 4.6 — Obligations Of Counsel Post-hearing

It is counsel's responsibility to represent or obtain representation for any residual legal matters relating to the case.

Implementation

1. Counsel should take the necessary actions to effect an appeal at the client's request. Counsel should undertake to file a Notice of Appeal or assure that alternative counsel is appointed to perfect an appeal.

2. Counsel should assess any treatment issues that exist requiring legal intervention and, where appropriate, refer the client to the bar association, advocacy group, attorney general's office, legal aid, private counsel or other appropriate source.

3. Counsel should, where appropriate, inform the client of the existence of social services, such as housing and food available in the community, the existence and location of community mental health providers, and the existence of medical treatment available in the community upon discharge from a hospital.

Chapter 5

Maximum Caseload Standards For Defense Counsel

Background

The Indigent Defense Task Force recognizes that there have been, and will continue to be, a variety of providers of indigent defense in the State of Oregon. Because of that variety, it is not possible to determine an appropriate weighted caseload for all providers. The Task Force determined that the Metropolitan Public Defender (MPD) offers the model that is most efficient in terms of scale. The MPD is the largest office by volume of cases in the state, and is the most experienced in managing caseloads. The MPD has a high level of staff support and clerical support. These levels of staff and clerical support are not available in other settings and substantially increase the ability of counsel to handle cases. As a result, adjustments to factor in the lack of available resources are necessary in determining maximum caseloads in other settings.

In 1993, the MPD established a unit valuation system to determine the number of cases each attorney in the office could handle each year. The MPD system gave cases a unit value based on the anticipated time demands. Unit values range from 100 to 1. The MPD assumed in the valuation that a "mythical competent attorney" could effectively handle 600 units per year. The MPD, in its contract proposal of October, 1993, proposed these unit values and has worked with them under the contract that was awarded.

Established Unit Values

The first step in the process of determining a weighted caseload is to determine the *average* time demand expected of a particular type of case. This analysis assumes that some cases will take more time and other cases will take less and seeks to determine what the average time is only in relation to other cases. In other words, a minimum unit value is determined and unit values are attributed to each type of case. In essence, unit values are a comparison of the expected time commitment for handling certain types of cases in relation to other types of cases. Obviously substantial felonies are expected to take more time than misdemeanors. The unit value analysis put forth by the MPD proposal seeks to compare time anticipated for relative types of cases.

Maximum Caseload Per Attorney Per Year

The second step in the analysis is to determine the maximum number of units that a criminal defense attorney working a full load, i.e. a full time equivalent (FTE) attorney, could handle over the course of a year. The MPD proposal assumed that the "mythical competent defense attorney" could handle 600 units per year. This meant that in applying the unit valuation tables, a full caseload for an attorney would be 6 felony level 11 cases in one year or at the other end of the spectrum, 600 drug diversion cases in one year.

Assumptions

As stated in the introductory paragraph of this Chapter, the MPD has a high level of staff support. This reaches the level of one investigator and one trial assistant per attorney for felony and juvenile cases and .5 investigator and .5 trial assistant per attorney for misdemeanor cases. Where office support staff is less, corresponding adjustments would have to be made in determining the maximum caseload of a public defender office. Because the private bar does not handle the volume that would create the efficiencies derived through the MPD system, the maximum caseload values have little relevancy to private bar providers.

Additional Reasons for Adjustments

The MPD has unique circumstances that do not exist outside Multnomah County. The physical proximity

of jail, courthouse, District Attorney and defender office, combined with the physical proximity of crime scenes and witnesses, virtually eliminate travel.

The concentration of volume allows for specialization within the office. This reduces the need for legal research. It also reduces time committed to plea bargaining, as the volume of similar cases that have gone before establish the likely results and penalties.

All counties other than Multnomah County have less case volume and greater travel time. Inefficiencies increase as either volume decreases or travel increases. As a result, the maximum caseload standards in this report would be impossible to approach outside of Multnomah County.

Conclusion

The Committee believes that the MPD proposal is a reasonable one to adopt as a *maximum* caseload standard in that the MPD office proposal was developed in Oregon by the largest and best staffed public defender office, which is believed to have maximum caseload-handling capability. It is anticipated that adjustments would be appropriate for defender offices that do not have the same amount of support staff per lawyer or the same volume of cases. Further adjustments would have to be made for less than full-time attorneys and private attorneys who are taking conflict cases as a part of their practice. The adoption of a unit valuation system and a maximum caseload per FTE defense attorney is meant to be a guide, subject to review.

Table Of Unit Values And Corresponding Maximum Caseload Per Attorney Per Year For Large Volume Defense Practice (MPD) In Multnomah County

Case Year	Unit Valuation	@600/Atty/Yr
Felonies		
Felony Level 11	100	6
Felony Level 10	15	40
Felony Level 9	15	40
Felony Level 8	4	150
Felony Level 7	2.5	240
Felony Level 6	2.5	240
Felony Level 1-5 - includes contempt	2	300
Fugitive	1	600
Felony PV	1	600
Misdemeanors		
Msd- includes misdemeanor traffic cases	1.5	400
Msd PV	1	600
Juvenile		
Delinquency		
Level 11	100	6
Level 8-10	7.5	80
Level 1-7	1.25	480
Misdemeanor	0.75	800

Case Year	Unit Valuation	@600/Atty/Yr
Remand	60	10
PV	0.5	1200
Adult Termination of Parental Rights	60	10
Child Termination of Parental Rights	30	20
Adult Dependency	7.5	80
Child Dependency	5	120
Review Hearings	0.75	800
Citizen's Review Board Hearings	0.75	800
Indian Child Welfare Act Cases		
Adult Termination of Parental Rights	65	9
Child Termination of Parental Rights	32	19
Adult Dependency	8	75
Child Dependency	5.5	109
Review Hearings	1	600
Citizen's Review Board Hearings		
Civil Commitment	1	600
Drug Diversion (STOF)	1	600

Appendix

OSB Indigent Defense Task Force On Defense Standards Survey Results

The OSB Indigent Defense Task Force conducted surveys of judges, defense attorneys, prosecutors, and probationers with respect to criminal defense representation. The purpose of the surveys was to assist the task force in evaluating the strengths and weaknesses of the existing indigent defense system. The surveys did not address representation in juvenile dependency, delinquency or involuntary commitment proceedings.

Part One of this Appendix provides a sampling of the survey results and comments. With respect to surveys completed by judges, defense attorneys, and prosecutors, the results reported in this section are those that pertain to the quality of services provided by criminal defense attorneys in general, and by retained defense counsel and state-paid defense counsel, specifically. Probationers were not asked the same questions asked of judges, defense attorneys and prosecutors regarding quality of representation. The sampling of probationers' survey responses that are included in Part One shows the types of services that received the highest number of "excellent" ratings and those that received the highest number of "poor" ratings by probationers.

Part Two of this appendix provides tabulations of all of the survey results.

Part Three contains a copy of the survey document used for each of the four different surveys.

Part Four is a report received by the task force from a federal inmate who, at the suggestion of a task force member, conducted an informal survey of federal inmates at the Sheridan, Oregon facility, with respect to quality of criminal defense representation.

Appendix Part One — Sampling Of Survey Results And Comments

NOTE: The surveys submitted to judges and prosecutors contained two questions (#1 and #5) concerning the quality of representation in indigent defense criminal cases which were essentially the same. Because the tabulation of responses to each of the two questions, however, were not exactly the same, the responses only to Question #5 are presented below.

I. Responses From Judges

OSB Task Force surveys were mailed to all one-hundred fifty (150) Circuit and District Court judges. Sixty-seven (67) surveys were returned. Twenty-six (26) different counties were represented in the sample.

It appears a sufficient diversity of geographic responses were obtained so that all forms of indigent defense delivery systems utilized in Oregon were identified by one or more judges as the "primary

form" of indigent defense delivery system in their jurisdiction. Of the four groups surveyed, judges provided the most written comments.

Results With Respect To Quality Of Representation

The judge respondents rated the quality of legal representation in **all criminal defense cases** (retained and indigent defense) as:

Excellent	12
Good	54
Fair	6
Poor	0

The quality of representation in **indigent defense criminal cases** was rated as:

Excellent	17
Good	47
Fair	10
Poor	1

The quality of representation in **retained criminal cases** was rated as:

Excellent	21
Good	47
Fair	3
Poor	0

Sample Comments — Judges

We are asking a few attorneys to take on the bulk of indigent defense at minimal compensation; some attorneys can adequately handle the caseloads, some have problems keeping up with caseload.

Too many cases for too few people. Not enough funding to cover increases in crime severity or sanctions that prevent plea bargaining.

Lack of client control; unwillingness to initiate plea discussions (defense counsel wait for DA to make offer); unwillingness of some to follow discovery rules; not understanding evidentiary rules; making frivolous sentencing arguments or release arguments.

Cases get tried that should have pled.

Too much plea bargaining with superficial understanding of facts.

The public defender's office is excellent, but new attorneys on the list add energy and aren't stale. There needs to be a balance between experience and energy versus experience and passivity. * * * The level of experience in the public defender's office and the willingness to mentor new lawyers is terrific.

No effective means of excluding the few incompetents.

Too much for lawyers to do spreads them far too thinly and mistakes, sometimes serious, happen. The lawyers need less clients/cases so as to perform adequately within time lines. They are handling more and more work/clients/cases with less and less resources. Inadequate client contact pre-trial affects seriously (and negatively) the perception of fairness by the client. Generally, the retained lawyer has more time/resources to apply to the representation and often can be 'more motivated' to attend to details important to the client.

Cases get tried that should have pled. Counsel is sometimes too slow — over tries case. Counsel is harried with too big a caseload — results in anger and unprofessional conduct.

Lack of adequate preparation and time spent with client. This is especially true on probation violation matters. Newer attorneys sometimes lack adequate training in the fundamentals of trial practice and evidence. Overall, they all seem overworked.

At times, many times retained attorneys *wander* into the criminal world and don't do half the job court-appointed attorneys do.

Some retained attorneys are excellent — few if any appointed lawyers are. This is to be expected, is realistic and appropriate. Appointed clients should expect reasonable representation. Monied clients should expect excellent representation.

Court-appointed defense attorneys seem more motivated by moving a lot of cases (being paid per case and not per hour) than by providing quality representation. I think the flat fee-per case approach is a bad way to deliver indigent defense services. It places the attorney in a conflict of interest with the client/defendant: the attorney, in order to promote his economic well-being, must move the cases quickly. The more time he spends on a particular case, the less money he makes, in effect. The only way to balance these concerns with the State's concern in keeping control over indigent defense budg-

ets is to have a system of public defender offices where the attorneys are salaried.

My only concern is adequate funding — this year there were more cases than had been contracted to handle.

Good smart lawyers who try hard. They carry a heavy load and burnout can be a problem. They are ethical and truly care for their clients.

Defense bar does not put up enough of a fight — there is an absence, in most cases, of a truly *vigorous* representation. You get what you pay for. Preparation, vigor and overall competence is greater in retained cases, with occasional exceptions.

Lack of information about sentencing options suitable for defendants.

There is generally a good professional working relationship between the defense bar and the prosecution. Without this, we would be in serious trouble. The other point that comes to mind is that both the public defender's office and the district attorney's office are staffed with competent, experienced people.

Two chief areas of concern: (1) costs for experts and investigators, etc.; (2) lawyers taking too many cases on a small dollar margin in order to get contracts ....

Increasing caseload with limited defense panel. Measure 11 cases will require more attorney and court time. Death penalty cases are consuming the qualified defense attorneys. I believe for the dollars spent the indigent defendant is often better represented than the retained client at a much higher fee.

The public defenders are honest, ethical, and attempt to do a good job. They lack overall experience due to their youth. I actually believe in many cases [defendants] do better with the public defender. That is why we lobbied [the State Court Administrator] to switch our county from a consortium of private attorneys to a public defender.

Insufficient time explaining process to clients.

II. Responses From Defense Attorneys

OSB Task Force surveys were distributed to members of the Oregon Criminal Defense Lawyers' Association (OCDLA) via a general member mailing. Forty-two (42) completed surveys were returned. About two-thirds of the returned surveys were from attorneys who identified themselves as private practitioners as opposed to public defenders.

Thirteen (13) counties were represented in the returned surveys. Of the five largest counties by general population, no surveys were returned from Marion County. Significant geographical diversity was obtained and the answers appear to reflect general trends versus unique differences based on the geography or population of the area.

Results With Respect To Quality Of Representation

The criminal defense lawyer respondents rated the quality of legal representation **in all criminal defense cases** (retained and indigent defense) as:

Excellent	7
Good	26
Fair	8
Poor	2

The quality of representation in **indigent defense criminal cases** was rated as:

Excellent	6
Good	24
Fair	10
Poor	5

The quality of representation in **retained criminal cases** was rated as:

Excellent	12
Good	28
Fair	3
Poor	0

Sample Comments — Defense Attorneys

Money crunch may encourage less than thorough work. Except in a few cases, quality is better in appointed [versus retained] cases.

Two chief areas of concern. (1) Sentencing: many attorneys (most) do not anticipate sentencing issues so are not prepared for sentencing issues. Sentencing is a very important area of advocacy, yet many attorneys merely pass through it with no apparent thought for advocacy or even oversight. (2) Search & Seizure: attorneys not up on the ever-changing law.

Pretrial conferences are not set up for real negotiation; some caseloads too high.

The eagerness of the contract firms to plead clients out ASAP and to have little contact with clients is often at shameful levels.

Chief strong point: strong communication between defense attorneys — good working relationships with one another. Chief area of concern: ballot measure 11 is taking up a disproportionate amount of our time/energy and adding stress.

Chief strong point: most defenders know each other and are willing to consult with one another (generally informally). Many *dedicated* defenders. Chief area of concern: caseloads are becoming bigger and bigger and have long since passed "too big" so that public defenders cannot spend the time that the private bar can working up a case.

Most (not all) contracts go to the cheapest lawyers who are really bad and never intend to prepare a defense!

The federal defender, Metro, and many retained lawyers set a high standard that others cannot ignore. Overall things are strong, but there are a few lawyers who are extremely weak in all areas. The SCA should do a better job in identifying lawyers who are not qualified. This is not to say that some artificial qualification standards or mandatory training is the answer. Real benchmarks/standards could work like timely client contact, review of motion practice, trial/plea ratios, number of hours prepping for trial.

Too many cases leads to burnout and apathy which means too many pleas to bad offers.

Chief areas of concern: Overemphasis on prosecution/law enforcement, while under staffing courts, under compensating indigent defense.

In response to the question "[i]s there a difference between the quality of representation for retained and court-appointed clients?" I treat them equally, but I constantly have to justify to the court administrator why I spent a lot of time on a case. This is especially true for my mentally ill clients — which seem to be 70% of court-appointed clients lately.

Chief areas of concern: We have not managed to expose the public to ideas that will spread responsibility for why our justice system operates and fails to operate in the manner it does. Our citizenry is quick to believe the "problems" are all caused by defendants abusing the Bill of Rights versus police overstepping authority, district attorneys failing to spend time upfront to accurately evaluate [cases], public willing to believe there's no difference between an arrested methamphetamine manufacturer and an arrested person coerced into acting as a go-between in a bar sale of a paperfold of meth. Public glosses over issue of responsibility

Chief strong points: The consortium spreads the representation of indigent clients out amongst a fairly broad base of practitioners while still allowing us to act as a cohesive unit when necessary; i.e., sharing motions, understanding system wide problems, etc.

Chief areas of concern: The limited funds available for investigation hampers the defense of many misdemeanor cases. Also the low unit pay rate discourages trial by some attorneys and also causes a lack of post-trial/plea follow up that is often necessary.

III. Responses From Prosecutors

Surveys were mailed to each of the three-hundred thirty-six (336) state prosecutors registered with the Oregon District Attorneys' Association. Ninety-nine (99) surveys were returned.

Results With Respect To Quality Of Representation

The prosecutor respondents rated the quality of legal representation **in all criminal defense cases** (retained and indigent defense) as:

Excellent	10
Good	72
Fair	15
Poor	0

The quality of representation in **indigent defense criminal cases** was rated as:

Excellent	12
Good	69
Fair	17
Poor	0

The quality of representation in **retained criminal cases** was rated as:

Excellent	14
Good	71
Fair	12
Poor	0

Sample Comments — Prosecutors

Please identify your chief areas of concern about the quality of criminal defense or criminal defense practices in your jurisdiction? (Question #6 and #10)

One of the lawyers who works for the public defender isn't very good. The rest are excellent. The public defender's budget is inadequate to provide excellent representation, but then our budget is inadequate too.

Many lawyers appear to be more concerned with making money than representing the interests of their clients. By avoiding equitable solutions for their clients, the attorneys are getting more severe sanctions imposed on their clients.

I have none regarding the quality as it is excellent.

Ethics; communication with defendants; communication with prosecutors; discovery violations; procrastination.

Criminal defense, especially indigent defense, pays too little to attract quality attorneys. Plus they carry too many clients to do an effective job.

Too many people, not enough time.

My chief area of concern is in juvenile court — whether dependency or delinquency. Also some very marginally competent attorneys are sometimes appointed.

Public defenders are generally good. My worst experiences have been with solo practitioners on the conflict list. There appears to be no prerequisites, such as competency, to being placed on the list.

We have a high failure to appear rate. This causes many problems in the timely resolution of cases and sometimes double appointments. Most of this is not the fault of the defense attorneys, but rather our lack of jail space.

Private bar is gradually losing expertise as most work is handled by [public defenders]. I think this is unhealthy.

Unfortunately, there is not a mechanism in place in the system to get rid of the few bad lawyers that are in the consortium.

Most of the defense bar is very willing to negotiate a reasonable settlement. I worked in another county for eight (8) years with a public defender's office that I would characterize as system fighters. They would convince clients to take their case to trial, if they could not get the deal they wanted, just to clog the docket and the DA's workload. Their client most often ended up much worse off than under the proposed negotiated offer. In effect, they were selling out the best interest of their client to fight the system.

Borderline unethical tactics in hiding reciprocal discovery. For some it is a disease.

Unnecessary use of indigent defense funds for 'investigative work' and psychological evaluations. Some concern for training of young lawyers in questionable tactics.

Many attorneys haven't met with their clients prior to the day of plea or [probation violation hearing]. Good client contact appears to be lacking in many cases.

Many persons involved are too busy to ever learn their craft. Also zealotry gets in the way of effectiveness. The contract firms are just sending cases down a conveyer belt — no one has any time.

A few defense counsel have good client contact — some keep in good client contact with their clients — the majority do *not*.

Defense attorneys put everything off until the last minute. Frequently seek setovers because they are not prepared. In general, clog the system with cases that should be resolved.

There has been so much turnover in the [public defender's] office that the experienced attorneys are overburdened.

Volume of caseloads adversely affect some defenders in their performance. It appears that some very inexperienced defenders are given serious cases too early in their careers. • • • Our system relies heavily on young, inexperienced lawyers, many of whom do a very good job. They should be supported by the system that puts them to work.

The main problem in our jurisdiction is that many criminal defendants receive appointed attorneys when they are not qualified or marginally qualified and are not required to reimburse the costs.

Postconviction relief issues.

Please identify the chief strong points of criminal defense in your jurisdiction:

They know how system works, know what's realistic and generally do a good job at trial with cases that deserve a trial. They don't waste a large amount of time and resources.

Good group of lawyers. Honest, easy to work with. Can trust them.

Except for one provider, we have a good relationship with defenders and have confidence in their ethics and abilities. Good communications.

Some very zealous and very knowledgeable attorneys — mostly reasonable.

They are ethical and straight forward with a couple of exceptions.

Abundant funding for legal assistants and investigators.

Our defenders are the most experienced both in volume and variety.

Is there a difference between the quality of representation for retained and court-appointed clients?

Without question, despite denials if asked directly, I have observed a general tendency to move quicker and more effectively in retained cases and to allow indigent defendants to receive a less interested service. Example, a lawyer would never allow a [retained client] to have a warrant issued if he failed to appear. The lawyer would request a reset to investigate and to aid his client —to get him there. In indigent cases, these same lawyers would make no effort to save the client from a warrant. The attitude is much less service-oriented. If he fails to show, that's his fault is the attitude.

The experienced [public defenders] are excellent as are the private practitioners who do a lot of criminal work. The problems are the turnover in the [public defender's office] and the attorneys who dabble at criminal work.

I have had attorneys who do minimal work on court-appointed cases and the same attorney with same issues do much more extensive work when retained.

Appointed attorneys are familiar with procedures and do a good job explaining this to their clients. Many retained attorneys are not familiar with criminal procedure and in the long run do a disservice to their client.

IV. Responses From *Probationers*

In November 1995 through March 1996, probationers being processed into community corrections offices for Clackamas, Jackson, Curry, Multnomah, Marion and Polk counties were asked to complete a written two-page survey. One-hundred ten (110) probationers responded, seventy-four (74) of whom indicated they were first offenders. Only eighteen (18) probationers reported that they had been incarcerated awaiting resolution of their case.

The manner in which the two-page survey was presented to probationers by intake personnel for completion is unknown. However, after collecting completed surveys, it was discovered that fifteen (15) of the respondents failed to complete the second page of the survey.

Results With Respect To Quality Of Representation

The probationers who completed the survey appear to be relatively satisfied with the manner in which they were represented by their attorneys. However, the survey results reveal that a significant number of the probationers believe their attorneys performed poorly with respect to spending adequate time with them, investigating all defenses and willingness to fight the prosecution.

Probationers were asked to rate their attorneys' performance in a number of areas.

The following areas of performance received the highest number of **"excellent"** ratings by the probationers:

Pleasant to deal with	38
Willingness to plea bargain	36
Dealt honestly with you	34
Fully explained the defense process	33
Explained matters to your satisfaction	32
Knowledge of applicable law	31
Listened to your ideas/concerns	31
Worked hard for you/was prepared	30
Response to your phone calls/letters	30

The following areas of attorney performance received the highest number of **"poor"** ratings:

Willingness to fight the prosecution	31

Spent adequate time with you 30
Investigated all defenses 24
Kept you informed 22
Response to your phone calls/letters . . 21
Worked hard for you/was prepared . . 18
Could be trusted 17
Discussed risks and options 17

Sample Comments — Probationers

I was pleased with my attorney as follows:

Because they did their jobs, what they were supposed to do. Helped in getting charges dropped.

He's hard to get ahold of on the phone — otherwise he was great.

[Name of attorney] did an excellent job. She explained things to me and left it up to me as to what I wanted her to do. I felt really comfortable with her as well as the other staff.

He was very nice and worked to get me what he thought was fair. He was sure I understood everything before I signed anything.

Very polite. Around when I called. Appeared for me every time. Believed in me at the beginning. Backed away toward the end, hurt me and my case.

She was professional at making sure I understood everything that was happening. I was happy that she didn't patronize me or talk down to me.

Prompt, informative, did not beat around the bush.

He was friendly and honest. I just don't think I was enough help. I was young and scared.

He did the best he could do. He made the best of a bad thing.

I was displeased with my attorney as follows:

I had to get him to call DA for plea bargain. I never had a one-on-one appointment with him to discuss my case. He never phoned me once. I had to call him repeatedly. In two months, I talked to him two times. Once on September 20 at first hearing for approximately 15 minutes. Then once on October 17 or 18th for approximately 15 minutes. Then I showed up at his office on day of court and sat there till he could see me. I knew absolutely nothing about anything except that I was going to jail.

He didn't discuss my case with me ahead of time. He did what he had to do and nothing else.

Was shuffled to four different attorneys in four different offices. Only met with 'my' attorney for approximately 10 minutes. Never really discussed options.

Was a bit late for court. Just made me more nervous. Had to fill out and listen to my plea papers. Explained inside the courtroom during court.

I felt my attorney was not familiar enough with the system, she did not fight for me, and everything she told me was wrong. I feel I would have done much better on my own and would never trust a court-appointed attorney again.

He never showed up for two court days, had to delay, never informed me that he had moved his office.

Left doubts as to who he was working for.

I feel they are too eager to plea bargain instead of fighting for truth and justice. My first offense was a joke. I pled guilty because I didn't quite understand my options and recourse. Felt plea bargain was too easily entered.

He didn't explain the plea bargain. Told me one thing and another happened.

His bill was too much for the time he put in to my case.

He was a dump truck.

Appendix Part Two — Survey Tabulations

I. Judge's Responses

Sixty-seven (67) responses were received from judges. Not every respondent answered every question; some gave more than one answer.

Jurisdiction:

County	38
State	24
1st Judicial Dist	2
Circuit Court	2

Current Position:

Circuit Judge	33
Judge	14
District Judge	18
Trial Judge	1

Years in Position:

Average number of years in position:	9

Prior legal experience:

Private Practice	55
Public Defender	11
County Counsel	5
Judge's Clerk	7
None	0
Other	40

Primary form of Indigent Defense Delivery Services In Your Jurisdiction:

Public Defender	44
Consortium	32
Law Firm	8
List	11
Other	1
Retained	1

1. In your experience, how would you characterize the quality of defense for indigent accused in your jurisdiction?

Excellent	15
Good	51
Fair	9
Poor	1

2. In your experience, is there a difference in quality of indigent defense between felony and misdemeanor practice?

Yes	27
No	29

3. Indicate your observations of the quality of representation for criminal defendants overall in your jurisdiction:

Excellent	12
Good	54
Fair	6
Poor	0

4. Indicate your observations of the quality of representation of retained criminal defendants in your jurisdiction:

Excellent	21
Good	47
Fair	3
Poor	0

5. Indicate your observations of the quality of representation for indigent defendants in your jurisdiction:

Excellent	17
Good	47
Fair	10
Poor	1

7. Please rate the below listed characteristics of criminal defense attorneys that you perceive as most important in producing quality representation:

Scale: Very Important 5 4 3 2 1 Not Very Important	**5**	**4**	**3**	**2**	**1**
a. Temperament	23	31	12	1	0
b. Knows the law	42	26	1	0	0
c. Aggressive	6	11	32	17	1
d. Organized	43	24	1	0	0
e. Ethical	57	9	1	0	0
f. Communicative	35	26	5	0	0
g. Timely	29	32	6	0	0
h. Reasonable	43	21	2	0	0
i. Trustworthy	59	10	0	0	0

8. Specifically, indicate the quality of the following practice characteristics for criminal defense attorneys who represent the indigent in your jurisdiction:

Defense attorneys are generally prepared for pretrial:

Always	1
Most of the time	43
Sometimes	19
Rarely	2

Defense attorneys are generally prepared for trial:

Always	8

Most of the time 55
Sometimes 4
Rarely 0

Defense attorneys are generally prepared for sentencing issues:
Always 4
Most of the time 55
Sometimes 10
Rarely 1

Defense attorneys work hard at negotiating the case:
Always 6
Most of the time 49
Sometimes 12
Rarely 0

Defense attorneys resolve cases pre-trial (settlement):
Always 0
Most of the time 53
Sometimes 12
Rarely 1

Deputy District Attorneys have realistic expectations about the strengths or weakness of the case:
Always 0
Most of the time 48
Sometimes 19
Rarely 3

Unrealistic expectations about the strengths of their case by Deputy District Attorneys impact the resolution of the case:
Always 0
Most of the time 13
Sometimes 47
Rarely 7

9. Rate your perception of criminal defense representation in the following areas:

	Excellent	Good	Fair	Poor
Precharging investigation	2	18	20	26
Negotiations	8	51	9	0
Motion practice	4	41	21	1
Plea practice	8	52	8	0
Trial practice	10	50	11	1
Sentencing	7	47	11	2
Client contact	3	29	26	6
Post-trial issues	3	28	24	3
Probation violation issues	5	42	19	1
Appeal	1	20	9	0

10. In your experience, is there a difference between the quality of representation for retained and court-appointed clients?
Yes 37
No 29

II. Defense Attorney's Responses

Forty-two (42) responses were received were received from defense attorneys. Not every respondent answered every question; some gave more than one answer.

What county do you principally practice in?
Clackamas 2
Clatsop 2
Columbia 1
Deschutes 2
Douglas 3
Harney 1
Hood River 1
Jackson 1
Lane 4
Multnomah 17
Tillamook 2
Wasco 1
Washington 5
State Appellate Court 1

Current legal experience (check all that apply):
Private Practice 29
Public Defender 12
Other 8

Prior legal experience (check all that apply):
Private Practice 31
Public Defender 14
District Attorney 9
Other 4
Judge 6
Other 4
County Counsel 2

Primary form of Indigent Defense delivery services you have been involved with:
Public Defender 20
Private Law Firm 18
Court List 18
Consortium 6
Other 3

1. Indicate your observations of the overall quality of representation for criminal defendants in your county:
Excellent 7
Good 26
Fair 8
Poor 2

2. Indicate your observations of the quality of representation for retained criminal defendants in your county:

Excellent	12
Good	28
Fair	3
Poor	0

3. Indicate your observations of the quality of representation for indigent defendants in your county:

Excellent	6
Good	24
Fair	10
Poor	5

4. In your experience, is there a difference in quality or indigent defense between felony and misdemeanor practice?

Yes	15
No	23

5. Please rate the characteristics of criminal defense attorneys that you perceive as most important in producing quality representation:

Scale: Very Important 5 4 3 2 1 Not Very Important	5	4	3	2	1
a. Temperament	22	15	5	0	0
b. Knows the law	31	7	4	0	0
c. Aggressive	3	20	9	8	2
d. Organized	15	23	3	0	1
e. Ethical	23	13	6	0	0
f. Communicative	19	17	5	0	0
g. Timely	11	24	5	1	1
h. Reasonable	11	21	7	3	0
i. Trustworthy	27	12	2	1	0

6. Specifically, indicate the quality of the following practice characteristics for criminal defense attorneys who represent the indigent in your county:

Defense attorneys are generally prepared for pre-trial:

Always	1
Most of the time	27
Sometimes	11
Rarely	2

Defense attorneys are generally prepared for trial:

Always	8
Most of the time	29
Sometimes	5
Rarely	0

Defense attorneys are generally prepared for sentencing issues:

Always	5
Most of the time	29
Sometimes	6
Rarely	3

Defense attorneys work hard at negotiating the case:

Always	9
Most of the time	27
Sometimes	4
Rarely	1

Defense attorneys resolve cases pre-trial (settlement):

Always	2
Most of the time	33
Sometimes	7
Rarely	1

Deputy District Attorneys have realistic expectations about the strengths or weaknesses of cases:

Always	0
Most of the time	18
Sometimes	19
Rarely	4

Unrealistic expectations about the strengths of their case by Deputy District Attorneys impact the resolution of the case:

Always	7
Most of the time	17
Sometimes	16
Rarely	2

7. Rate your perception of criminal defense representation in the following areas:

	Excellent	Good	Fair	Poor
Precharging investigation	2	13	11	12
Negotiations	8	24	4	1
Motion practice	3	20	13	1
Plea practice	6	22	7	2
Trial practice	9	19	8	0
Sentencing	8	21	6	1
Client contact	3	13	17	4
Post-trial issues	0	7	16	12
Probation violation issues	4	16	12	4
Appeal	1	13	12	4

10. In your experience, is there a difference between the quality of representation for retained and court appointed clients?

Yes	29
No	10

III. Prosecutor's Responses

Ninety-nine (99) responses were received from prosecutors. Not every respondent answered every question; some gave more than one answer.

Jurisdiction:

County	98
State	1

Years in Position:

Average number of years in Position	8

Current Position:

First Assistant	1
Assistant DA	1
District Attorney	15
Senior DDA	12
DDA	68
Prosecutor	2

Prior legal experience:

Private practice	36
Public defender	10
County counsel	4
Judge's clerk	12
None	37
Other	20

Primary form of Indigent Defense delivery services in your jurisdiction:

Public Defender	70
Consortium	29
Law firm	16
List	8
Other	3
Retained	2

1. In your experience, how would you characterize the quality of defense for indigent accused in your jurisdiction?

Excellent	14
Good	65
Fair	20
Poor	0

2. In your experience, is there a difference in quality for indigent defense between felony and misdemeanor practice?

Yes	27
No	56

3. Indicate your observations of the quality of representation for retained criminal defendants in your jurisdiction:

Excellent	14
Good	71
Fair	12
Poor	0

4. Indicate your observations of the quality of representation for criminal defendants overall in your jurisdiction:

Excellent	10
Good	72
Fair	15
Poor	0

5. Indicate your observations of the quality of representation for indigent defendants in your jurisdiction:

Excellent	12
Good	69
Fair	17
Poor	0

7. Please rate the characteristics of criminal defense attorneys that you perceive as most important in producing quality representation:

Scale: Very Important 5 4 3 2 Not Very Important

	5	4	3	2
a. Temperament	32	38	24	4
b. Knows the law	57	39	2	0
c. Aggressive	2	36	41	18
d. Organized	40	41	16	1
e. Ethical	80	12	6	1
f. Communicative	43	45	10	1
g. Timely	34	53	11	1
h. Reasonable	51	41	6	1
i. Trustworthy	80	15	2	1

8. Specifically, indicate the quality of the following practice characteristics for criminal defense attorneys who represent the indigent in your jurisdiction:

Defense attorneys are generally prepared for trial:

Always	3
Most of the time	41
Sometimes	46
Rarely	7

Defense attorneys are generally prepared for trial:

Always	10
Most of the time	76
Sometimes	13
Rarely	0

Defense attorneys are generally prepared for sentencing issues:

Always	6
Most of the time	69
Sometimes	21
Rarely	2

Defense attorneys work hard at negotiating the case:
- Always 6
- Most of the time 40
- Sometimes 49
- Rarely 4

Defense attorneys resolve case pre-trial (settlement):
- Always 0
- Most of the time 50
- Sometimes 45
- Rarely 3

Defense attorneys have realistic expectations about the strengths of the case:
- Always 0
- Most of the time 48
- Sometimes 48
- Rarely 2

9. Rate your perception of criminal defense representation in the following areas:

	Excellent	Good	Fair	Poor
Precharging investigation	1	23	36	24
Negotiations	7	50	38	4
Motion practice	8	38	45	8
Plea practice	8	55	33	2
Trial practice	9	59	29	0
Sentencing	6	60	30	2
Client contact	5	33	43	15
Post-trial issues	2	26	47	8
Probation violation issues	6	36	43	8
Appeal	4	22	29	5

10. In your experience, is there a difference between the quality of representation for retained and court appointed clients?
- Yes 58
- No 34

IV. Probationer's Responses

One hundred-ten (110) responses were received from probationers. Not every respondent answered every question; some gave more than one answer.

County:
- Jackson 39
- Clackamas 36
- Multnomah 23
- Marion/Polk 3
- Curry 1

Defense attorney was:
- Court-appointed 94
- Retained 14

In jail awaiting trial/plea?
- Yes 18
- No 88

Probation on:
- Felony 73
- Misdemeanor 33

First or Prior Offender:
- First offender 74
- Prior offender 33

5. Please rate your attorney's performance:

	Excellent	Good	Fair	Poor
a. Pretrial jail visits	20	17	21	14
b. Response to your phone calls/letters	30	29	21	21
c. Involved you in defense process	26	31	27	12
d. Listened to your ideas/concerns	31	30	29	15
e. Fully explained the defense process	33	28	27	16
f. Investigated all defenses	24	21	29	24
g. Spent adequate time w/you	23	27	24	30
h. Kept you informed	27	34	20	22
I. Discussed risks and options	29	38	21	17
j. Willingness to fight the prosecution	24	21	23	31
k. Could be trusted	28	34	25	17
l. Willingness to plea bargain	36	29	20	4
m. Knowledge of applicable law	31	29	18	5
n. Dealt honestly with you	34	28	18	9
o. Had you prepared for court	27	20	27	15
p. Worked hard for you/was prepared	30	13	28	18
q. Cared about your best interests	26	25	25	14
r. Explained matters to your satisfaction	32	26	24	9
s. Pleasant to deal with	38	27	20	5

Appendix Part Three — Survey Instruments

Oregon State Bar
Indigent Defense Task Force
Survey Of Judges

Jurisdiction (County, Federal, etc.)	Current Position	Years in position

Prior Legal Experience: (Check all that apply.)

☐ private practice ☐ county counsel ☐ none
☐ public defender ☐ judge's clerk ☐ other

Primary form of Indigent Defense delivery services in your jurisdiction:

☐ public defender ☐ law firm ☐ other
☐ consortium ☐ list ☐ retained

1. In your experience, how would you characterize the quality of defense for indigent accused in your jurisdiction?

☐ excellent ☐ good ☐ fair ☐ poor

2. In your experience, is there a difference in quality for indigent defense between felony and misdemeanor practice?

☐ Yes, ☐ No Explain: _____

_____

3. Indicate your observations of the quality of representation for criminal defendants overall in your jurisdiction?

☐ excellent ☐ good ☐ fair ☐ poor

4. Indicate your observations of the quality of representation for retained criminal defendants in your jurisdiction?

☐ excellent ☐ good ☐ fair ☐ poor

5. Indicate your observations of the quality of representation for indigent defendants in your jurisdiction?

☐ excellent ☐ good ☐ fair ☐ poor

6. Please identify your chief areas of concern in the quality of criminal defense in your jurisdiction?

_____

_____

_____

7. Please rate the below listed characteristics of criminal defense attorneys that you perceive as most important in producing quality representation:

	Very Important		**Neutral**		**Not very important**
a. Temperament	5	4	3	2	1
b. Knows the law	5	4	3	2	1
c. Aggressive	5	4	3	2	1
d. Organized	5	4	3	2	1
e. Ethical	5	4	3	2	1
f. Communicative	5	4	3	2	1
g. Timely	5	4	3	2	1
h. Reasonable	5	4	3	2	1
i. Trustworthy	5	4	3	2	1

8. Specifically, indicate the quality of the following practice characteristics for criminal defense attorneys who represent the indigent in your jurisdiction:

Defense attorney are generally prepared for pretrial:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys are generally prepared for trial:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys are generally prepared for sentencing issues:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys work hard at negotiating the case:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys resolve cases pre-trial (settlement):

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Deputy District Attorneys have realistic expectations about the strengths or weakness of the case:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Unrealistic expectations about the strengths of their case by Deputy District Attorneys impact the resolution of the case:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Please expalin: _____

_____

9. Rate your perception of criminal defense representation in the following areas:

	Excellent	Good	Fair	Poor
Pre-charging investigation	☐	☐	☐	☐
Negotiations	☐	☐	☐	☐
Motion practice	☐	☐	☐	☐
Plea practice	☐	☐	☐	☐
Trial practice	☐	☐	☐	☐
Sentencing	☐	☐	☐	☐
Client contact	☐	☐	☐	☐
Post-trial issues	☐	☐	☐	☐
P. V. issues	☐	☐	☐	☐
Appeal	☐	☐	☐	☐

10. Please identify the chief strong points of criminal defense in your jurisdiction:

_____

_____

_____

11. Please identify the chief areas of concern for criminal defense practice in your jurisdiction:

_____

_____

_____

12. In your experience, is there a difference between the quality of representation for retained and court appointed clients?

☐ Yes, ☐ No Explain: _____

_____

Oregon State Bar
Indigent Defense Task Force
Survey Of Defenders

What county do you principally practice in? _____

Current legal experience (check all that apply):

☐ Private Practice ☐ Public Defender ☐ Other_____

Prior legal experience (check all that apply):

☐ Private Practice ☐ Public Defender ☐ District Attorney
☐ Judge _ ☐ County Counsel ☐ Other_____

Primary form of Indigent Defense delivery services you have been involved with:

☐ Consortium ☐ Private Law Firm ☐ Court List
☐ Public Defender ☐ None ☐ Other_____

1. Indicate your observations of the overall quality of representation for criminal defendants in your county:

☐ Excellent ☐ Good ☐ Fair ☐ Poor

2. Indicate your observations of the quality of representation for **retained** criminal defendants in your county:

☐ Excellent ☐ Good ☐ Fair ☐ Poor

3. Indicate your observations of the quality of representation for **indigent** defendants in your county:

☐ Excellent ☐ Good ☐ Fair ☐ Poor

4. In your experience, is there a difference in quality for indigent defense between felony and misdemeanor practice?

☐ Yes, ☐ No Explain: _____

_____

5. Please rate the characteristics of criminal defense attorneys that you perceive as most important in producing quality representation:

	Very Important		**Neutral**		**Not Very Important**
a. Temperament	5	4	3	2	1
b. Knows the law	5	4	3	2	1
c. Aggressive	5	4	3	2	1
d. Organized	5	4	3	2	1
e. Ethical	5	4	3	2	1
f. Communicative	5	4	3	2	1
g. Timely	5	4	3	2	1
h. Reasonable	5	4	3	2	1
i. Trustworthy	5	4	3	2	1

6. Specifically, indicate the quality of the following practice characteristics for criminal defense attorneys who represent the indigent in your county:

Defense attorneys are generally prepared for pretrial:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys are generally prepared for trial:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys are generally prepared for sentencing issues:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys work hard at negotiating the case:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys resolve cases pre-trial (settlement):

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Deputy District Attorneys have realistic expectations about the strengths or weakness of cases:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Unrealistic expectations about the strengths of their case by Deputy District Attorneys impact the resolution of the case:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

7. Rate your perception of criminal defense representation in the following areas:

	Excellent	**Good**	**Fair**	**Poor**
Pre-charging investigation	4	3	2	1
Negotiations	4	3	2	1
Motion practice	4	3	2	1
Plea practice	4	3	2	1
Trial practice	4	3	2	1
Sentencing	4	3	2	1

Client contact	4	3	2	1
Post-trial issues	4	3	2	1
P. V. issues	4	3	2	1
Appeal	4	3	2	1

8. Please identify the chief strong points of criminal defense in your county:

_____

_____

_____

9. Please identify the chief areas of concern for criminal defense practice in your county:

_____

_____

_____

10. In your experience, is there a difference between the quality of representation for retained and court appointed clients?

☐ Yes, ☐ No Explain: _____

_____

Oregon State Bar
Indigent Defense Task Force
Survey Of Prosecutors

Jurisdiction (County, Federal, etc.)	Current Position	Years in position

Prior Legal Experience: (Check all that apply.)

☐ private practice ☐ county counsel ☐ none
☐ public defender ☐ judge's clerk ☐ other

Primary form of Indigent Defense delivery services in your jurisdiction:

☐ public defender ☐ law firm ☐ other
☐ consortium ☐ list ☐ retained

1. In your experience, how would you characterize the quality of defense for indigent accused in your jurisdiction?

☐ Excellent ☐ Good ☐ Fair ☐ Poor

2. In your experience, is there a difference in quality for indigent defense between felony and misdemeanor practice?

☐ Yes, ☐ No Explain: _____

_____

3. Indicate your observations of the quality of representation for retained criminal defendants in your jurisdiction?

☐ Poor ☐ Fair ☐ Good ☐ Excellent

4. Indicate your observations of the quality of representation for criminal defendants overall in your jurisdiction?

☐ Poor ☐ Fair ☐ Good ☐ Excellent

5. Indicate your observations of the quality of representation for indigent defendants in your jurisdiction?

☐ Poor ☐ Fair ☐ Good ☐ Excellent

6. Please identify your chief areas of concern in the quality of criminal defense in your jurisdiction?

_____

_____

7. Please rate the below listed characteristics of criminal defense attorneys that you perceive as most important in producing quality representation:

	Very Important		**Neutral**		**Not Very Important**
a. Temperament	5	4	3	2	1
b. Knows the law	5	4	3	2	1
c. Aggressive	5	4	3	2	1
d. Organized	5	4	3	2	1
e. Ethical	5	4	3	2	1
f. Communicative	5	4	3	2	1
g. Timely	5	4	3	2	1
h. Reasonable	5	4	3	2	1
i. Trustworthy	5	4	3	2	1

8. Specifically, indicate the quality of the following practice characteristics for criminal defense attorneys who represent the indigent in your jurisdiction:

Defense attorney are generally prepared for pretrial:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorney are generally prepared for trial:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys are generally prepared for sentencing issues:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys work hard at negotiating the case:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys resolve cases pre-trial (settlement):

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys have realistic expectations about the strengths of the case:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

9. Rate your perception of criminal defense representation in the following areas:

	Excellent	**Good**	**Fair**	**Poor**
Pre-charging investigation	☐	☐	☐	☐
Negotiations	☐	☐	☐	☐
Motion practice	☐	☐	☐	☐
Plea practice	☐	☐	☐	☐
Trial practice	☐	☐	☐	☐
Sentencing	☐	☐	☐	☐
Client contact	☐	☐	☐	☐
Post-trial issues	☐	☐	☐	☐
P. V. issues	☐	☐	☐	☐
Appeal	☐	☐	☐	☐

10. Please identify the chief areas of concern for criminal defense practice in your jurisdiction:

_____

_____

_____

11. Please identify the chief strong points of criminal defense in your jurisdiction:

_____

_____

_____

12. In your experience, is there a difference between the quality of representation for retained and court appointed clients?

☐ Yes, ☐ No Explain: _____

_____

Oregon State Bar
Indigent Defense Task Force
Survey Of Probationers

Please answer the following questions based upon your own personal experiences in the criminal justice system. There are no right or wrong answers.

1. County _____; Probation: Felony ☐ Misdemeanor ☐

2. I am a first offender ☐; prior offender ☐.

3. My defense attorney was: ☐ court appointed ☐ retained

4. I have been in jail awaiting trial/plea? ☐ yes ☐ no

5. Please rate your attorney's performance: (Circle your response):

	Excellent	**Good**	**Fair**	**Poor**
a. Pre-trial jail visits	1	2	3	4
b. Response to your phone calls/letters	1	2	3	4
c. Involved you in the defense process	1	2	3	4
d. Listened to your ideas/concerns	1	2	3	4
e. Fully explained the defense process	1	2	3	4
f. Investigated all defenses	1	2	3	4
g. Spent adequate time with you	1	2	3	4
h. Kept you informed	1	2	3	4
i. Discussed risks and options	1	2	3	4
j. Willingness to fight the prosecution	1	2	3	4
k. Could be trusted	1	2	3	4
l. Willingness to plea bargain	1	2	3	4
m. Knowledge of applicable law	1	2	3	4
n. Dealt honestly with you	1	2	3	4
o. Had you prepared for court	1	2	3	4
p. Worked hard for you/was prepared	1	2	3	4
q. Cared about your best interests	1	2	3	4
r. Explained matters to your satisfaction	1	2	3	4
s. Pleasant to deal with	1	2	3	4

6. I was pleased with my attorney as follows:

_____

_____

7. I was displeased with my attorney as follows:

_____

_____

Appendix Part Four — Performance Standards For Attorneys: the Inmate Perspective

by M. Kelly

Background

In attempting to establish possible standards of performance for attorneys, it would appear necessary to first identify those areas in which attorneys in general are currently performing or operating unsatisfactorily. One method of ascertaining this is to inquire of those individuals who either utilize, observe, or interact with attorneys on a regular basis. One such group is defendants in criminal cases. The following, then, is the essence of observations, comments and personal experiences offered by inmates at the Federal Prison Camp at Sheridan, OR.

Results

The perspective of the federal prison inmates varies greatly due to the variety in offender backgrounds and characteristics. Despite these differences, the retrospective evaluation of legal representation offered by criminal defendants is remarkably similar. Most individuals identify precisely the same areas of concern or dissatisfaction regarding their trial counsel and generally convey a similar overall assessment of their experiences.

These areas of concern and/or dissatisfaction can be grouped into three basic categories: (1) pretrial; (2) sentencing; and (3) post-conviction phase. The first group deals with that period of time before a jury verdict or guilty plea is entered. The second group pertains to that time from verdict/plea through sentencing. The final group contains those concerns usually arising after sentence has been imposed.

Pretrial Issues:

While the errors or omissions committed by an attorney before trial are the first to occur, they are often the last to be recognized, especially by the defendant/client. This is due to the fact that the defendant is frequently unfamiliar with the judicial system and process, usually by virtue of the fact that he/she is a first time offender. This lack of experience prevents the defendant/client from identifying mistakes or omissions during pretrial proceedings. Further, the defendant is usually suffering from the "clubbed fish" syndrome. However, once identified, the complaints of one individual to the next are often similar. They include:

1) Failure to timely initiate attorney/client visitation;

2) Failure to fully debrief the defendant regarding the facts of the crime. This results in an over-reliance on the prosecution's theory of the case;

3) Incomplete examination of charging instrument and other relevant documents, i.e., indictment/search warrant;

4) Insufficient effort at identifying pretrial issues; i.e., failure to vigorously pursue discovery and investigate or interview victims and witnesses;

5) Failure to explore potential defenses;

6) Unwillingness to pursue or incorporate defendant's ideas or theories into defense;

7) Reluctance to accept defendants' telephone communication;

8) Failure to answer correspondence in a timely fashion, if at all; and

9) Unwillingness to fight the prosecution — a predisposition to a plea bargain.

The overall conclusion drawn by federal inmates from their pretrial experience is that most attorneys never seriously consider taking a case to trial. While this may be more common in federal cases than state, there definitely exists a predisposition toward plea bargaining. The ramifications of this reluctance to pursue a defense are many, most of which are covered in the above list. Importantly, however, is

that this approach results in a premature resignation of the attorney to a course of action which does not include sufficient effort being made to investigate issues which could lead to the discovery of a potential defense, and in the attorney maintaining a perfunctory attitude toward the client and his insights.

Sentencing Issues:

As defendants are often guilty of at least some portion of the crimes with which they have been charged, most ultimately reach a plea bargain regardless of the attorney's best efforts at finding a defense. Thus, it may be argued, representation and preparation for the sentencing phase of criminal proceedings has become the most important function of the contemporary defense counsel because the outcome of this part of the defense process will affect not just the amount of time a defendant will spend in prison, but how and where he might spend it. This is particularly true at the federal level.

Even more specifically, the Presentence Investigation Report (PSI) has become the centerpiece of the sentencing proceedings. Unfortunately, the litany of complaints by the federal inmates interviewed for this report begs the question: Do attorneys themselves appreciate the full role and impact of the PSI? These complaints included:

1) Failure to impress upon the defendant the importance of the PSI;

2) Failure to recognize and challenge detrimental information;

3) Allowing judges to make nonspecific findings regarding important sentencing matters. This occurs when the court makes a finding regarding only the appropriate quantitative *range* of drugs or financial loss to be used in sentencing rather than the specific amount; and

4) Failing to require the court to make a specific finding as to the scope of a conspiracy participant's understanding of the agreement or relevant conduct.

Other issues unrelated to the PSI include:

1) Neglecting to ask for downward departure or minimal participant consideration;

2) Failing to request the abatement of interest on fines and restitution; and

3) Lack of diligence in obtaining clarification of ambiguous statements in the judgment, such as when payments must begin on a fine or restitution.

Also of concern is the same lack of communication between the attorney and the defendant expressed in the discussion of the pretrial issues. Once again, this absence of synergy results in detrimental consequences, primarily in the form of information going unchallenged at sentencing which does not directly relate to the sentence, but may have a large impact on how the Department of Corrections or the Bureau of Prisons administrates the sentence. Even a hint of weapons, threatening statements, or the like which were never discussed in court, may provide the basis for prison officials to justify the imposition of one or more "management variables" which could affect the inmate's prison stay. In short, greater attention must be demonstrated to those issues which do not directly affect the actual sentence, but may determine how that sentence is administrated.

Post-trial Issues:

As one might suspect, once a defendant enters prison, he often develops a sense of abandonment. The causes of this are numerous and come from many sources, but those originating from the attorney include:

1) Failure to discuss or consider issues and ideas for the appeal proffered by the defendant;

2) Unwillingness to allow the defendant to review the appeal briefs prior to their filing; and

3) A continuing reluctance to take calls or answer letters.

In general, the conclusion that is drawn by many inmates is that attorneys are unwilling to incorporate their clients' ideas or insights into the appeals proc-

ess. This unilateral approach by the attorney naturally results in the client continually initiating contact with the attorney via phone calls and letters, which the attorney naturally finds little need to answer. This, of course, evokes a great deal of frustration and resentment, both of which are unnecessary, and can be avoided with representation which is slightly more sincere in its practice.

Recommendation:

For the most part, the complaints inmates have regarding their attorney's representation do not deal so much with the technical aspects of their performance as it does with their "bedside manner." Failure to initiate regular contact with the client from arrest through appeal, failure to accept calls and answer letters and the unwillingness to allow the defendant to contribute to his defense with ideas and opinions, portray an unprofessional image and create a resentful client.

Therefore, the following improvements are recommended:

1) Guidelines depicting acceptable time for response to client letters and phone calls;
2) Guidelines recommending that all possible defenses to a defendant's charges be explored prior to entering into plea negotiations; and
3) The implementation of standards which define and convey the concept that the attorney is providing a service to the client and the relationship should, therefore, be conducted accordingly.

Conclusion:

Most inmates seem to recognize that attorneys, by and large, are hard working, good natured individuals who perform their responsibilities to the best of their abilities. Unfortunately, many seem to afford little or no attention to details which could prevent the alienation of their criminal defendant clients. With a little additional effort, the perception of attorneys' performance could be greatly improved. In the absence of such, however, standards mandating a level of performance in these areas may be warranted.

Annotations

Performance Standards

Chapter 1
General Standards For Representation In All Criminal, Delinquency, Dependency And Civil Commitment Cases

STANDARD 1.1 — Prerequisites For Representation

Counsel shall only accept an appointment or retainer if counsel is able to provide quality representation and diligent advocacy for the client.

■ **Cases and Statutes**

The right to assistance of counsel is equally applicable to those who retain counsel and to those to whom counsel is appointed. *Shipman v. Gladden*, 253 Or 192, 199 (1969); *Moore v. United States*, 432 F2d 730 (3rd Cir. 1970)

■ **Related Standards and Guidelines**

Oregon Code of Professional Responsibility

DR 6-101 Competence and Diligence

Oregon Judicial Department, "Qualification Standards for Court-Appointed Counsel to Represent Indigent Persons at State Expense" (1990)

STANDARD 2.1 Attorneys appointed to represent indigent persons at state expense must provide each client the time and effort necessary to ensure competent and adequate representation. Neither defender organizations nor assigned counsel should accept work loads that, by reason of their excessive size or complexity, interfere with rendering competent and adequate representation or lead to the breach of professional obligations.

STANDARD 3.1 Subject to the provisions of Standard 4.1, the appointing authority shall appoint only those attorneys who:

1. Are members of the Oregon State Bar or are attorneys of the highest court of record in any other state or country who will appear under ORS 9.240; *and*
2. Either:
   (a) Meet the qualifications specified below for the applicable case type; *or*
   (b) Possess significant experience and skill equivalent to or exceeding the qualifications specified below, and who demonstrate to the appointing authority's satisfaction that the attorney will provide competent and adequate representation; *and*
3. Have adequate facilities to ensure reasonable and timely personal and telephonic contact between attorney and client, and between court and attorney, including adequate support staff or answering service/machine for receiving messages and notifying clients of court dates.

National Legal Aid and Defender Association (NLADA), "Performance Guidelines for Criminal Defense Representation" (1994)

NLADA Guideline 1.1 — Role of Defense Counsel

(a) The paramount obligation of criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the criminal process.

(b) Attorneys also have an obligation to abide by ethical norms and act in accordance with the rules of the court.

ABA Standards for Criminal Justice: Providing Defense Services, Third Edition

(a) Neither defender organizations, assigned counsel nor contractors for service should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases.

(b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgement, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organizations, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

Metropolitan Public Defender

Established a unit valuation system to determine the number of cases each attorney can handle each year. Types of cases are given unit values based on anticipated time demands. Unit values range from 100 to 1. It is assumed that a mythical competent attorney can effective handle 600 units per year.

State Bar of Michigan, Committee on Assigned Counsel Standards, "Standards for Assigned Counsel" (1995)

1. Declining Appointment. Counsel shall decline an appointment from the court to represent an indigent client if the nature or extent of counsel's existing caseload is likely to prevent effective representation of that client.

STANDARD 1.2 — General Duties And Responsibilities Of Counsel To Client; Avoiding Conflict Of Interests

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

■ **Related Standards and Guidelines**

Oregon Code of Professional Responsibility

DR 5-107 Settling Similar Claims of Clients

DR 7-101 Representing a Client Zealously

DR 7-102 Representing a Client within the Bounds of the Law

NLADA Guideline 1.3– General Duties of Defense Counsel

(c) Counsel has the obligation to keep the client informed of the progress of the case, where it is possible to do so.

STANDARD 1.3 — Role Of Counsel

Counsel should seek the lawful objectives of the client and should not substitute counsel's judgment for that of the client in those case decisions that are the responsibility of the client.

■ **Related Standards and Guidelines**

Oregon Code of Professional Responsibility

DR 5-108(A), (B) Avoiding Influences by Others than the Client

Massachusetts Committee for Public Counsel Services, "Performance Guidelines Governing Representation of Indigents in Criminal Cases", 1991

1.3 General Duties of Defense Counsel

(a) Counsel's primary and most fundamental responsibility is to promote and protect the best interests of the client. This includes honoring the attorney/client privilege, respecting the client at all times, and keeping the client informed of the progress of the case....

(b) Client should make every effort to arrange for prompt and timely consultation with the client in an appropriate private setting....

(c) Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting appointment.

(d) Counsel has an obligation to keep and maintain a thorough, organized, and current file on each client....

(e) Counsel must be alert to, and avoid where appropriate, under the law all potential and actual conflicts of interest that would impair the ability to represent a client.

(f) The attorney shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions are: whether to plead guilty or not guilty and to alter such plea; whether to be tried by a jury or a court; whether to testify at trial; whether to appeal, and whether to waive his/her right to a speedy trial.

(g) The attorney should explain that final decisions concerning trial strategy, after full consideration with the client and after investigation of the applicable facts and law, are ultimately to be made by the attorney....

(h) Counsel's obligation to the client continues on all matters until and unless another attorney is assigned and/or files an appearance. Counsel should fully cooperate with successor counsel.

(i) Counsel should be aware of and protect the client's right to a speedy trial, unless strategic considerations warrant otherwise.

(j) Unless the prejudice outweighs the benefits, counsel should seek any necessary recess or continuance of any proceeding for which counsel is inadequately prepared....

(k) Consistent with the obligations and constraints of both court and ethical rules, counsel should make reasonable efforts to seek the most advantageous forum for the client's case, e.g. motions to change venue, etc.

(l) Where counsel is unable to communicate with client because of either language or mental disability, the attorney shall take whatever steps are necessary to insure that he/she is able to communicate with the client and that the client understands the proceedings. Such steps would include having counsel obtain expert assistance to assist with the matter.

(m) Counsel should be prompt for all court appearances and appointments and, if a delay is unavoidable, should take necessary steps to inform the client, the court, and minimize the inconvenience to others.

STANDARD 1.4 — Initial Client Interview

Counsel should conduct a client interview as soon as practicable after being retained or appointed by the court, in order to obtain information necessary to pro-

vide quality representation at the early stages of the case and to provide the client with information concerning counsel's representation and the case proceedings.

■ **Cases and Statutes**

Counsel must obtain information from the client. *DeCoster I, supra* at 1203; *United States v. Tucker*, 716 F2d 576, 582, 591, 593 (9th Cir. 1983); *DeCoster II, supra* at 280, 281; *State v. Pfeiger*, 15 Or App 383, 388 (1973); *Cole v. Peyton*, 389 F2d 224, 226 (4th Cir. 1968) (the court further noted that counsels' caseload was so large as to be a factor in their below standard representation in the instant case.). Counsel must fully advise the defendant. *Lyons v. Pearce*, 298 Or 554 (1985); *Barzee v. Cupp*, 29 Or App 705 (1977); *State ex rel Russell v. Jones*, 293 Or 312, 317-318 (1982); *Gairson v. Cupp*, 415 F2d 352 (9th Cir. 1969).

■ **Related Standards and Guidelines**

NLADA Guideline 2.2 — Initial Interview

(a) Preparation: Prior to conducting the initial interview the attorney, should, where possible:

(1) be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known;

(2) obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by bail agencies concerning pretrial release, and law enforcement reports that might be available;

(3) be familiar with the legal criteria of determining pretrial release and the procedures that will be followed in setting those conditions;

(4) be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as custodian for that client's release;

(5) be familiar with any procedures for reviewing the trial judge's setting of bail.

(b) The Interview:

(1) The purpose of the initial interview is both to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome.

(2) Information that should be acquired includes, but is not limited to:

(A) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, immigration status (if applicable), employment record and history;

(B) the client's physical and mental health, educational and armed services records;

(C) the client's immediate medical needs;

(D) the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearance or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision;

(E) the ability of the client to meet any financial conditions of release;

(F) the names of individuals or other sources that counsel can contact to verify the information provided by the client; counsel should obtain the permission of the client before contacting these individuals;

(3) Information to be provided to the client includes, but is not limited to:

(A) an explanation of the procedures that will be followed in setting the conditions of pretrial release;

(B) an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;

(C) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;

(D) the charges and potential penalties;

(E) a general procedural overview of the progression of the case, where possible;

(c) Supplemental Information

(1) Wherever possible, counsel should use the initial interview to gather additional information relevant to preparation of the defense. Such information may include, but is not limited to:

(2) the facts surrounding the charges against the client;

(3) any evidence of improper police investigative practices or prosecutorial conduct which affects the client's rights;

(4) any possible witnesses who should be located;

(5) any evidence that should be preserved;

(6) where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

State Bar of Michigan

7. Client Interview. Counsel shall conduct a timely interview of the client after being appointed and sufficiently before any court proceedings so as to be prepared for that proceeding.

Massachusetts Committee for Public Counsel Services, "Performance Guideline Governing Representation of Indigents in Criminal Cases", 1988

2.2 Initial Interview and Preparation for Bail Hearing

(e) Whether or not the client is detained, counsel should describe the court procedures and counsel's obligation regarding the attorney/client privilege. Counsel should explain the client's rights under the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights and should specifically advise the client not to discuss the case or any of the facts surrounding it with anyone but counsel unless counsel advises otherwise. This admonition should include the client's speaking out in court and the client's right to request that his/her attorney be present at any interview or questioning.

M. Kelly, Federal Prison Camp, Sheridan, Oregon, "Performance Standards for Attorneys: The Inmate Perspective" (1995)Pretrial Issues

1) Failure to time initiate attorney/client visitation.

2) Failure to fully debrief the defendant regarding the facts of the crime. This results in an over-reliance on the prosecution's theory of the case.

3) Incomplete examination of the charging instrument and other relevant documents. (i.e. Indictment/Search Warrant.)

4) Insufficient effort at identifying pretrial issues. (i.e. failure to vigorously pursue discovery, and investigate or interview victims and witnesses.)

5) Failure to explore potential defenses.

6) Unwillingness to pursue or incorporate defendant's ideas or theories into defense.

7) Reluctance to accept defendant/client telephone communication.

8) Failure to answer correspondence in a timely fashion, if at all.

9) Unwillingness to fight the prosecution; a predisposition to plea bargain.

A. Lopez, Multnomah County Bar Association, Subcommittee on Indigent Defense, "Case Life of Adult Criminal Case" (1991)

I. Preindictment/Arraignment
- A. Explain Miranda and other privileges; attorney/client, parent, husband/wife, etc.
- B. Explain charges/penalties.
- C. Explain rights/procedures, administrative hearings applicable.
- D. Explain civil compromise, expungement (if applicable).
- E. Generate release information (if custodial setting)
- F. Generate witness lists.
- G. Talk to alleged victim or police or DA for potential preindictment or precomplaint resolution.
- H. Assist with setting surrender/arraignment.
- I. Duty to Preserve evidence.
- J. Explain criminal process (e.g., Juvenile Court, civil liability, forfeitures, tort claims).
- K. Internal affairs complaint information.
- L. Preliminary evaluation: mental competence.
- M. First stage referral, information, attorney referral, appropriate hotline, shelter, etc.

II. FIRST APPEARANCE
- A. Advice of rights, reserve rights, respond to name, formal entry of not guilty plea (if misdemeanor).
- B. Generate release information, make recog pitch, review any relevant information, suggest relevant alternatives, make community contacts.
- C. Determine whether complaint is crime or violation.
- D. Set initial/get contact and overview, explain future court dates, FTA law, duties and responsibilities w/release authorities DMDA, ISP, CSS, BSP, third party conditions.
- E. Emphasize any court warnings, lawyer's role, importance of remaining silent re: facts of case.
- F. Brief investigator — initiate investigation if appropriate.
- G. Get trial assistant involved re: alternatives (e.g. drug or alcohol counseling).
- H. Open/organize file.
- I. Letter to client, future court dates, significant events.
- J. Check for conflicts, other pending cases, p.v., parole holds.

III. First Client Interview
- A. Get waiver of appearance.
- B. Release of information.
- C. Develop theory of case.
- D. Generate alternatives.
- E. Get names/addresses of potential witnesses; interview witnesses if time permits.
- F. Identify handicaps, communication difficulties — take steps to assure appropriate conditions or interpreter assigned — ex parte Motion for Interpreter.
- G. If in custody, see immediately — advise, per client's request, parents, spouse, others of custodial situation — if out, schedule appointment.
- H. Make mutual check of defendants.
- I. Begin negotiations with state, advise D.A of defense witnesses (if any) you want to go before Grand Jury and questions to be asked of them.

STANDARD 1.5 — Theory Of The Case

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case.

■ Cases and Statutes

Failure to pursue defendant's theory of the case is not ineffective assistance of counsel. *Krummacher v. Gierloff*, 290 Or 867, 627 P2d 458 (1981)

■ **Related Standards and Guidelines**

NLADA Guideline 4.3 — Theory of the Case

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case.

State Bar of Michigan

24. Developing Trial Strategy. Counsel shall strive to develop a legally correct and factually plausible strategy for trial.

Performance Standards

Chapter 2
Specific Standards For Representation In Criminal And Juvenile Delinquency Cases

STANDARD 2.1 — Prerequisites For Representation

Counsel should be proficient in applicable substantive and procedural law and should have appropriate experience, skill and training for the type of representation required.

■ **Cases and Statutes**

Some states have recognized these duties as guidelines to serve as a starting point in the development of clearer standards for a determination of effective assistance of counsel. *Strickland v. Washington*, 80 L. Ed. 674, 694 (1984); *DeCoster I, supra* at 1203. The standards represent only minimum duties owed by counsel to each client, not aspirational guidelines to which the attorney should strive. *United States v. DeCoster (DeCoster II)*, 624 F2d 196, 276 (1976).

ORS 419C.285 provides that, while only the youth and the state are parties to the adjudication stage of a delinquency proceeding, parents or guardians, the State Office for Services to Children and Families (SOSCF) and the Oregon Youth Authority (OYA) (formerly Children's Services Division [CSD]) if the youth is temporarily committed to the agency, a Court Appointed Special Advocate if one is appointed, and a psychological parent who has intervened in the case under ORS 109.119 (1), are all parties to the dispositional stage of a delinquency proceeding. Parties have the right to notice of the proceeding, the right to appear with counsel and to have counsel appointed if otherwise provided by law. The right to call witnesses and participate in the hearing, as well as the right to appeal. ORS 419C.285 (2). Counsel is constitutionally and statutorily required for parents or guardians facing loss of custody or significant interference with the parent-child relationship. *State ex rel Juv. Dept. v. Grannis*, ORS 419B.205. Further, the juvenile court has authority over parents and guardians of youth within the court's jurisdiction for delinquent acts, and may order them to participate in services for the child or themselves. ORS 419C.573, ORS 419C.575. Parents or guardians subject to such orders and potential contempt penalties for failure to comply, are entitled to court appointed counsel if indigent. ORS 419C.575.

■ **Related Standards and Guidelines**

NLADA Guideline 1.2 — Education, Training, and Experience of Defense Counsel

(a) To provide quality representation, counsel must be familiar with the substantive criminal law and law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Where appropriate, counsel should also be informed of the practices of the specific judge before whom a case is pending.

(b) Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.

NLADA Guideline 1.3 — General Duties of Defense Counsel

(a) Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.

Washington Defender Association Standards for Public Defense Services

Standard Fourteen - Qualifications of Attorneys

2. Trial attorneys' qualifications according to severity or type of case:
   - e. Juvenile Cases - Class A. Each attorney representing a juvenile accused of a Class A felony shall meet the following requirements:
     - (i) Minimum requirements set forth in Section 1 [re: qualifications to practice law in Washington] , and
     - (ii) Either:
       - a. has served one year as a prosecutor; or
       - b. has served one year as a public defender; or
       - c. has been trial counsel alone of record in five juvenile Class B and C felony trials; and
     - (iii) Each attorney shall be accompanied at his or her first juvenile trial by a supervisor
   - f. Juvenile Cases - Classes B and C. Each attorney representing a juvenile accused of a Class B or C felony shall meet the following requirements:

(i) Minimum requirements set forth in Section 1; and

(ii) Either:

a. has served one year as a prosecutor; or

b. has served on year as a public defender; or

c. has been trial counsel alone in five misdemeanor cases brought to a final resolution; and

(iii) Each attorney shall be accompanied at his or her first juvenile trial by a supervisor.

QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT INDIGENT PERSONS AT STATE EXPENSE, Oregon Judicial Department (1990).

"For juvenile delinquency misdemeanor cases and status offense cases - - 3.1 A (1.) Has reviewed and is familiar with the ABA Standards for Criminal Justice (2d ed.), Chapters 4, 5, 10 through 15, and 20 through 22; the Code of Professional Responsibility; the Criminal and Evidence Codes of Oregon, as set forth in ORS Chapters 40, 131-169, 471, and 475; the Uniform Trial Court Rules; and Oregon State Bar, Criminal Law (1986); and (2.) Satisfies one of the following: a.) has been certified under the Oregon Supreme Court Rules on Law Student Appearances to represent clients on behalf of a public defender office, a district attorney office, or a private attorney office in criminal cases; has undertaken such representation for at least six months; and can present a letter from the student's immediate supervisor certifying the student's knowledge of applicable criminal procedure and sentencing alternatives; or, b.) Has observed five complete trials of criminal cases that were tried and submitted to a jury; or c.) Has served as counsel or co-counsel in at least two criminal cases that have been tried and submitted to a jury, or, d.) Has served as co-counsel in at least five criminal cases. Such service shall have included attendance at all court appearances and all client interviews in each case; or, e.) Has served as a judicial clerk for a court that regularly hears criminal cases; or, (3.) In lieu of the above qualifications, possesses significant equivalent experiences under Standard 3.1.2.b. For juvenile delinquency minor felony case and for abuse and neglect and dependency cases - 3.1.3 B 1.) Meets the qualifications in Section A; * and 2.) Has continued to meet the qualifications in Section A for at least nine months; and 3.) Has served as counsel or as co-counsel and has handled a significant portion of the trial in two criminal cases that have been submitted to a jury; and 4.) In at least one felony trial submitted to a jury, has associated on a pro bono or paid basis as co-counsel with an attorney who has previously tried felony cases and is otherwise qualified to try felony cases under these standards; and 5.) On request, can present an additional showing of expertise and competence in the area of criminal trial practice by submitting at least three letters of reference from other criminal trial lawyers or judges the attorney has appeared before on criminal cases. The letters must explain why the attorney has special experience and competence to handle felony cases involving potential incarceration of up to five years . . .

For juvenile delinquency major felony cases, for waiver cases based on major felonies, and for termination of parental rights cases - 3.1.3 C. 1.) Meets the qualifications specified in section B; and 2.) Has continued to meet the qualifications of Section B for nine months and has had nine months of lesser felony trial experience in a public defender or a district attorney office or in private practice; and 3.) On request, can present evidence of additional expertise and competence in the area of criminal trial practice by submitting at least five letters of reference from other criminal trial lawyers or judges that the attorney has appeared before on criminal cases. The letters must explain why the attorney has special experience and competence to handle felony cases involving potential incarceration of 20 years; or 4.) In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.

For juvenile delinquency murder cases -

3.1.3.D. Murder Cases

1. Lead Counsel. An attorney is qualified for appointment as lead counsel in murder cases, not including capital murder if he or she:
   a. Meets the qualifications in Section C; and
   b. Has been trying major felony cases for the past three years; and
   c. Has demonstrated to persons with knowledge of his or her practice a high level of learning, scholarship, training, experience, and ability to provide competent and vigorous representation to defendants charged with a crime for which the most serious penalties can be imposed; including handling cases involving codefendants, a significant number of witnesses, and cases involving suppression issues, psychiatric issues and scientific evidence, and
   d. Has acted as lead counsel or co-counsel in a significant number of major felonies tried to a jury, which should include at least one homicide case that was tried to a jury and went to a final verdict; and
   e. On request, can demonstrate the above by:
      1) A written statement by the attorney explaining why the attorney believes that he or she has the qualifications required to handle a murder case; and
      2) Certification from those with knowledge of the attorney's practice indicating that they believe that the attorney should be allowed to defend murder cases and explaining why the attorney has the qualities required. Certification must include at least five letters from at least two of the following three groups:
         a) Judges before whom the attorney has appeared;

b) Defense attorneys who are recognized and respected by the local bar as experienced criminal trial lawyers and who have knowledge of the attorney's practice; and

c) District attorneys or deputies against who or with whom the attorney has tried cases; or

f. In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.

2. Co-Counsel. Co-Counsel in murder cases must meet the qualification is subparagraphs 1.a, b, c, and e of this section or must posses significant equivalent experience under Standard 3.1.2.b.

* The Qualification Standards do not specify how much of an attorney's practice must involve criminal or juvenile cases in order to meet the qualifications for a particular level of practice. Attorneys should be engaged in that type of practice at least half-time for a period specified.

■ **Commentary:**

A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings, p. 4

"Society also needs well-trained and knowledgeable counsel to ensure that expensive institutional resources are reserved for those youth who truly need them, and that young people receive the services they need to avoid future trouble, as well as to provide equal justice in adversarial proceedings."

Ibid., p. 12

"Defender programs that appear to be of high quality have a number of characteristics in common:

-Supportive structural features of the program that make effective representation possible, including limitations on caseloads, the ability to enter the case early on, and the flexibility to represent the client in related collateral matters (such as special education);

-Comprehensive initial and ongoing training, and available resource materials;

-Adequate non-lawyer support and resources;

-Hands-on supervision of attorneys;

-A work environment that values and nurtures juvenile court practice."

STANDARD 2.2 — General Duties And Responsibilities Of Counsel; Avoiding Conflicts Of Interest

In adult criminal and juvenile delinquency matters, counsel or counsel associated in practice should avoid representing two or more clients who have been jointly charged or whose cases have been consolidated.

■ **Related Standards and Guidelines**

Oregon Code of Professional Responsibility

DR 4-101 Preservation of Confidences and Secrets of a Client

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

NLADA Guideline 1.3 — General Duties of Defense Counsel

(b) Counsel must be alert to all potential and actual conflicts of interest that would impair counsel's ability to represent a client. Where appropriate, counsel may be obliged to seek an advisory opinion on any potential conflicts.

State Bar of Michigan, "Standards for Assigned Counsel," (1995)

3. Declining Representation - Conflict from Joint Representation. A lawyer or lawyers associated in practice shall not represent two or more defendants who have been jointly charged or whose cases have been consolidated unless the following conditions are met:

(a) The attorney proposing to represent two or more defendants states on the record before trial, that joint representation will in all probability not cause a conflict of interest and the reasons for that conclusion;

(b) The defendants state, on the record, after the court's inquiry and the attorney's statement, that it is their desire to proceed with the same attorney; and

(c) The court finds, on the record, that a joint representation will in all probability not cause a conflict of interest, and states the reason for the finding.

If an unanticipated conflict occurs before or during trial, an attorney who is representing two or more defendants shall immediately inform the court.

4. Disclosure of other Conflicts. When counsel identifies an actual or potential conflict of interest arising from circumstances other than the joint representation of co-defendants, counsel shall advise both the client and the court that such a conflict exists. Counsel shall explain the basis of the conflict to the extent possible without divulging privileged communications or jeopardizing the legal right or physical safety of any person. Thereafter, counsel shall withdraw from the case unless the court has elicited from the client, on the record, a knowing and voluntary waiver of the right to proceed with conflict-free counsel.

5. Preservation of Attorney-Client Privilege. Counsel shall preserve the attorney-client privilege and not disclose, without the client's permission, statements made in confidence.

6. Acceptance of Fees. Counsel shall not seek or accept fees from an indigent client or from any other source on the client's behalf other than fees authorized by the appointing authority.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

3.2 Adversity of interests.

(a) Adversity of interests defined. For purposes of these standards, adversity of interests exists when a lawyer or lawyers associated in practice:
  (i) Formally represent more than one client in a proceeding and have a duty to contend in behalf of one client that which their duty to another requires them to oppose.
  (ii) Formally represent one client but are required by some third person or institution, including their employer, to accommodate their representation of that client to factors unrelated to the client's legitimate interests.

(b) Resolution of adversity. At the earliest feasible opportunity, counsel should disclose to the client any interest in or connection with the case or any other matter that might be relevant to the client's selection of a lawyer. Counsel should at the same time seek to determine whether adversity of interests potentially exists and, if so, should immediately seek to withdraw from representation of the client who will be least prejudiced by such withdrawal.

STANDARD 2.3 — Role Of Counsel

Counsel should seek the lawful objectives of the client and should not substitute counsel's judgment for that of the client in those case decisions that are the responsibility of the client.

■ Cases and Statutes

Counsel is constitutionally and statutorily required for youth in delinquency cases. *In re Gault*, 387 US 1 (1967.)

ORS 419C.200 et seq. Counsel must be appointed for youth whenever requested in cases where the youth would be entitled to court-appointed counsel if the youth were an adult charged with the same offense. ORS 419C.200 (1). The parent or guardian of the youth's estate may be required to pay for costs of court-appointed counsel if they do not meet the standards for indigency applied in adult criminal cases. ORS 419C.203; ORS 135.050. Payment of court-appointed counsel is governed by the same statutes governing such payments in adult criminal cases. ORS 419C.206; ORS 419C.209; ORS 135.050 - .055; ORS 151.430 - .480; and ORS 151.460.

■ Related Standards and Guidelines

Oregon Code of Professional Responsibility

DR 5-108(A), (B) Avoiding Influence by Others than the Client

Massachusetts Committee for Public Counsel Services (1991)

1.3 General Duties of Defense Counsel

(a) Counsel's primary and most fundamental responsibility is to promote and protect the best interests of the client. This includes honoring the attorney/client privilege, respecting the client at all times, and keeping the client informed of the progress of the case....

(b) Client should make every effort to arrange for prompt and timely consultation with the client in an appropriate private setting....

(c) Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting appointment.

(d) Counsel has an obligation to keep and maintain a thorough, organized, and current file on each client....

(e) Counsel must be alert to, and avoid where appropriate, under the law all potential and actual conflicts of interest that would impair the ability to represent a client.

(f) The attorney shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions are: whether to plead guilty or not guilty and to alter such plea; whether to be tried by a jury or a court; whether to testify at trial; whether to appeal, and whether to waive his/her right to a speedy trial.

(g) The attorney should explain that final decisions concerning trial strategy, after full consideration with the client and after investigation of the applicable facts and law, are ultimately to be made by the attorney....

(h) Counsel's obligation to the client continues on all matters until and unless another attorney is assigned and/or files an appearance. Counsel should fully cooperate with successor counsel.

(i) Counsel should be aware of and protect the client's right to a speedy trial, unless strategic considerations warrant otherwise.

(j) Unless the prejudice outweighs the benefits, counsel should seek any necessary recess or continuance of any proceeding for which counsel is inadequately prepared....

(k) Consistent with the obligations and constraints of both court and ethical rules, counsel should make reasonable efforts to seek the most advantageous forum for the client's case, e.g. motions to change venue, etc.

(l) Where counsel is unable to communicate with client because of either language or mental disability, the attorney shall take whatever steps are necessary to insure that he/she is able to communicate with the client and that the client understands the proceedings. Such steps would include having counsel obtain expert assistance to assist with the matter.

(m) Counsel should be prompt for all court appearances and appointments and, if a delay is unavoidable, should take necessary steps to inform the

client, the court, and minimize the inconvenience to others.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

3.1 The nature of the relationship

(a) Client's interest's paramount. However engaged, the lawyer's principal duty is the representation of the client's legitimate interests. Considerations of personal and professional advantage or convenience should not influence counsel's advice or performance.

(b) Determination of client's interests.

(i) Generally. In general, determination of the client's interests in the proceedings, and hence the plea to be entered is ultimately the responsibility of the client after full consultation with the attorney.

(ii) Counsel for the juvenile.

[a] Counsel for the respondent in a delinquency or in need of supervision proceeding should ordinarily be bound by the client's definition of his or her interests with respect to admission or denial of the facts or conditions alleged. It is appropriate and desirable for counsel to advise the client concerning the probable success and consequences of adopting any posture with respect to those proceedings. . .

[c] In delinquency and in need of supervision proceedings where it is locally permissible to so adjudicate very young persons, and in child protective proceedings, the respondent may be incapable of considered judgment in his or her own behalf.

STANDARD 2.4 — Obligations Of Counsel Regarding Pretrial Release

When a client is in custody, counsel should explore with the client the pretrial release of the client under the conditions most favorable to the client and attempt to secure that release.

■ Related Standards and Guidelines

NLADA Guideline 2.1 — General Obligations of Counsel Regarding Pretrial Release

The attorney has an obligation to attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client.

NLADA Guideline 2.3 — Pretrial Release Proceedings

(a) Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release.

(b) Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.

(c) If the court set conditions of release which require the posting of a monetary bond or the posting of real property as collateral for release, counsel should make sure the client understands the available options and the procedures that must be followed in posting such assets. Where appropriate, counsel should advise the client and others acting in his or her behalf how to properly post such assets.

(d) Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court to any special medical or psychiatric and security needs of the client and request that the court direct the appropriate officials to take steps to meet such special needs.

State Bar of Michigan "Standards for Assigned Counsel," (1995)

8. Securing Client's Release. Counsel shall take reasonable steps to secure the client's release from custody under the least restrictive conditions possible.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

6.4 Detention.

(a) If the client is detained. . . the lawyer should immediately consider all steps that may in good faith be taken to secure the child's release from custody.

(c) The lawyer should not personally guarantee the attendance or behavior of the client or any other person, whether as surety on a bail bond or otherwise.

New York State Bar Association: Law Guardian Representation Standards

Standard B-3

If detention has been requested, a strong argument for release should be advanced, including the introduction of any facts ascertained through interviewing of the child or others. Alternatives to detention, or, at least, secure detention, should be argued. If the child is nevertheless placed in detention, a probable cause hearing should be requested.

Standard C-3

Evidence, if any, which militates against continued detention should be gathered, including school records, affidavits, and witnesses who could testify concerning the lack of probable cause or present alternatives to detention.

■ **Commentary:**

A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings, p. 32

"Effective representation and advocacy at the earliest stage of the proceedings may have a significant influence on the ultimate disposition of the case. Juveniles who are securely detained prior to adjudication—rather than released to parents or placed in community-based programs—are much more likely to be incarcerated at disposition than youth who have not been detained, regardless of the charges against them. Thus, it is vital that defenders explore alternatives to secure detention as early as possible.

STANDARD 2.5 — Initial Court Appearances

Counsel should preserve all of the client's constitutional and statutory rights at initial court appearances.

■ **Related Standards and Guidelines**

NLADA Guideline 3.1 — Presentment and Arraignment

The attorney should preserve the client's rights at the initial appearance on the charges by:

(1) entering a plea of not guilty in all but the most extraordinary circumstance where a sound tactical reason exists for not doing so;

(2) requesting a trial by jury, if failure to do so may result in the client being precluded from later obtaining a trial by jury;

(3) seeking a determination of whether there is probably cause to support the charges alleged and, if there is not probably cause, or other grounds exist for dismissal, requesting that the court dismiss the charge or charges;

(4) requesting a timely preliminary hearing if it is provided for under the rules of the court unless there is a sound tactical reason not to do so.

NLADA Guideline 3.2 Preliminary Hearing

(a) Where is client is entitled to a preliminary hearing, the attorney should take steps to see that the hearing is conducted timely unless there are strategic reasons for not doing so.

(b) In preparing for the preliminary hearing, the attorney should become familiar with:

(1) the elements of each of the offenses alleged;

(2) the law of the jurisdiction for establishing probably cause;

(3) factual information which is available concerning probable cause.

NLADA Guideline 3.3 — Prosecution Requests for Non-Testimonial Evidence

The attorney should be familiar with the law governing the prosecution's power to require a defendant to provide non-testimonial evidence (such as handwriting exemplars and physical specimens), the circumstances in which the defendant may refuse to do so, the extent to which counsel may participate in the proceedings, and the record of the proceedings required to be maintained.

State Bar of Michigan "Standards for Assigned Counsel," (1995)

9. Filing Appearance; Arraignment on Complaint or Preliminary Hearing on Petition. Counsel shall promptly file an appearance and shall be present at the arraignment on the complaint or preliminary hearing on petition, unless counsel is not appointed until after that proceeding has occurred, or unless counsel and the client have made other satisfactory arrangements.

10. Preliminary Review and Discovery. Counsel shall conduct a preliminary review of the available evidence and applicable law; and, in felony and delinquency cases, this review should be before the preliminary examination or probable cause hearing.

11. Conducting Preliminary Examinations or Probate [sic] Cause Hearings. In a felony or delinquency case, counsel should evaluate the client's best interest in deciding whether to hold or waive the preliminary examination or probable cause hearing and discuss with the client the considerations relevant to that decision.

12. Appearance at Arraignment on Information. In a felony case, counsel shall appear at the arraignment on the information unless a written waiver of arraignment has been filed in conformity with the applicable court rule.

13. Insuring Propriety of Evidentiary Procedures. Counsel shall take reasonable steps to ensure that police or prosecution procedures for obtaining non-testimonial evidence are properly conducted.

Case Life of Adult Criminal Case

V. FURTHER PROCEEDINGS

Check Grand Jury results.

A. Set for arraignment.

B. Generate more release options, follow up with release conditions as needed.

C. Advise client of Grand Jury result, arraignment date and time.

D. Set call back schedule with trial assistant if no complainant (misdemeanor) or cannot proceed (felony).

VI. ARRAIGNMENT

A. Advise court as to why client is not there (stay bench warrant).

B. Representation at arraignment.

1. Not guilty.
2. Preserve rights.
3. Advise court if mental defense.
4. Release on recog if appropriate.
5. Request further proceedings dates and times.

Massachusetts Committee for Public Counsel Services (1988)

3.2 Probable Cause Hearing,

(e) Counsel should be certain that the proceedings are being adequately recorded. Counsel should be prepared to challenge the prosecution's showing of probable cause on each element and on aggravating elements. Counsel should take maximum discovery advantage of the hearing, such as by filing appropriate motions and using compulsory process and sequestration. Counsel should not present affirmative proof, especially the client's testimony, unless there is a sound tactical reason for doing so which overcomes the inadvisability of disclosing the defense case at this stage.

(f) Where appropriate, counsel should consider pursuing the alternative of a court retaining jurisdiction over a lesser-included offense.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

7.3 (b) Other motions. Where the circumstances warrant, counsel should promptly make any motions material to the protection and vindication of the client's rights, such as motions to dismiss the petition, to suppress evidence, for mental examination, or appointment of an investigator or expert witness, for severance, or to disqualify a judge. Such motions should ordinarily be made in writing when that would be required for similar motions in civil or criminal proceedings in the jurisdiction. If a hearing on the motion is required, it should be scheduled at some time prior to the adjudication hearing if there is any likelihood that consolidation will work to the client's disadvantage.

New York State Bar Association: Law Guardian Representation Standards

Standard B-1. The petition and supporting papers should be examined carefully. If any defects are found, appropriate preliminary motions should be filed, such as a motion to dismiss.

■ **Commentary:**

A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings, p. 32

"Attorneys' work during the pretrial period of juvenile cases is critical to obtaining favorable outcomes for their clients. It is during this time that attorneys must investigate the facts, obtain discovery from prosecutors, acquire additional information about their clients' personal histories, file motions on behalf of their clients, and advocate for clients at probable cause hearings and other pretrial hearings. This stage of the case sets the foundation for strategies at adjudication hearings, negotiations with prosecutors, and development of appropriate dispositions."

STANDARD 2.6 — Independent Investigation

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

■ **Cases and Statutes**

Counsel must conduct an adequate investigation of the facts. *United States v. Cronic*, 80 L Ed2d 657, 671 (1984); *State v. Smith*, 140 Ariz 355, 681 P2d 1374 (1984); *Krummacher, supra* at 875; *DeCoster I, supra* at 1203; *Ewing v. Williams, supra* at 396 n. 5; *United States v. Williams*, 631 F2d 198, 211, 212 (9th Cir 1980); Tucker, supra at 593; *United States v. Porterfield*, 624 F2d 122, 1230124 (10th Cir. 1980); *State v. Vargas*, 74 Or App 588, 596 (1985); *Proffit v. United States*, 582 F2d 854, 858-859 (4th Cir. 1978); *United States v. Baynes*, 622 F2d 66, 69 (3rd Cir. 1980); *Hines v. Enomoto*, 658 F2d 667 (9th Cir. 1981); *DeHart v. State*, 55 Or App 254, 258, 265 (1981). Defense counsel is obligated to perform all necessary legal investigation, researching all relevant issues of law. *People v. Ibarra*, 34 Cal. Rptr. 863, 386 P2d 487, 490 (1963); *In Re Williams*, 81 Cal. Rptr. 784, 460 P2d 984 (1969); *Krummacher v. Gierloff*, 290 Or 867, 875; *DeCoster II, supra* at 278.

■ **Related Standards and Guidelines**

Oregon Code of Professional Responsibility

DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer

NLADA Guideline 4.1 — Investigation

(a) Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts concerning guilt. The investigation should be conducted a promptly as possible.

(b) Sources of investigative information may include the following:

(1) Charging Documents

Copies of all charging documents in the case should be obtained and examined to determine the specific charges that have been brought against the accused. The relevant statutes and precedents should be examined to identify:

(A) the elements of the offense(s) with which the accused is charged;

(B) the defenses, ordinary and affirmative, that may be available;

(C) any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.

(2) The accused

If not previously conducted, an in-depth interview of the client should be conducted as soon as possible and appropriate after appointment or retention of counsel. The interview with the client should be used to:

(A) seek information concerning the incident or events giving rise to the charge(s) or improper police investigative practices or

prosecutorial conduct which affects the client's rights;

(B) explore the existence of other potential sources of information relating to the offense;

(C) collect information relevant to sentencing

(3) Potential witnesses

Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused. If the attorney conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews.

(4) The police and prosecution

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.

(5) Physical evidence

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant or sentencing.

(6) The scene

Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstance as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).

(7) Expert assistance

Counsel should secure the assistance of experts where it is necessary or appropriate to:

(A) the preparation of the defense;

(B) adequate understanding of the prosecution's case;

(C) rebut the prosecution's case.

NLADA Guideline 4.2 — Formal and Informal Discovery

(a) Counsel has a duty to pursue as soon as practicable discovery procedures provided by the rules of the jurisdiction and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case. In considering discovery requests, counsel should take into account that such requests may trigger reciprocal discovery obligations.

(b) Counsel should consider seeking discovery of the following items:

(1) potential exculpatory information;

(2) the names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;

(3) all oral and/or written statements by the accused, and the details of the circumstances under which the statements were made;

(4) the prior criminal record of the accused and any evidence of other misconduct that the government may intend to use against the accused;

(5) all books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;

(6) all results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;

(7) statements of co-defendants.

State Bar of Michigan "Standards for Assigned Counsel," (1995)

14. Discovery. Counsel shall pursue discovery of the prosecution case, by informal methods if available, and by formal methods if necessary. In felony cases, counsel shall comply with the applicable rules for reciprocal discovery.

15. Defense Investigation. Counsel shall conduct a timely investigation of the prosecution case and potentially viable defense theories.

16. Keeping the Client Informed. Counsel shall keep the client apprised of the progress of the case and shall timely inform the client of pleadings filed in the client's behalf and orders and opinions issued by the court in the case.

17. In-depth Interview. Counsel shall conduct an in-depth client interview before trial or plea.

18. Obtaining Expert and Investigative Assistance. Counsel shall seek to obtain expert assistance, including investigation needed to meet the prosecution case or prepare a defense.

19. Reviewing Applicable Law. Counsel shall be familiar with the law applicable to the offense(s) charged, lesser included offenses, potential defense, and the admissibility of potential prosecution and defense evidence.

20. Obtaining Transcripts of Prior Proceedings. Where necessary for preparation of the defense, counsel shall obtain and read transcripts of prior proceedings in the case or in related proceedings.

Massachusetts Committee for Public Counsel Services (1988)

IV Pretrial Preparation, 4.4

Among the discovery material counsel should consider seeking, through motions if necessary, are the following items under the control of all pertinent law enforcement agencies:

(a) details of all identification procedures, including examination of any photographs shown and selected;

(b) written and oral statements of defendant/co-defendant(s);

(c) copies of statements by potential witnesses;
(d) copies of all official reports, e.g. police, arson, hospital, results of any scientific test;
(e) inspection of physical evidence;
(f) list of potential witnesses and addresses;
(g) names and addresses of any witnesses expected to offer expert opinions and the substance of their anticipated testimony;
(h) probation records of all potential witnesses;
(i) copies of Grand Jury minutes;
(j) exculpatory evidence, including promises, rewards, inducements made to witnesses;
(k) any other item helpful to prepare and try the case (e.g. 911 tapes and videotapes).

Case Life of Adult Criminal Case

VII. POST ARRAIGNMENT

A. Demand discovery.
B. Obtain and review police reports.
C. Review evidence alone and with client — evaluate evidence with client.
   1. Make a witness list.
   2. Identify motions or challenges.
      a. Theory of case.
      b. Potential defenses.
   3. Point out strengths and weaknesses of case to client including probable outcome and consequences.
D. Review alternatives.
   1. Civil compromise.
   2. Diversion.
   3. Plea.
   4. Jury/court trial.
E. Explain court procedures including next court date, time and place.
F. Explain and emphasize attorney/client privilege, obtain any waivers, releases, or agreements necessary for effective representation.
G. Review social, community alternatives.
H. Re-emphasize FTA law, importance of following court and pretrial release responsibilities.
I. Make sure client has attorney's and trial assistant's business cards.
J. Escort client out of building.
K. During interview — clear calendar for client, have appointment when support staff is available.
L. Prepare and present ex parte appointments of experts, investigator, medical reports, aid and assist, transport orders.
M. File notice of defenses as mandated by law, reciprocal discovery.
N. Investigation.
O. Research, draft motions, continue working on alternatives.
P. If in custody be prepared for daily inquiries from client re: case status and progress made.
Q. Handle calls from concerned agencies, family, friends, other lawyers.
R. Generate meeting with co-defendant's lawyers, obtain permission from co-defendant's lawyers to talk with co-defendant or witnesses.
S. Schedule time to meet with D.A. and complainant if necessary.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

7.3 Discovery and motion practice.

(a) Discovery.
   (i) Counsel should promptly seek disclosure of any documents, exhibits or other information potentially material to representation of clients in juvenile court proceedings. If such disclosure is not readily available through informal processes, counsel should diligently pursue formal methods of discovery including, where appropriate, the filing of motions for bills of particulars, for discovery and inspection of exhibits, documents and photographs, for production of statements by and evidence favorable to the respondent, for production of a list of witnesses, and for the taking of depositions.
   (ii) In seeking discovery, the lawyer may find that rules specifically applicable juvenile court proceedings do not exist in a particular jurisdiction or that they improperly or unconstitutionally limit disclosure. In order to make possible adequate representation of the client, counsel should in such cases investigate the appropriateness and feasibility of employing discovery techniques available in criminal or civil proceedings in the jurisdiction.

New York State Bar Association: Law Guardian Representation Standards

Standard A-1

The law guardian should interview the child to ascertain the detailed facts concerning the crime charged and the facts surrounding the child's arrest and questioning (if the law guardian is not assigned until the initial appearance, the law guardian should request a brief adjournment to carry out these functions).

Standard A-2

At the initial interview the law guardian should carefully ascertain the child's involvement, if any, in the alleged crime; the child's possible involvement should be examined on a confidential basis without the presence of the parents.

Standard C-1

The law guardian should attempt to interview major witnesses, such as complainant or victim who may testify at the probable cause hearing and obtain copies of any statements such witnesses may have made, as well as copies of relevant police reports.

Standard D-1

If a full fact-finding hearing is a possibility, the law guardian should conduct interviews with the respondent and witnesses, both defense and prosecution. If helpful, the scene of the occurrence should be visited.

Standard D-3

If necessary because the case is unusually complicated or for other valid reasons, an investigator or experts, such as mental health specialists, should be retained.

Standard D-4

If there is any reasonable probability of a full hearing, the scope of testimony and possible cross-examination should be carefully prepared with the child and major defense witnesses.

■ **Commentary:**

A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings, p. 30

"It is also vital that defenders take time to keep clients informed before and after court appearances and other significant events. Going through the system can be a confusing and frightening process. Young people often have incorrect notions of what might happen to them. Clients should be told exactly how to get in touch with counsel and when their attorney will next be in contact. Clients should be advised of what to do if rearrested and what their responsibilities are between court appearances.

STANDARD 2.7 — Pretrial Motions; Hearings Regarding Ability To Aid And Assist And Waiver Of Juvenile Court Jurisdiction

Counsel should research, prepare, file and argue appropriate pretrial motions whenever there is reason to believe the client is entitled to relief. Counsel should be prepared to provide quality representation and advocacy for the client at any hearings regarding the client's ability to aid and assist and waiver of juvenile court jurisdiction.

■ **Cases and Statutes**

In the initial stages of appointment, defense counsel must be prepared to take all procedural steps necessary to protect the defendant's legal rights. *ABA Standards*, sec. 4-3.6. Motions for psychiatric evaluations must be made whenever there is a reasonable possibility of success, as well as motions to suppress illegally obtained evidence, for change of venue, continuance, severance or dismissal. *Arrowood v. Clusen*, 732 F2d 1364 (7th Cir. 1984); *King v. Cupp*, 68 Or App 460 (984); *Moran v. Morris*, 478 F. Supp. 145 (C.D. Cal. 1979); *United States v. Easter*, 539 F2d 663 (8th Cir. 1976); *Cooper v. Fitzharris*, 586 F2d 1325 (9th Cir. 1978).

■ **Related Standards and Guidelines**

NLADA Guideline 5.1 — The Decision to File Pretrial Motions

(a) Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the defendant to relief which the court has discretion to grant.

(b) The decision to file pretrial motions should be made after thorough investigation, and after considering the applicable law in light of the circumstances of each case. Among the issues that counsel should consider addressing in a pretrial motion are:

(1) the pretrial custody of the accused;

(2) the constitutionality of the implicated statute or statutes;

(3) the potential defects in the charging process;

(4) the sufficiency of the charging document;

(5) the propriety and prejudice of any joinder of charges or defendants in the charging document;

(6) the discovery obligations of the prosecution and the reciprocal discovery obligations of the defense;

(7) the suppression of evidence gathered as a result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution, or corresponding or additional state constitutional provisions, including:

(A) the fruits of illegal searches or seizures;

(B) involuntary statements or confessions;

(C) statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination;

(D) unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification.

(8) suppression of evidence gathered in violation of the accused's right to counsel, or privilege arising out of state or local law;

(9) access to resources or experts which may be denied to an accused because of his or her indigence;

(10) the defendant's right to a speed trial;

(11) the defendant's right to a continuation in order to adequately prepare his or her case;

(12) matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;

(13) matters of trial or courtroom procedure.

(c) Counsel should withdraw or decide not to file a motion only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the defendant's rights against later claims of waiver or procedural default. In making this decision, counsel should remember

that a motion may have many objectives in addition to the ultimate relief requested by the motion. Counsel thus should consider whether:

(1) the time deadline for filing pretrial motions warrants filing a motion to preserve the client's rights, pending the results of further investigation;

(2) changes in the governing law might occur after the filing deadline which could enhance the likelihood that relief ought to be granted;

(3) later changes in the strategic and tactical posture of the defense may occur which affect the significance of potential pretrial motions.

NLADA Guideline 5.2 — Filing and Arguing Pretrial Motions

(a) Motions should be filed in a timely manner, should comport with the formal requirements of the court rules and should succinctly inform the court of the authority relied upon. In filing a pretrial motion, counsel should be aware of the effect it might have upon the defendant's speedy trial rights.

(b) When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:

(1) investigation, discovery and research relevant to the claim advanced;

(2) the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses;

(3) full understanding of the burdens of proof, evidentiary principles and trial court procedures applying to the hearing, including the benefits and costs of having the client testify.

NLADA Guideline 5.3 — Subsequent Filing of Pretrial Motions

Counsel should be prepared to raise during the subsequent proceedings any issue which is appropriately raised pretrial, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Further, counsel should be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.

State Bar of Michigan "Standards for Assigned Counsel," (1995)

21. Consideration of Pretrial Motions. Whenever there exists a good faith reason to believe that the applicable law may entitle the client to relief which is within the court's discretion to grant, counsel should consider filing an appropriate motion.

22. Consulting Client on Pretrial Motions. While the ultimate power to decide whether to file a motion or to refrain from filing a motion is vested in counsel, counsel should consult with the client concerning these alternative courses of action.

23. Filing Pretrial Motions. The motions counsel should consider filing include:

(a) pretrial motions reasonably available on the facts which might lead to reduction or dismissal of the charge(s);

(b) motions to suppress illegally obtained evidence;

(c) motions to exclude arguably inadmissible substantive or impeachment evidence which is damaging to the defense unless there is strategic benefit to the client in having evidence admitted;

(d) procedural motions required by the facts of the case to ensure the fairness of the proceedings and to preserve claims for appellate review.

25. Filing Notice of Affirmative Defense. Counsel shall file timely notices of affirmative defenses if required by law.

New York State Bar Association: Law Guardian Representation Standards

Standard D-2

Every possible defense, including mental disease or defect or lack of intent, should be considered.

Standard D-5

The full range of discovery permitted under the Family Court Act should be considered and appropriate requests or motions filed.

Standard D-6

The full range of appropriate pre-trial motions (e.g. discovery, suppression, inspection, *Wade, Huntley*) should be carefully considered and, when relevant, filed on a timely basis. Similarly, appropriate pretrial hearings should be requested.

Standard D-9

The strength and weaknesses of the prosecution case should be fully evaluated from the point of view of both fact-finding and disposition. The defense strategy should be developed with full consultation, in terms the child can understand, with the child and his parent. The law guardian's position, goals and strategies should be agreed to by the child.

Standard D-11

The law guardian should insure that the time requirements for motions and convening a fact-finding hearing are complied with.

STANDARD 2.8 — Pretrial Negotiations And Admission Agreements

Counsel should:

1. with the consent of the client explore diversion and other informal and formal admission or disposition agreements with regard to the allegations;

2. fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;

3. keep the client fully informed of the progress of the negotiations;

4. convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers;

5. continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and

6. not enter into any admission or disposition agreement on behalf of the client without the client's authorization.

■ **Cases and Statutes**

Failure to advise defendant of the possibility of a minimum sentence prior to guilty plea is basis for post conviction relief if defendant did not know of minimum and it would have made a difference in his decision to plead guilty. *Moen v. Peterson*, 312 Or 503, 824 P2d 404 (1991); *Hartzog v. Keeney*, 304 Or 57, 724 P2d 600 (1987); Failure to advise defendant of dangerous offender statute unless defendant knew of statute anyway, *Meyers v. Maass*, 106 Or App 32, 806 P2d 521 (1991). Failure to submit tentative plea agreement to judge for purpose of getting judge to concur and follow procedure set forth by ORS 135.432(2). Failure to advise defendant that plea agreement was not binding on judge. *Trujillo v. Maass*, 312 Or 431, 822 P2d 703 (1991) Incorrectly advising defendant that his record could be expunged where defendant conditioned his plea of guilty on being able to expunge his record. *Long v. State of Oregon*, 130 Or App 198, 880 P2d 509 (1984).

■ **Related Standards and Guidelines**

Oregon Code of Professional Responsibility

DR 5-107 Settling Similar Claims of Clients

NLADA Guideline 6.1 — The Plea Negotiation Process and the Duties of Counsel

(a) Counsel should explore with the client the possibility and desirability of researching a negotiated disposition of the charges rather than proceeding to a trial and in doing so should fully explain the rights that would be waived be a decision to enter a plea and not proceed to trial.

(b) Counsel ordinarily obtain the consent of the client before entering into any plea negotiation.

(c) Counsel should keep the client fully informed of any continued plea discussion and negotiations and convey to the accused any offers made by the prosecution for a negotiated settlement.

(d) Counsel should not accept any plea agreement without the client's express authorization.

(e) The existence of ongoing tentative plea negotiations with the prosecution should not prevent counsel from taking steps necessary to preserve a defense.

NLADA Guideline 6.2— The Contents of the Negotiation

(a) In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of :

(1) the maximum term of imprisonment and fine or restitution that may be ordered, and any mandatory punishment or sentencing guideline system;

(2) the possibility of forfeiture of assets;

(3) other consequences of conviction such as deportation, and civil disabilities;

(4) any possible and likely sentence enhancements or parole consequences;

(5) the possible and likely place and manner of confinement;

(6) the effect of good-time credits on the sentence of the client and the general range of sentences for similar offenses committed by defendants with similar backgrounds.

(b) In developing a negotiation strategy, counsel should be completely familiar with:

(1) concessions that the client might offer the prosecution as part of a negotiated settlement, including but not limited to:

(A) not to proceed to trial on the merits of the charges;

(B) to decline from asserting or litigating any particular pretrial motions;

(C) an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs.

(D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity.

(2) benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:

(A) that the prosecution will not oppose the client's release on bail pending sentencing or appeal;

(B) that the defendant may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of a conviction;

(C) to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;

(D) that the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

(E) that the defendant will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;

(F) that the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the preparer of the official presentence report, a specified position with respect to the sanction to be imposed on the client by the court;

(G) that the prosecution will not present, at the time of sentencing and/or in communication with the preparer of the official presentence report, certain information;

(H) that the defendant will receive, or the prosecution will recommend, specific benefits concerning the accused's place and/or manner of confinement and/or release on parole and the information concerning the accused's offense and alleged behavior that may be considered in determining the accused's date of release from incarceration.

(c) In conducting plea negotiations, counsel should be familiar with:

(1) the various types of pleas that may be agreed to, including a plea of guilty, a plea of nolo contendre, a conditional plea of guilty and a plea in which the defendant is not required to personally acknowledge his or her guilt (Alford plea);

(2) the advantages and disadvantages of each available plea according to the circumstances of the case;

(3) whether the plea agreement is binding on the court and prison and parole authorities.

(d) In conducting plea negotiations, counsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority which may affect the content and likely results of negotiated plea bargains.

NLADA Guideline 6.3 — The Decision to Enter a Plea of Guilty

(a) Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, and the advantages and disadvantages and the potential consequences of the agreement.

(b) The decision to enter a plea of guilty rests solely with the client, and counsel should not attempt to unduly influence that decision.

NLADA Guideline 6.4 — Entry of the Plea before the Court

(a) Prior to the entry of the plea, counsel should:

(1) make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;

(2) make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions and other consequences the accused will be exposed to by entering a plea;

(3) explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering the questions of the judge and providing a statement concerning the offense.

(b) When entering the plea, counsel should make sure the full content and conditions of the plea agreement are placed on the record before the court.

(c) After entry of the plea, counsel should be prepared to address the issue of release pending sentencing. Where the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for and present to the court all reasons warranting the client's release on bail pending sentencing.

State Bar of Michigan "Standards for Assigned Counsel," (1995)

26. Negotiation of Plea. Where appropriate, counsel shall attempt to negotiate the most favorable plea agreement possible under the circumstances.

27. Informing the Client of Plea Negotiations. Counsel shall accurately evaluate and convey to the client any offers of a negotiated plea.

Massachusetts Committee for Public Counsel Services (1988)

V. Disposition by Plea or Admission

5.5 Where an attorney believes that the client's desires are not in the client's best interest, the attorney may attempt to persuade the client to change her/her position. If the client remains unpersuaded, however, the attorney should assure the client he/she will defend the client vigorously.

5.6 Counsel must not attempt to unduly influence or coerce the accused into pleading guilty or to admitting to sufficient facts by any means, including, but not limited to, overstating the consequences, or by threatening to withdraw from representing the accused if he/she decided not to accept the proposed agreement and to proceed to trial.

Case Life of Adult Criminal Case

IV. MISDEMEANOR — CUSTODY PRETRIAL — PLEA/SENTENCING

A. Need alternatives developed.

B. Review any existing reports alone/with client.

C. Initiate any investigation warranted.

D. Explain significance of plea/types of pleas/plea contract, trials.
E. Complete/review plea petition.
F. Prepare sentencing statements, review with client.
G. Docket and do plea and sentencing.
H. Go over advice of rights with client.
I. Pull up all other existing charges for negotiation/disposition or set other court matters (e.g., P.V.) as necessary.
J. Direct and supervise trial assistant re: having alternatives in place.
K. Assemble letters in support or witnesses for sentencing.

Case Life of Adult Criminal Case

VIII. PRETRIAL CONFERENCE
A. Review file (if felony).
B. Negotiate plea.
C. Present alternatives.
D. Candid review of position re: trial, corroborate with defense, discovery, motions, legal theory.
E. Communicate pretrial offer to client, answer questions, assist client with making up mind, advise client of next court date.
F. If misdemeanor, obtain offer.
G. Check conflicts with trial date, pick alternative dates with D.A. if necessary.
H. If plea, docket with chief criminal court, advise client; iron out any problems with D.A., if not attend certification, sit there and wait.
I. Ex parte motion for new dates.
J. File motions, observe thirty-five day rule.
K. Issue subpoenas.
L. Develop trial notebook.
M. Prepare exhibits.
N. Coordinate witnesses.
O. Substantive trial preparation — final theory.
1. Prepare witnesses.
2. Outline direct and cross examination.
3. Draft opening and closing.
4. Prepare jury instructions.
5. Voir dire.
6. Make sure D.A. has been given witness statements and notice of other physical evidence available for review.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

7.1 Adjudication without trial.
(a) Counsel may conclude, after full investigation and preparation, that under the evidence and the law the charges involving the client will probably be sustained. Counsel should so advise the client and, if negotiated please are allowed under prevailing law, may seek the client's consent to engage in plea discussions with the prosecuting agency. Where the client denies guilt, the lawyer cannot properly participate in submitting a plea of involvement when the prevailing law requires that such a plea be supported by an admission of responsibility of fact.
(b) The lawyer should keep the client advised of all developments during plea discussions with the prosecuting agency and should communicate to the client all proposals made by the prosecuting agency. Where it appears that the client's participation in psychiatric, medical, social or other diagnostic or treatment regime would be significant in obtaining a desired result, the lawyer should so advise the client and, when circumstances warrant, seek the client's consent to participation in such a program.

New York State Bar Association: Law Guardian Representation Standards

Standard D-8

Dispositional alternatives should be carefully explored at this point, including possible community based programs or other dispositions which involve the minimum feasible loss of liberty. A dispositional strategy should be formulated prior to reaching negotiated agreement or the fact-finding hearing.

Standard D-10

The law guardian should not agree to an admission unless a) pre-trial discovery and evaluation has revealed no legal impediment to a finding, b) the child has been fully advised, in terms he can understand, of the facts, the alternatives, the consequences and the rights he is waiving, and c) the disposition is agreed to or there is an agreed upon range or limitation; an admission should not be entered without the intelligent consent of the child.

STANDARD 2.9 — Trial

Counsel should be prepared to provide quality representation and advocacy for the client at any court or jury trial.

■ Cases and Statutes

Defense counsel must be adequately prepared to control and direct the course of the case. ABA Standards, sec. 4-5.1; *Krummacher, supra* at 975. This includes calling witnesses, having arranged for their appearance, making necessary objections, and impeaching state witnesses where appropriate. *Tucker, supra* at 593; *Howe v. Cupp*, 55 Or App 247 (1981); *DeCoster II, supra*; *United States v. Moore*, 432 F2d 730 (3rd Cir. 1970). Defense counsel must interpose appropriate objections to the form and content of questions as well as any objectionable responses to those questions. Failure to conduct significant cross-examination or to impeach witnesses with prior inconsistent statements reflected grossly inadequate trial preparation. *Tucker, supra* at 593; *Hussick v. Oregon*, 19 Or App 915, 919 (1974); *Rook v. Cupp*, 18 Or App 608 (1974); Counsel has to advocate the defense with professional skill and

judgement. *Krummacher v. Gierloff*, 290 Or 867, 627 P2d 458 (1981). Failure of counsel to present corroborating evidence of alibi, *Yeager v. Maass*, 93 Or App 561, 763 P2d 184 (1988); Failing to object to "acquittal first" (requiring a finding of not guilty before determining guilt on a lesser charge) instructions is basis for post-conviction relief. *Tarwater v. Cupp*, 304 Or 639, 748 P2d 125 (1988); *Peaslee v. Keeney*, 81 Or App 488, 728 P2d 948 (1986).

■ **Related Standards and Guidelines**

Oregon Code of Professional Responsibility

DR 7-106 Trial Conduct

DR 7-107 Trial Publicity

DR 7-108 Communication with or Investigation of Jurors

DR 7-109 Contact with Witnesses

DR 7-110 Contact with Officials

NLADA Guideline 7.1 — General Trial Preparation

(a) The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.

(b) Where appropriate, counsel should have the following materials available at the time of trial:

(1) copies of all relevant documents filed in the case;

(2) relevant documents prepared by investigators;

(3) voir dire questions;

(4) outline or draft of opening statement;

(5) cross-examination plans for all possible prosecution witnesses;

(6) direct examination plans for all prospective defense witnesses;

(7) copies of defense subpoenas;

(8) prior statements of all prosecution witnesses (e.g., transcripts, police reports);

(9) prior statements of all defense witnesses;

(10) reports from defense experts;

(11) a list of all defense exhibits, and the witnesses through whom they will be introduced;

(12) originals and copies of all documentary exhibits;

(13) proposed jury instructions with supporting case citations;

(14) copies of all relevant statutes and cases;

(15) outline or draft of closing arguments.

(c) Counsel should be fully informed as to the rules of evidence, and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.

(d) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.

(e) Throughout the trial process, counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all trial proceedings be recorded.

(f) Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other appropriate clothing;

(g) Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a court order to have the client available for conferences.

(h) Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

NLADA Guideline 7.2 — Voir Dire and Jury Selection

(a) Preparation

(1) Counsel should be familiar with the procedures by which a jury venire is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.

(2) Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury from a panel of the venire, and should be alert to any potential legal challenges to these procedures.

(3) Prior to jury selection, counsel should seek to obtain a prospective juror list.

(4) Where appropriate, counsel should develop voir dire questions in advance of trial. Counsel should tailor voir dire questions to the specific case. Among the purposes voir dire questions should be designed to serve are the following:

(A) to elicit information about the attitudes of individual jurors, which will inform about peremptory strikes and challenges for cause;

(B) to convey to the panel certain legal principles which are critical to the defense case;

(C) to preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;

(D) to present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor;

(E) to establish a relationship with the jury, when the voir dire is conducted by an attorney.

(5) Counsel should be familiar with the law concerning mandatory and discretionary voir dire

inquires so as to be able to defend any request to ask particular questions of prospective jurors.

(6) Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Counsel should also be aware of any local rules concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.

(7) Where appropriate, counsel should consider whether to seek expert assistance in the jury selection process.

(b) Examining the Prospective Jurors

(1) Counsel should consider permission to personally voir dire the panel. If the court conducts voir dire, counsel should consider submitting proposed questions to be incorporated into the court's voir dire.

(2) Counsel should take all steps necessary to protect the voir dire record for appeal, including, where appropriate, filing a copy of the proposed voir dire questions or reading proposed questions into the record.

(3) If the voir dire questions may elicit sensitive answers, counsel should consider requesting that questioning be conducted outside the presence of the remaining jurors and that the court, rather than counsel, conduct voir dire as to those sensitive questions.

(4) In a group voir dire, counsel should avoid asking questions which may elicit responses which are likely to prejudice other prospective jurors.

(c) Challenges

(1) Counsel should consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client.

NLADA Guideline 7.3 — Opening Statement

(a) Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.

(b) Counsel should be familiar with the law of the jurisdiction and the individual trial judge's rules regarding the permissible content of an opening statement.

(c) Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement and of deferring the opening statement until the beginning of the defense case.

(d) Counsel's objective in making an opening statement may include the following:

(1) to provide an overview of the defense case;

(2) to identify the weaknesses of the prosecution's case;

(3) to emphasize the prosecution's burden of proof;

(4) to summarize the testimony of witnesses, and the role of each in relationship to the entire case;

(5) to describe the exhibits which will be introduced and the role of each in relationship to the entire case;

(6) to clarify the juror's responsibilities;

(7) to state the ultimate inferences which counsel wishes the jury to draw.

(e) Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.

(f) Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations weight against any such objections or requests. Such tactical considerations may include, but are not limited to:

(1) the significance of the prosecutor's error;

(2) the possibility than an objection might enhance the significance of the information in the jury's mind;

(3) whether there are any rules made by the judge against objecting during the other attorney's opening argument.

NLADA Guideline 7.4 — Confronting the Prosecution's Case

(a) Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgement of acquittal.

(b) Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.

(c) In preparing for cross-examination, counsel should be familiar with applicable law and procedures concerning cross-examinations and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.

(d) In preparing for cross-examination, counsel should:

(1) consider the need to integrate cross-examination, the theory of the defense and closing argument;

(2) consider whether cross-examination of each individual witness is likely to generate helpful information;

(3) anticipate those witnesses the prosecutor might call in its case-in-chief in rebuttal;

(4) consider a cross-examination plan for each of the anticipated witnesses;

(5) be alert to inconsistencies in a witness testimony;
(6) be alert to possible variations in witnesses testimony;
(7) review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
(8) where appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;
(9) be alert to issues relating to witness credibility, including bias and motive for testifying.

(e) Counsel should consider conducting a voir dire examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. Counsel should be aware of the applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.

(f) Before beginning cross-examination, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If counsel does not receive prior statements of prosecution witnesses until they have completed direct examination, counsel should request adequate time to review these documents before commencing cross-examination.

(g) Where appropriate, at the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgement of acquittal on each count charged. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

NLADA Guideline 7.5 — Presenting the Defense Case

(a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

(b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify.

(c) Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

(d) In preparing for presentation of a defense case, counsel should, where appropriate:
(1) develop a plan for direct examination of each potential defense witness;
(2) determine the implications that the order of witnesses may have on the defense case;
(3) consider the possible use of character witnesses;
(4) consider the need for expert witnesses.

(e) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.

(f) Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.

(g) Counsel should conduct redirect examination as appropriate.

(h) At the close of the defense case, counsel should renew the motion of judgment of acquittal on each charged count.

NLADA Guideline 7.6 — Closing Argument

(a) Counsel should be familiar with the substantive limits on both prosecution and defense summation.

(b) Counsel should be familiar with the local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.

(c) In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:
(1) highlighting weaknesses in the prosecutor's case;
(2) describing favorable inferences to be drawn from the evidence;
(3) incorporating into the argument:
(A) helpful testimony from direct and cross-examinations;
(B) verbatim instructions drawn from the jury charge;
(C) responses to anticipated prosecution arguments;
(4) the effects of the defense arguments on the prosecution's rebuttal argument.

(d) whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:
(1) whether counsel believes that the case will result in a favorable verdict for the client;
(2) the need to preserve the objection for a double jeopardy motion;
(3) the possibility that an objection might enhance the significance of the information in the jury's mind.

NLADA Guideline 7.7— Jury Instructions

(a) Counsel should be familiar with the local rules and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.

(b) Where appropriate, counsel should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Where possible, counsel should provide caselaw in support of the proposed instructions.

(c) Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.

(d) If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of the proposed instructions or reading proposed instructions into the record.

(e) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

(f) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge state the proposed charge to counsel before it is delivered to the jury.

State Bar of Michigan "Standards for Assigned Counsel," (1995)

28. Preserving Right to Jury Trial If the case proceeds to trial, counsel should evaluate the client's best interests in deciding whether to waive a jury trial and discuss with the client the considerations relevant to that decision.

29. Voir Dire. Counsel should seek personal information regarding prospective jurors, either through voir dire or examination of jury questionnaires. Counsel shall ask voir dire questions pertinent to the case. Where required, counsel should submit voir dire questions to the court.

30. Opening Statement. Counsel shall make an opening statement consonant with the overall defense strategy, either at the beginning of trial or the beginning of the defense case, unless strategic reasons dictate otherwise.

31. Cross-Examination Counsel shall cross-examine and impeach prosecution witnesses to the extent and in the manner which reasonably appears likely to benefit the defense.

32. Waiving Prosecution Witnesses Counsel may waive the production of prosecution witnesses only where the appearance of those witnesses has no strategic benefit to the defense and the client is informed of the waiver.

33. Client's Decision to Testify: Counsel's Recommendation. Counsel shall discuss with the client the considerations relevant to the client's decision whether to testify and shall recommend the decision which counsel believes to be in the client's best interest. The ultimate decision whether to testify is the client's.

34. Preparation of Defense Witnesses. Counsel shall strive to prepare defense witnesses for direct and cross-direct examination and advise them regarding appropriate courtroom dress and demeanor.

35. Objections: Offers of Proof. Counsel shall object to damaging inadmissible evidence unless the benefit to the client from its admission outweighs the harm, and shall make such other objections as are necessary to protect the client's right to fair trial and to appellate review. Where defense evidence is excluded, counsel should make such offer of proof as is necessary to protect the record.

36. Production of Defense Evidence. Counsel shall make reasonable efforts to produce witnesses and evidence necessary to present the defense case persuasively.

37. Directed Verdict. Counsel shall move outside the jury's presence, for a directed verdict at the close of the prosecution's proof if appropriate reasons for such motion exist. The motion should be repeated at the close of the defense case. If the verdict is unfavorable to the client, counsel should repeat the motion after verdict as a motion for judgement of acquittal.

38. Closing Argument. Counsel shall present a closing argument which explains why the client should not be found guilty as charged.

39. Jury Instructions. Counsel shall request jury instructions which present the applicable law in a manner most favorable to the defense. Counsel shall object to instructions which are legally erroneous or which, on the facts of the case, are unfairly damaging to the defense and shall place on the record or in the court file requests for instructions which are denied by the court.

Massachusetts Committee for Public Counsel Services (1988)

6.3 Bench Trial or Jury Trial

(a) The decision to proceed to trial with or without a jury rests solely with the client after complete advice of counsel.

(b) Counsel should fully advise the client of the advantages and disadvantages of either a bench trial or a jury trial. Counsel should exercise great caution before advising a jury waiver, especially without thorough discovery, including knowledge of the likely availability of prosecution witnesses, and their likely response to cross examination.

6.4 Voir Dire and Jury Selection

(c) Challenges

(3) In exercising challenges for cause or peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.

(4) Counsel should make every effort to consult with the client in exercising challenges.

(5) Counsel should be alert to prosecutorial misuse of peremptory challenges and should seek appropriate remedial measures.

Case Life of Adult Criminal Case

IX. COURT CALENDAR — CALL

A. Advise client to be at call.

B. Request offer if not yet received.

X. POST CALL

XI. TRIAL

A. Meet the judge and staff if not yet acquainted.

B. Motion in limine.

C. Voir dire.

D. State's opening statement — object appropriately.

E. Defense opening.

F. Make objections as appropriate to state's direct.

G. Cross examine state's witnesses.

H. MJOA — set up theory during state's case in chief; then cross examine on objections.

I. Last minute preparation with client and witnesses.

J. Try case.

K. Object appropriately to state's cross.

L. Closing statement.

M. Make second motion for MJOA.

N. Discuss jury instructions.

O. Make motion on record.

P. Ensure jury will review only those exhibits admitted into evidence.

Q. Check verdict forms.

R. Listen clearly to jury instructions.

S. Put any exceptions to jury instructions or omissions on the record.

T. Notify court where you will be; have client available.

U. Prepare client for verdict.

V. Prepare answers to jury questions.

W. Accept verdict/hung jury.

X. Poll jury.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

7.2 Formality, in general.

While the traditional formality and procedure of criminal trials may not in every respect be necessary to the proper conduct of juvenile court proceedings, it is the lawyer's duty to make all motions, objections or requests necessary to protection of the client's rights in such form and at such time as will best serve the clients legitimate interests at trial or on appeal

New York State Bar Association: Law Guardian Representation Standards

Standard E-1

The law guardian should present an opening statement.

Standard E-2

Prosecution witnesses should be cross-examined and an attempt made to impeach such witnesses by appropriate questioning, inconsistent prior statements, and other evidentiary methods.

Standard E-3

Appropriate expert witnesses should be called.

Standard E-4

Defense witnesses, including the child, should be questioned in accordance with pre-trial preparation; if necessary, character or rebuttal witnesses should be called.

Standard E-5

The law guardian should always present a summation.

Standard E-6

If appropriate, post-trial motions and briefs should be submitted.

STANDARD 2.10 — Sentencing Or Disposition

Counsel should:

1. be knowledgeable in disposition provisions and alternatives;

2. ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the disposition to be imposed;

3. ensure all reasonably available mitigating and favorable information is presented to the court;

4. in delinquency cases and in adult criminal cases as appropriate, be prepared to present a disposition plan on behalf of the client, as well as to respond to inaccurate or unfavorable information presented by other parties;

5. in delinquency cases, advocate for or develop dispositional resources that will aid the client in obtaining the least restrictive disposition, and obtain all appropriate orders to protect the youth's rights and interests.

■ Cases and Statutes

Representation at sentencing, as in a trial, must be adequate. *Lyons v. Pearce, supra* at 567; *Carroll v. Cupp*, 49 Or App 773, 776 (1980); *DeCoster II, supra* at 281. Counsel should object to any sentence inconsistent with the law, (*e.g.* Mandatory minimum not permitted for juvenile. *Wells v. Peterson*, 315 Or 233, 844 P2d 192 (1992). Trial attorney failed to object to sentencing order including restitution and costs although because the defendant was indigent and sentenced to prison, he could not pay restitution and costs. *Steffans v. Keeney*, 82 Or App 625, 728 P2d 948 (1986). Counsel requested court recommend against deportation as permitted by federal law. *Lyons v. Pearce*, 298 Or 554, 694 P2d 969 (1984). Counsel should move to

withdraw plea if prosecutor fails to follow plea agreement. *Chilcote v. Zenon*, 105 Or App 393, 804 P2d 521 (1991).

■ **Related Standards and Guidelines**

NLADA Guideline 8.1 — Obligations of Counsel in Sentencing

(a) Among counsel's obligations in the sentencing process are:
  (1) where a defendant chooses not to proceed to trial, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, and financial implications;
  (2) to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;
  (3) to ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court;
  (4) to develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;
  (5) to ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful or is otherwise improper is stricken from the text of the presentence investigation report before distribution of the report;
  (6) to consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted.

NLADA Guideline 8.2 — Sentencing Options, Consequences and Procedures

(a) Counsel should be familiar with the sentencing provisions and options applicable to the case, including:
  (1) any sentencing guideline structure;
  (2) deferred sentence, judgement without a finding, and diversionary probation;
  (3) expungement and sealing of records;
  (4) probation or suspension of sentence and permissible conditions of probation;
  (5) restitution;
  (6) fines;
  (7) court costs;
  (8) imprisonment including any mandatory minimum requirements;
  (9) confinement in mental institutions;
  (10) forfeiture.

(b) Counsel should be familiar with direct and collateral consequences of the sentence and judgement, including:
  (1) credit for pre-trial detention;
  (2) parole eligibility and applicable parole release ranges;
  (3) effect of good-time credits on the client's release date and how those credits are earned and calculated;
  (4) place of confinement and level of security and classification;
  (5) self-surrender to place of custody;
  (6) eligibility for correctional programs and furloughs;
  (7) available drug rehabilitation programs, psychiatric treatment, and health care;
  (8) deportation;
  (9) use of the conviction for sentence enhancement in future proceedings;
  (10) loss of civil rights;
  (11) impact of a fine or restitution and any resulting civil liability;
  (12) restrictions on or loss of license.

(c) Counsel should be familiar with the sentencing procedures, including:
  (1) the effect that plea negotiations may have upon the sentencing discretion of the court;
  (2) the procedural operation of any sentencing guideline system;
  (3) the effect of a judicial recommendation against deportation;
  (4) the practices of the officials who prepare the presentence report and the defendant's rights in that process;
  (5) the access to the presentence report by counsel and the defendant;
  (6) the prosecution's practice in preparing a memorandum on punishment;
  (7) the use of a sentencing memorandum by the defense; the opportunity to challenge information presented to the court for sentencing purposes;
  (8) the opportunity to challenge information presented to the court for sentencing purposes;
  (9) the availability of an evidentiary hearing to challenge information and the applicable rules of evidence and burdens of proofs at such a hearing;
  (10) the participation that victims and prosecution or defense witnesses may have in the sentencing proceedings.

NLADA Guideline 8.3 — Preparation for Sentencing

(a) In preparing for sentencing, counsel should consider the need to:
  (1) inform the client of the applicable sentencing requirements, options, and alternatives, and the

likely and possible consequences of the sentencing alternatives;

(2) maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;

(3) obtain from the client relevant information concerning such subjects as her or her background and personal history, prior criminal record, employment history and skills, education, medical history and condition, and financial status, and obtain from the client sources through which the information can be corroborated;

(4) ensure that the client has adequate time to examine the presentence report;

(5) inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court, considering the possible consequences that and admission of guilt may have upon an appeal, subsequent retrial or trial on other offenses;

(6) prepare the client to be interviewed by the official preparing the presentence report;

(7) inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;

(8) inform the client of the sentence or range of sentences counsel will ask the court to consider; if the client and counsel disagree as to the sentence or sentences to be urged upon the court, counsel shall inform the client of his or her right to speak personally for a particular sentence or sentences;

(9) collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary, counsel should specifically request the opportunity to present tangible and testimonial evidence.

NLADA Guideline 8.4 — The Official Presence Report

(a) Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or similar document. In addition, counsel should:

(1) determine whether a presentence report will be prepared and submitted to the court prior to sentencing; where preparation of the report is optional, counsel should consider the strategic implications of requesting that a report be prepared;

(2) provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the defendant's version of the offense;

(3) review the completed report;

(4) take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;

(5) take appropriate steps to preserve and protect the client's interests where the defense challenges information in the presentence report as being erroneous or misleading and;

A. the court refuses to hold a hearing on a disputed allegation adverse to the defendant;

B. the prosecution fails to prove an allegation;

C. the court finds an allegation not proved.

Such steps include requesting that a new report be prepared with the challenged or unproved information deleted before the report or memorandum is distributed to correctional and/or parole officials.

(6) Where appropriate counsel should request permission to see copies of the report to be distributed to be sure that the information challenged has actually been removed from the report or memorandum.

NLADA Guideline 8.5 — The Prosecutors Sentencing Position

(a) Counsel should attempt to determine, unless there is a sound tactical reason for not doing so, whether the prosecution will advocate that a particular type or length of sentence be imposed.

(b) If a written sentencing memorandum is submitted by the prosecution, counsel should request to see the memorandum and verify that the information presented is accurate; if the memorandum contains erroneous or misleading information, counsel should take appropriate steps to correct the information unless there is a sound strategic reasons for not doing so.

(c) If the defense request to see the prosecution memorandum is denied, an application to examine the document should be made to the court or a motion made to exclude consideration of the report by the court and to prevent distribution of the memorandum to parole and correctional officials.

NLADA Guideline 8.6— The Defense Sentencing Memorandum

(a) Counsel should prepare and present to the court a defense sentencing memorandum where there is a strategic reason for doing so. Among the topics counsel may wish to include in the memorandum are:

(1) challenges to incorrect or incomplete information in the official presentence report and any prosecution sentencing memorandum;

(2) challenges to improperly drawn inferences and inappropriate characteristics in the official presentence report and any prosecution sentencing memorandum;

(3) information contrary to that before the court which is supported by affidavits, letters, and public records;

(4) information favorable to the defendant concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, education background, and family and financial status;

(5) information which would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crimes;

(6) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities;

(7) information of a sentencing proposal.

NLADA Guideline 8.7— The Sentencing Process

a. Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's interest.

b. Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence.

c. In the event there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the defendant, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.

d. Where information favorable to the defendant will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the defendant.

e. Where the court has the authority to do so, counsel should request specific orders of recommendations from the court concerning the place of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, permission for the client to surrender directly to the place of confinement and against the deportation of the defendant.

f. Where appropriate, counsel should prepare the client to personally address the court.

State Bar of Michigan "Standards for Assigned Counsel," (1995)

40. Preparing Client for Presentence or Dispositional Investigation. Counsel shall aid the client in preparing for a presentence or dispositional interview and shall advise the client of the potential consequences of making any previously undisclosed admissions of guilt.

41. Providing Information to Probation Officer. Where appropriate, counsel shall provide to the probation officer favorable information about the client and information about the availability of suitable alternatives to incarceration or detention.

State Bar of Michigan "Standards for Assigned Counsel," (1995)

42. Review of Sentencing or Dispositional Information. Counsel shall review with the client the accuracy of any information to be presented to the sentencing judge, including any dispositional reports, the presentence report and the sentencing information report.

43. Correcting Sentencing or Dispositional Information. Counsel shall seek at or before sentencing or disposition to have incorrect, unfavorable information in any report corrected or stricken, to have information added to any report, and where applicable, to have harmful miscalculations of the sentencing guidelines score recomputed.

44. Presenting Information at Sentencing or Disposition. Counsel shall present to the sentencing court information favorable to the client and suitable dispositional alternatives to incarceration or detention, where appropriate.

45. Preparing Client for Sentencing or Disposition. Counsel shall aid the client in preparing for allocation at sentencing or disposition. The client should be informed sufficiently in advance of sentencing or disposition of the right to allocation in order to prepare for effective allocution.

Performance Standards for Attorneys: The Inmate Perspective

Sentencing Issues Related to the Presentence Investigation

1) Failure to impress upon the defendant/client the importance of the PSI.

2) Failure to recognize and challenge detrimental information.

3) Allowing judges to make nonspecific findings regarding important sentencing matters. This occurs when the court makes a finding regarding only the appropriate quantitative *range* of drugs or financial loss to be used in sentencing rather than the specific amount.

4) Failing to require the court to make a specific finding as to the scope of a conspiracy participant's understanding of the agreement or relevant conduct.

Performance Standards for Attorneys: The Inmate Perspective

Sentencing Issues Unrelated to the PSI

1) Neglecting to ask for downward departure or minimal participant consideration.

2) Failing to request the abatement of interest on fines and restitution.

3) Lack of diligence in obtaining clarification of ambiguous statements in the judgement, such as when payments must begin on a fine or restitution.

Case Life of Adult Criminal Case

XI. TRIAL (CONTINUED)

Y. If appropriate, request PSI, otherwise prepare client for PSI.

Z. Be present at PSI if needed.

AA Present supplemental materials/alternatives to PSI writer.

BB. Prepare for sentencing as outlined above.

CC. Obtain and review PSI alone and with client — isolate objections, present presentencing or seek D.A.'s stipulation to exclusion.

DD. Notice and advise of rights and PC rights.

EE. Be prepared to deal with issues raised, dangerous offender or sentencing guidelines.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

9.1 In general.

The active participation of counsel at disposition is often essential to protection of clients' rights and to furtherance of their legitimate interests. In many cases the lawyer's most valuable service to clients will be rendered at this stage of the proceeding.

9.2 Investigation and preparation.

(a) Counsel should be familiar with the dispositional alternatives available to the court, with it's procedures and practices that the disposition stage, and with community services that might be useful in the formation of a dispositional plan appropriate to the client's circumstances.

(b) The lawyer should promptly investigate all sources of evidence including any reports or other information that will be brought to the court's attention, and interview all witnesses material to the disposition decision.

(i) If access to social investigation, psychological, psychiatric or other reports or information is not provided voluntarily or promptly, counsel should be prepared to seek their disclosure and time to study them through formal measures.

(ii) Whether or not social and other reports are readily available the lawyer has a duty independently to investigate the client's circumstances, including such factors as previous history, family relations, economic condition and any other information relevant to disposition.

(c) The lawyer should seek to secure the assistance of psychiatric, psychological, medical or other expert personnel needed for purposes of evaluation, consultation or testimony with respect to formation of a dispositional plan.

9.3 Counseling prior to disposition.

(a) The lawyer should explain to the client the nature of the disposition hearing, the issues involved and the alternatives open to the court. The lawyer should also explain fully and candidly the nature, obligations and consequences of any proposed dispositional plan, including the meaning of conditions of probation, the characteristics of any institution to which commitment is possible, and the probable duration of the client's responsibilities under the proposed dispositional plan. Ordinarily, the lawyer should not make or agree to a specific dispositional recommendation without the client's consent.

(b) When psychological or psychiatric evaluations are ordered by the court or arranged by counsel prior to disposition, the lawyer should explain the nature of the procedure to the client and encourage the client's cooperation with the person or persons administering the diagnostic procedure . . .

9.4 Disposition hearing.

(a) It is the lawyer's duty to insist that a proper procedure be followed throughout the disposition stage and that orders rendered be based on adequate reliable evidence.

(i) Where the dispositional hearing is not separate from adjudication or the court does not have before it all evidence required by statute, rules of court or the circumstances of the case, the lawyer should seek a continuance until such evidence can be presented if to do so would serve the client's interests.

(ii) The lawyer at disposition should be free to examine fully and to impeach any witness whose evidence is damaging to the client's interests and to challenge the accuracy, credibility and weight of any reports, written statements or other evidence before the court. The lawyer should not knowingly limit or forego examination or contradiction by proof of any witness, including a social worker or probation department officer when failure to examine fully will prejudice the client's interests. Counsel may seek to compel the presence of witnesses whose statements of fact or opinion are before the court or the production of other evidence on which conclusions of fact presented at disposition are based.

New York State Bar Association: Law Guardian Representation Standards

Standard F-1

The law guardian should request the court to order reports which may be helpful, including mental health studies or other evaluations.

Standard F-2

Every realistic dispositional alternative should be explored, including, where relevant, specific placements with residential or non-residential programs; the law guardian should develop a specific dispositional plan to present to the court.

Standard F-3

If the law guardian's dispositional plan is likely to be disputed, potential witnesses, including parents, school officials or neighbors, should be inter-

viewed; evidence should be gathered to support the specific dispositional plan.

Standard F-4

If helpful in forming or furthering the law guardian's dispositional plan, the law guardian should visit the child's home or meet with school officials or other relevant persons. @ann = Standard F-5

The probation report should be read prior to the dispositional hearing.

Standard F-7

The desires of the child should be ascertained and the child and the parent should be advised of the potential alternatives. The child should fully consent to the specific disposition which the law guardian intends to present and argue.

Standard G-2

If appropriate in light of the seriousness of factual disputes or other reasons, the maker of relevant reports, including the probation officer, should be examined.

Standard G-5

The law guardian should present and argue a complete dispositional alternative consistent with the needs and desires of the child, including specific programs or dispositional orders, the specific duration f placement or other disposition and, if appropriate, alternative possibilities.

Standard H-1

The law guardian should explain to the child and the parents, in terms the child can understand, the disposition and its consequences, including the rights and possibilities of post-trial motions or requests for new hearings, the consequences of possible violations of the dispositional order and the continuing jurisdiction of the court.

■ **Commentary:**

A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings, p.53

"Thus, attorneys need to be knowledgeable about eligibility requirements and funding mechanisms for various programs, including special education; "nonlegal" topics such as the causes of delinquency and family conflict; policies and procedures of the agencies coming into contact with the court; ways to use the skills of other professionals such as psychiatrists or psychologists; and the availability of local programs and facilities for juvenile offenders."

STANDARD 2.11 — Post-Disposition Procedures

Counsel should be familiar with the procedures available to the client after disposition.

■ **Cases and Statutes**

Trial counsel must assist in the designation of the record. *Accocella v. Allen*, 288 Or 175, 187 (1979).

■ **Related Standards and Guidelines**

NLADA Guideline 9.1 — Motion for a New Trial

(a) Counsel should be familiar with the procedures available to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.

(b) When a judgement of guilty has been entered against the defendant after trial, counsel should consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding whether to file such a motion, the factors counsel should consider include:

(1) The likelihood of success of the motion, given the nature of the error or errors that can be raised;

(2) the effect that such a motion might have upon the defendant's appellate rights, including whether the filing of such a motion is necessary to, or will assist in, preserving the defendant's right to raise on appeal the issues that might be raised in the new trial motion.

NLADA Guideline 9.2 — Right to Appeal

(a) Counsel should inform the defendant of his or her right to appeal the judgement of the court and the action that must be taken to perfect an appeal. In circumstances where the defendant wants to file an appeal but is unable to do without the assistance of counsel, the attorney should file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the defendant's rights to appeal, such as ordering transcripts of the trial proceedings.

(b) Counsel's advice to the defendant should include an explanation of the right to appeal the judgement of guilty and, in those jurisdictions where it is permitted, the right to appeal the sentence imposed by the court.

(c) Where the defendant takes an appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in the trial court.

NLADA Guideline 9.3 — Bail Pending Appeal

(a) Where a client indicates a desire to appeal the judgement and/or sentence of the court, counsel should inform the client of any right that may exist to be released on bail pending the disposition of the appeal.

(b) Where an appeal is taken and the client requests bail pending appeal, trial counsel should cooperate with appellate counsel in providing information to pursue the request for bail.

NLADA Guideline 9.4 — Self-Surrender

Where a custodial sentence has been imposed, counsel should consider requesting a stay of execution of the judgement to permit the client to report directly to the place of confinement.

NLADA Guideline 9.5 — Sentence Reduction

Counsel should inform the client of procedures available for requesting a discretionary review of, or reduction in the sentence imposed by the trial court, including any time limitations that apply to such a request.

NLADA Guideline 9.6 — Expungement or Sealing of Record

Counsel should inform the client of any procedures available for requesting that the record of conviction to be expunged or sealed.

Performance Standards for Attorneys: The Inmate Perspective

Post-Trial Issues

1) Failure to discuss or consider issues and ideas for the appeal proffered by the defendant.
2) Unwillingness to allow the defendant to review the appeal briefs prior to their filing.
3) A continuing reluctance to take calls or answer letters.

Performance Standards for Attorneys: The Inmate Perspective

Recommendations

1) Guidelines depicting acceptable time for response to client letters and phone calls.
2) Guidelines recommending that all possible defenses to a defendant's charges be explored prior to entering into plea negotiations.
3) The implementation of standards which define and convey the concept that the attorney is providing a service to the client and the relationship should therefore be conducted accordingly.

Case Life of Adult Criminal Case

XI. TRIAL (CONTINUED)

FF. Assist defendant with filing notice of appeal, motion for new trial, if appropriate.
GG. Provide any assistance needed to appeals attorney.
HH. Closing letters, time reports, billing to court.
II. Working with family, making arguments and preparing for parole board hearing.
JJ. Keep track of billing and modify office budget accordingly.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

10.1 Relations with the client after disposition.

(a) The lawyer's responsibility to the client does not necessarily end with dismissal of the charges or entry of a final dispositional order. The attorney should be prepared to counsel and render or assist in securing appropriate legal services for the client in matters arising from the original proceeding.
(i) If the client has been found to be within the juvenile court's jurisdiction, the lawyer should maintain contact with both the client and the agency or institution involved in the disposition plan in order to ensure that the client's rights are respected and, where necessary, to counsel the client and the client's family concerning the dispositional plan.
(ii) Whether or not charges against the client have been dismissed, where the lawyer is aware that the client . . . needs and desires community or other medical, psychiatric, psychological, social or legal services, he or she should render all possible assistance in arranging for such services.

(b) The decision to pursue an available claim for post dispositional relief from judicial and correctional or other administrative determination related to juvenile court proceedings, including appeal, habeas corpus or an action to protect the client's right to treatment is ordinarily the client's responsibility after full consultation with counsel.

10.2 Post dispositional hearings before the juvenile court.

(a) The lawyer who represents a client during initial juvenile court proceedings should ordinarily be prepared to represent the client with respect to proceedings to review or modify adjudicative or dispositional orders made during earlier hearings or to pursue any affirmative remedies that may be available to the client under local juvenile court.
(b) The lawyer should advise the client of the pendency or availability of a post dispositional hearing or proceeding and of its nature, issues and potential consequences. Counsel should urge and, if necessary, seek to facilitate the prompt attendance at any such hearing of the client of any material witnesses who may be called.

10.3 Counsel on Appeal

(a) Trial counsel, whether retained or appointed by the court, should conduct the appeal unless new counsel is substituted by the client or by the appropriate court. Where there exists and adequate pool of competent counsel available for the assignment to appeals from juvenile court orders and substitution will not work substantial disadvantage to the client's interests, new counsel may be appointed in place of trial counsel. . .
(c) Counsel on appeal, after reviewing the record below and undertaking any other appropriate investigation, should candidly inform the client as to whether there are meritorious grounds for appeal and the probable results of any such appeal, and should further explain the potential advantages and disadvantages associated with appeal. However, appellate counsel should not seek to withdraw

from a case solely because his or her own analysis indicates that the appeal lacks merit.

10.4 Conduct of appeal

The rules generally governing conduct of appeals in criminal and civil cases govern conduct of appeals in juvenile court matters.

10.5 Post dispositional remedies: Protection of the client's right to treatment

(a) A lawyer who has represented a client through trial and/or appellate proceedings should be prepared to continue representation when post dispositional action, whether affirmative or defensive, is sought, unless new counsel is appointed at the request of the client or continued representation would, because of geographical considerations or other factors, work unreasonable hardship.

(b) Counsel representing a client in post dispositional matters should promptly undertake any factual or legal investigation in order to determine whether grounds exist for relief from juvenile court or administrative action. If there is reasonable prospect of a favorable result, the lawyer should advise the client and, if their interests are not adverse, the client's parents of the nature, consequences, probable outcome and advantages or disadvantages associated with such proceedings.

(c) The lawyer engaged in post dispositional representation should conduct those proceedings according to the principles generally governing representation in juvenile court matters.

New York State Bar Association: Law Guardian Representation Standards

Standard H-3

The child and the parents should be advised in writing of the right to appeal, including the right to appeal as a poor person. The possibilities of appeal should be explored fully, including possible grounds. The law guardian should file a notice of appeal and assure that the appeal is perfected unless the child indicates explicitly and intelligently his decision to waive and appeal.

Standard H-3

The law guardian should examine the dispositional order to ensure that the order conforms to the agreed disposition or finding.

■ **Commentary:**

A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings, p. 55

"The failure to maintain representation during the entire period of juvenile court jurisdiction is a serious problem. It means that attorneys do not monitor their clients' progress in programs and institutional placements or assure that the services ordered by courts are actually provided and that conditions in programs and institutions are lawful. As a consequence, needed modifications in court orders may not come to official attention until youth have acted out or committed new offenses. New counsel appointed at the post disposition stage are unlikely to develop a relationship with the children or their families, or have the background needed to best articulate their clients' needs and capabilities."

Performance Standards

Chapter 3
Specific Standards For Representation In Juvenile Dependency Cases

STANDARD 3.1 — Prerequisites For Representation

Counsel should be proficient in applicable substantive and procedural juvenile law and should have appropriate experience, skill and training for the type of representation required.

■ **Related Standards and Guidelines**

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

Prerequisites for Court Appointment in Dependency Court

1. The attorney should have a solid familiarity with and receive ongoing training on the Welfare and Institutions Code statutory requirements, the Evidence Code, local and state court rules, court policies, relevant case law, the practice guidelines set forth in this document and the substantive, ethical and procedural issues unique to practice in Dependency Court. The attorney should keep current with changes in statutory and case law.
2. Attorneys should receive training on the representation of children, including, but not limited to, statutory and case law.
3. The Attorney should be familiar with and receive ongoing training on the structure and functioning of the Juvenile Court, the Child Advocates Program, the Department of Children's Services, including Emergency Response and family preservation, reasonable efforts, placement, and adoption.
4. Attorneys new to Dependency Court should:
   a. observe and/or participate in each type of dependency hearing prior to accepting an appointment in Dependency Court;
   b. work and consult with an assigned mentor for the first three months; and
   c. visit two types of placement centers, a shelter care, foster home, or group home;

Guidelines for Continued Appointment in Dependency Court

The Attorney should be familiar with and receive ongoing training in the following areas:

1. The Psychological and medical aspects relating to dependency court matters, particularly in the areas of physical, emotional and sexual abuse, child development stages, and patters of child growth related to neglect and non-organic failure to thrive.
2. Interviewing techniques for children.
3. Child developmental stages, including the child's cognitive, emotional and social growth stages and language skills.
4. Child development as it relates to children as witnesses and the impact of the court process on the child.
5. Reasonable efforts, treatment resources and family preservation services available and the problems they are designed to address.
6. The various types of minute orders which the Dependency Court can issue.
7. The types of placement and treatment available to children.
8. Cultural and ethnic differences as they relate to child rearing.
9. Educational, mental health, medical treatment, and other resources available to children.
10. Government benefits available to assist families involved in the dependency system.
11. Medical status examinations and their effect on children.
12. Psychotropic drugs, their use and effect on children and resources for determining the appropriateness of their use.
13. Resources for the treatment and recognition of they physical and psychological aspects of physical abuse, sexual abuse, emotional abuse and the non-organic failure to thrive.
14. Patterns of child growth as related to neglect.
15. Immigration law issues, consequences and resources related to parents and children in Dependency Court.
16. The Indian Child Welfare Act, Native American families and children and appropriate resources.
17. Emancipation laws, procedures, and resources.
18. substance abuse and resources for substance abusing families.
19. Domestic violence and appropriate resources.
20. Family dynamics and cultural aspects of families.
21. Transitional aspects of placement and child's return home.
22. Other areas of the law that occasionally cross over into dependency cases such as tort actions, probate, and family law.

Qualification Standards for Court Appointed Counsel to Represent Indigent Persons at State Expense (Oregon

Judicial Department Policy Statement)
Section G. Juvenile Cases, Including Delinquency, Remand Hearings, Neglect, Abuse, Other Dependency Cases, Status Offenses and Termination of Parental Rights
An attorney is qualified for appointment to juvenile cases, under ORS Chapter 419, if he or she:

1. For all cases, has knowledge of juvenile justice statutes, case law, standards, and procedures; has observed at least one contested juvenile court case; is generally familiar with services available to children and parents in the juvenile system; and has reviewed and is familiar with the following materials:
   a. ORS, Chapter 419, Oregon Juvenile Code.
   b. ORS, Chapter 417, Interstate Compact on Juveniles and the Community Juvenile Services Act.
   c. ORS, Chapter 418, Child Welfare Services and Reporting of Child Abuse.
   d. ORS, Chapter 420, Juvenile Training Schools and Youth Care Centers.
   e. Oregon State Bar, *Juvenile Law* (1994, Supp. 1995).
   f. Pub. L. 95-272, Adoption Assistance and Child Welfare Act of 1980.
   g. Pub. L. 95-608, Indian Child Welfare Act of 1978, 25 USC sections 1901-1963 (1982).
   h. Education of the Handicapped Act of 1975, 20 USC sections 1400-1485 (1982, Supp. 1987).
   i. Pub. L. 93-112, Title V section 504, Rehabilitation Act of 1973, as amended, 29 USC section 794 (1982).

Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties

1. Requirements Prior to Representation.
   Prior to being appointed to represent any party in a dependency matter, all attorneys should:
   a. Be familiar with dependency law and related areas.
   b. Review any available videos of sample 300 hearings and other proceedings as required by the presiding juvenile court judge.
   c. Visit a shelter/emergency foster home/juvenile detention center.
   d. "Actively participate" in at least 3 dependency actions from detention through disposition.
2. Continuing Educational Requirements
   Similar to OSB Task Force on Indigent Defense II Standard 3.1
3. The attorney must, first and foremost, strive to acquire and develop basic advocacy skills such as client interviewing, case investigation, negotiation and trial practice.
4. The child's attorney should be especially aware of statutory or case law that pertains particularly to children who are the subject of dependency actions or their attorneys.
5. The following are examples of issues that may arise in the course of representing children. Knowledge in these areas will enhance the attorney's ability to advise and represent child clients.
   a. Guardianship
   b. Emancipation
   c. Mental Health
   d. Education/School Discipline
   e. Wardships
   f. Community Resources — therapy, recreation, shelter, etc.

■ **Commentary:**

Standards of Practice for Representing Children (Ann M. Haralambie)
"A properly trained child's attorney should have the information, or ability to acquire information and consultation, which will permit a professional and objective assessment of what the child's position should be, incorporating any input the child client is capable of providing, in those cases where the child is not sufficiently mature to form and express a reasoned position."

Independent Counsel for Children, Shannan L. Wilber, Family Law Quarterly
"Attorneys can be trained as to how to represent young children. Additionally, an attorney should be specially trained to establish an effective attorney-client relationship with abused and neglected children. Attorneys who had undergone such training have been found to be more effective advocates for the children, resulting in more specific court orders for treatment and assessment and an accelerated court process. This training should focus on the causes and dynamics of child abuse and neglect, identify aspects of child development relevant to determining an abused and neglected child's psychological needs at various ages, and provide information concerning local intervention programs designed to assist families at risk."

Resources Guidelines: Improving Court Practice in Child Abuse and Neglect Cases (National Council of Juvenile and Family Court Judges)
"Before becoming involved in an abuse and neglect case, attorneys should have the opportunity to assist more experienced attorneys in their jurisdiction. The should also be trained in, or familiar with:

Legislation and case law on abuse and neglect, foster care, termination of parental rights, and adoption of children with special needs

The causes and available treatment for child abuse and neglect.

The child welfare and family preservation services available in the community and the problems they are designed to address.

The structure and functioning of the child welfare agency and court systems, the services for which the agency will routinely pay, and the services for which the agency either refuses to pay or is prohibited by state law or regulation from paying.

Local experts who can provide attorneys with consultation and testimony on the reasonableness and appropriateness of efforts made to safely maintain the child in the home.

America's Children At Risk: A National Agenda for Legal Action (American Bar Association Presidential Working Group on the Unmet Legal Needs of Children and Their Families)

"Children, simply by virtue of being children, are denied legal rights that adults take for granted. Many children routinely appear in court without benefit of legal counsel in situations where any adult who had the resources or know-how would retain a lawyer. Many children involved in legal proceedings concerning child abuse and neglect, custody, visitation disputes, status offenses, delinquency, and other important matters are unrepresented from the beginning to the end of their cases. The lack of legal counsel is particularly devastating to children, who often cannot express their own views and may not fully understand the choices they are making . . ."

"Even when children are represented, the representation they receive is sometimes inadequate . . . Children's cases are often 'processed,' not advocated, and too frequently children's interests are poorly represented . . . Meaningful protection of children's rights requires that children be represented by highly skilled counsel at critical stages of critical proceedings that involve children is vital in a system where decisions about children's rights and liberties and those of their parents are decided."

Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness, Rebecca H. Heartz, Family Law Quarterly

"Four different models have been identified as the most common methods of representation. In the first model, an attorney is required although a volunteer may also be appointed. In the second model, both an attorney and a volunteer are required. In the third model, either an attorney or a volunteer may be appointed as GAL. In the last model, the volunteer may be appointed as GAL.

Twenty-three states require that the GAL be an attorney. Another twenty-three states have statutes for the appointment of either an attorney or a volunteer; the local judge makes the appointment. In a small number of states, GAL representation may be provided by social workers, probation officers, or court counselors. When attorneys are appointed as GALs, the may be private attorneys chosen from a list provided to the judge. In other jurisdictions, staff attorneys, like public defenders or legal aid attorneys, represent the child. Some jurisdictions rely on a combination of private and staff attorneys."

Juvenile Law (Oregon State Bar Continuing Legal Education) Section 12.1

"A child who is the subject of a juvenile court proceeding is neither plaintiff nor a defendant in the traditional sense that those terms are used in legal actions. Such a child is often a victim, having more at stake in a dependency proceeding than the typical victim has in a criminal case. By statute, a child is a party to a juvenile court dependency proceeding."

Juvenile Law (Oregon State Bar Continuing Legal Education) Section 12.25

"While trial skills, such as knowledge of the evidence code and the ability to cross-examine expert witnesses, can be as crucial in dependency cases as in any other litigation, the client benefits from a lawyer who knows or becomes familiar with the workings of the unique system through which the case is moving. The special and often complex issues raised by Indian children, or putative fathers, if unrecognized or ignored, can cause substantial delays in cases. Attorneys who are not familiar with the juvenile system may fail to realize that a dependency case exists in an environment heavily influenced by social workers."

STANDARD 3.2 — General Duties And Responsibilities Of Counsel To Client; Avoiding Conflict Of Interests

Counsel or counsel associated in practice should not represent two or more clients who are parties to the same or consolidated juvenile dependency cases unless it is clear there is no conflict of interest between the parties. Counsel should act in a professional manner in zealously advocating the client's position.

■ Related Standards and Guidelines

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. The attorney should make inquiries necessary to determine at the outset of the proceedings whether a conflict exists in the representation of a party.
2. Attorneys should avoid ex parte communication regarding pending cases with the judicial officer before whom the case is pending.

Qualification Standards for Court Appointed Counsel to Represent Indigent Persons at State Expense (Oregon Judicial Department Policy Statement)

Standard 2.1 Attorney Case Loads

Attorneys appointed to represent indigent persons at state expense must provide each client the time and effort necessary to ensure competent and adequate representation. Neither defender organizations nor assigned counsel should accept work loads that, by reason of their excessive size or complexity, interfere with rendering competent and adequate representation or lead to the breach of professional obligations.

Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties

1. All attorneys appearing in dependency actions have the same general mandate: to vigorously represent their clients' interests within applicable legal and ethical boundaries. This includes:
   a. investigating the allegations
   b. advising clients of risks and benefits of possible courses of action
   c. determining clients' interests
   d. representing those interests vigorously to the court and other parties

See *American Bar Association Juvenile Justice Standards: Counsel for Private Parties* under Standard 2.2.

■ **Commentary**

Juvenile Law (Oregon State Bar Continuing Legal Education) Section 12.23

"The conflict inherent in being retained by an adult to represent a child is more easily resolved. The attorney owes no duty to the person who pays for the representation, and has no confidential relationship with that person. The child is the client DR 5-108(A)-(B)."

STANDARD 3.3 — Role Of Counsel

It is the duty of counsel to determine whether a child client is capable of considered judgment. If counsel determines that the child is not capable of considered judgment, counsel should advocate what is in the client's best interests.

When representing parents and children capable of considered judgment, counsel should seek the lawful objectives of the client and should not substitute counsel's judgment in those case decisions that are the responsibility of the client.

■ **Related Standards and Guidelines**

American Bar Association Center for Professional Responsibility, Model Rules of Professional Conduct (1983)

Rule 1.14 requires attorneys, insofar as is possible, to maintain a normal attorney-client relationship with a client whose ability to make adequately considered decisions is impaired.

Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings (American Academy of Matrimonial Lawyers)

1. Determination of "impaired or "unimpaired" children

   There is a rebuttable presumption that children age 12 and above are unimpaired. There is a rebuttable presumption that children below the age of 12 are impaired. Under this standard, the child's counsel, rather than the judge, is to make the judgment whether the child is impaired.

2. Representing "Unimpaired" Children
   a. Unless controlling law expressly indicates otherwise, counsel's role in representing an unimpaired child client is the same as when representing an unimpaired adult client.
   b. Unimpaired clients, regardless of age, have the right to set the goals of representation. Counsel for an unimpaired client should discuss the case with the child and counsel him or her with regard to the objectives of representation. Counsel is obliged to seek to attain the objectives of representation set by the client.
   c. When representing an unimpaired child, counsel should take appropriate measures to protect the child from harm that may be incurred as a result of the litigation by striving to expedite the proceedings and encouraging settlement in order to reduce trauma that can be caused by the litigation.
3. Representing "Impaired" Children
   a. When a child client, by virtue of his or her impairment, is unable to set the goals of representation, the child's lawyer shall not advocate a position with regard to the outcome of the proceeding or issue contested during the litigation.
   b. To the greatest extent feasible, counsel for an impaired child should maintain a normal attorney-client relationship. This child should include, whenever possible, advising the client of counsel's role and informing the client of all significant developments in the case. When communicating with the child client, counsel should use terms and concepts comprehensible to a child of the client's age and intellect.
   c. When representing an impaired child, counsel should take appropriate measures to protect the child from harm that may be incurred as a result of the litigation by striving to expedite the proceedings and encouraging settlement in order to reduce trauma that can be caused by the litigation.
   d. Counsel for an impaired child should use all appropriate procedures to adduce, develop and communicate facts which the decision-maker should consider in deciding the case and which otherwise would not be brought to the decision-maker's attention.
   e. Unless the child requests otherwise, counsel should take appropriate steps to make the court aware of the child's preferences.
   f. At the conclusion of a trial or hearing, counsel for an impaired child shall not make closing argument or submit a memorandum to the court.

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

Representing Children:

1. The attorney should use understandable language and questioning techniques, and should make all reasonable efforts to ensure that the client understands the court process and proceedings and the outcome of the proceedings. Special efforts should be taken to ensure that the client fully understands any court-approved case plan and that the case plan accurately reflects the court's orders.
2. The child's attorney should assist, and attempt to protect, the child in his or her role as a witness, including, if appropriate, requesting that testimony be taken in chambers.
3. The child's attorney should request, recommend and/or advocate for needed services for the child and make his or her best effort to see that those services are provided. This is particularly critical in cases of children with "special needs" and children approaching emancipation.

Representing Parents:

1. A parent's attorney has an ethical obligation to zealously represent the client's interests. This entails vigilant protection of the parents' right to raise their children as they think best without state interference.
2. Once the state has intervened, the law mandates family preservation and reasonable efforts and services to keep the family together. If desired by the client, the parent's attorney should advocate for appropriate reasonable services to preserve and reunify the family.
3. Where necessary and appropriate to protect the parents' interests, the parent's attorney should pay insist on formal court processes, and the attorney should pay scrupulous attention to procedural and evidentiary rules.
4. It is important that the attorney involve the parent in the decision-making process at each stage of the proceedings. At each stage the attorney should fully advise the parent of all the immediate and long-term consequences of any decision made.
5. The attorney should fully explain the case plan and court orders to the client and encourage timely compliance.
6. The attorney should be sensitive to any literacy and language limitations of the parents, and utilize interpreters where necessary.
7. Upon request, the attorney should provide legal assistance in accessing services.

Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties

Communication skills/knowledge of child development

1. Communicating with a child client may require efforts beyond those normally required for effective communications with adult clients.
2. Attorneys for children should be especially sensitive to the child's background and stage of development.
   a. Knowledge of the basic stages of child development will help the attorney develop that sensitivity and age-appropriate communication skills.
3. An attorney for a child age four or older should interview the child to determine the child's wishes and assess the child's well-being.
4. Knowledge of child development will help the attorney to assess the need to seek expert assistance in a particular case and to understand the clinical evaluations that are so often a factor in dependency cases.

American Bar Association Center for Professional Responsibility, Model Rules of Professional Conduct (1983)

Rule 1.14 requires attorneys, insofar as is possible, to maintain a normal attorney-client relationship with a client whose ability to make adequately considered decisions is impaired.

See *American Bar Association Juvenile Justice Standards: Counsel for Private Parties* under Standard 2.3.

■ **Commentary**

Standards of Practice for Representing Children (Ann M. Haralambie)

It is suggested that the following principles be incorporated into any new standards:

1. The attorney's *subjective* view of the child's best interests in an inappropriate standard upon which to base a client's position.
2. A child capable of forming a reasonable position should be able to have that position advocated — otherwise *nobody* is presenting the child's position from the child's perspective.
3. The child's attorney should discuss the child's position and counsel the child about his or her position.
4. When the child's position would be *dangerous* for the child, and the attorney cannot dissuade the child from the position, the attorney should be authorized to take the minimally intrusive protective action.
5. When the child cannot form a reasonable position (which is not the same as a position the attorney thinks is in the child's best interests), the attorney should advocate a position based on an objective assessment of the child's best interests.
6. regardless of the position advocated, the child's expressed wishes should always be communicated to the court if the child wants them to be.

The following "presumptions and assumptions" should inform decisions regarding children's needs:

1. provision of basic needs;
2. provision and maintenance of nurturance, stability and contiguity, and the avoidance of unnecessary

disruptions that can interfere with the child's growth and development;
3. freedom from abuse or neglect;
4. maintenance of the family — this includes retaining ties among siblings and maintaining ties with biological fathers. In certain circumstances, it also includes at least considering the strong emotional bonds that may exist between a child an a nonbiological caretaker.

Further sources of information on which an attorney may make an informed, objective determination of children's needs:

1. evidence of the child's current desires;
2. opinions by persons such as teachers, counselors, baby-sitters, and neighbors about what the child will desire;
3. evidence of what similarly situated mature people wish had been advocated;
4. the child's separation behaviors when leaving each parent;
5. the child's pattern of asking for a particular person when the child is hurt, afraid, or in trouble;
6. expertise of appropriately qualified medical, mental health, and social work professionals to inform their position.

pp. 207-208. Primary debate since 1966 is whether attorney should decide what was in the child's best interests and advocate that, or whether attorney should be guided by the child's expressed views, even if the attorney felt they were not in the child's best interests.

pp. 211-215.—Proposed Paradigm Shift in Representation Standards. The author states that the attorneys subjective view of the child's best interests in an inappropriate standard upon which to base a client's position. The author sets forth objective criteria by which a child's position can be determined.

Independent Counsel for Children, Shannan L. Wilber, Family Law Quarterly

"[I]ndependent counsel should be appointed to represent children in any proceeding affecting their custody, placement or treatment. As a general rule, the attorney should advocate the wishes of the child—even if the attorney questions the correctness of the child's view. Only when the child is unable to articulate a reasoned preference should the attorney substitute a judgment for that of the client . . . The child's attorney is more than just a 'mouthpiece' for her client. The attorney provides additional functions which further undermine the notion that she is merely an extraneous figure. One critical function is the protection of the child from any unnecessary harm that may flow from the proceedings themselves. Parents engaged in a bitter custody battle or a protracted child abuse proceeding, for example, are often blind to the child's need for a prompt, harmonious resolution. Counsel for the child can oppose unnecessary continuances, move to quash frivolous motions, or request a court order providing counseling or other supportive services for the child."

STANDARD 3.4 — Obligations Of Counsel Regarding Pre-trial Placement

When a child has been removed from the parent's home and placed in shelter care, counsel should advocate for the placement order and other temporary orders the client desires, unless the client is a child incapable of considered judgment, in which case, counsel should advocate for the placement order and other temporary orders that are in the best interests of the child.

■ Related Standards and Guidelines

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. The attorney should participate actively in the detention or shelter hearing.
2. Prevention of trauma to the child through needless separation from his/her family should be a goal of the child's attorney where appropriate.

■ Commentary

Standards of Practice for Representing Children (Ann M. Haralambie)

"The child's attorney should be creative in fashioning and considering the options available to the child. In most litigated cases the child's true best interests are not included among the available options. All available choices are usually less than ideal for the child, leaving the attorney to choose the 'least detrimental alternative.' The attorney should not be bound by the options suggested by other parties but should instead make an affirmative effort to fashion alternatives that will best suit the child's needs. The child's attorney is often the best person to propose a middle ground that will be acceptable to the parties."

STANDARD 3.5 — Initial Client Interview And Client Contact

Establishing and maintaining a relationship with the client is the foundation of the attorney-client relationship. Counsel should conduct an initial interview of the client within 72 hours and maintain regular contact with the client throughout the case.

■ Related Standards and Guidelines

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. The attorney, or his/her staff, should conduct thorough and complete interviews with the client, and at every stage of the proceedings should ensure that the attorney receives all new information from the client. In order to maintain an accurate assessment of the case, the attorney should conduct

follow-up interviews and phone calls to check on progress or changes of circumstance. The attorney, or his/her staff, should regularly phone or write the client in order to prepare the case and to help resolve problems which occur between hearings.

2. The attorney should initiate and answer all correspondence and telephone calls which are necessary to the effective representation of the client.
3. The attorney or his/her staff should interview the child, when developmentally appropriate, to ascertain the child's wishes, needs, and background. It is the attorney's responsibility to ascertain the child's version of the incident.
4. Interviews should be done in an atmosphere where the child feels comfortable and privacy is insured.
5. At the initial interview, where possible, the attorney should inform the child, in language the child can comprehend, of the nature of the proceedings, the role of a lawyer, the child's rights and confidentiality aspects where appropriate.
6. The attorney should attempt to remain on the case until termination of jurisdiction to insure continuity of representation.

Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1995)

C-1. Meet with Child

See *American Bar Association Juvenile Justice Standards: Counsel for Private Parties* under Standard 2.5.

■ **Commentary:**

Standards of Practice for Representing Children (Ann M. Haralambie)

"There are very few circumstances in which it would not be imperative to meet with the child, and I cannot think of any circumstances where it would hurt . . . Older children may be able to articulate their own needs quite accurately. Younger children may demonstrate their needs more through their behavior or emotions. Unless the child's attorney spends adequate time with the child on an ongoing basis, those needs may never be shown. It may be necessary to touch base with the parents or professionals involved with the child again after talking to the child. Therapists are particularly helpful resources in interpreting the child's behaviors and statements . . . Children, unlike adults, are not used to talking with people they do not know well. An attorney must establish at least some level of relationship with the child before the child is likely to say anything at all that will be useful. Major adjustments are necessary in one's usual interviewing techniques when children are involved. A good start is to begin thinking about 'talking with,' rather than 'interviewing,' the child . . . An attorney can do several things in the first meeting to convey important information to the child. First, the attorney should explain who he or she is and what the attorney's role in the case is. Young children in particular are not likely to remember and may have been told erroneous information about your role by other people."

STANDARD 3.6 — Independent Investigation

Counsel should conduct a thorough, continuing and independent review and investigation of the case, including obtaining information, research and discovery in order to prepare the case for trial. Counsel should not rely solely on the report of the caseworker.

■ **Related Standards and Guidelines**

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. The attorney should have a complete familiarity with the facts of the case. This may involve reviewing the court file and other case-related documents, bringing discovery motions, interviewing witnesses, procuring experts and otherwise conducting an independent investigation.
2. The attorney, or his/her staff, is responsible for obtaining information regarding the parents' and Department of Children's Services' view of the case.
3. The complete legal file, whether an old or recently active case, should be reviewed.
4. Counsel shall investigate the interests of the minor beyond the scope of the juvenile proceeding and report to the court other interests of the minor that may need to be protected by the institution of other administrative or judicial proceedings.
5. The attorney should investigate what services were offered to the family to maintain the child in the home or prevent removal of the child from the home or to reunify the child with the family.
6. The attorney should consider whether a home visit to the client is appropriate and feasible.
7. The attorney should review relevant records and reports such as school records, medical records, court ordered evaluations and supplemental materials as soon as possible.

Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties

All attorneys should investigate as necessary to ascertain the facts, including interviewing of witnesses. Attorneys should not rely solely on the report of the social worker.

1. The attorney should determine the following from the client:
   a. Extent of contact agency has had with parent/child prior to removal.
   b. What services would have been helpful in avoiding removal.
   c. If client is a parent or child, client's goals and concerns about placement and whether there are relatives or close family friends who would be willing to take child.

d. If client is a parent and incarcerated, offense, length of incarceration, parent's plans after release, parenting/counseling and other programs available at prison; arrangements necessary to get parent to hearings.

e. If the client is a child, the attorney should:

i. Meet with child away from court setting and try to provide continuity and develop a trusting relationship. Explain, in age-appropriate language, the nature of the attorney-client relationship.

ii. Visit child in his/her home and observe child and child's interactions with others in the home. Assess the severity of the injuries and the child's general health and condition.

iii. Ask about and investigate resources that the child can think of, including relatives or friends.

iv. Regardless of the child's age, attempt to interview or at least observe the child. Observations are helpful in determining the accuracy of the petition and court report, or the statements of witnesses or parties.

v. Investigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the child that may be protected by other administrative or judicial proceedings.

2. The attorney should determine the following from the Agency Social Worker:

a. family's prior contacts with DSS

b. who made decision to remove child: child welfare worker or police

c. basis for removal, specific harms which removal was designed to prevent

d. alternatives to removal such as in-home services or removal of the perpetrator, and whether these services were considered prior to removal

e. contacts agency has made with parent and child since child was removed.

3. The attorney should interview the following witnesses:

a. representatives of other agencies with whom the family has been involved, either through DSS referral or on the family's own initiative

b. persons who have had significant contact with the child and may have relevant information about the child.

4. The attorney should obtain and review the agency's records. Where necessary, attorneys for parents and children should determine and utilize available discovery procedures. The attorney should look for:

a. Case plan

b. Services provided or requested by the family prior to the child's removal

c. Arrangements for visitation

d. Projected date of the child's return.

5. The attorney should obtain and review all court pleadings, supporting documents, and necessary and relevant records (including medical, psychological, school, etc.).

6. Attorneys should be familiar with local experts who can provide attorney with consultation and testimony on the reasonableness and appropriateness of efforts made to maintain the child in the home.

7. The child's attorney should investigate as many placement alternatives as possible, appropriate to the child's situation and discuss these possibilities with the child.

a. Knowledge of community and other resources independent of the child's social worker will be helpful in this regard.

Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1995)

C-2. Investigate

(1) Review child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case.

(2) Review court files of child and siblings, case-related records of the social service agency and other service providers.

(3) Contact lawyers for other parties and nonlawyer guardians ad litem or court-appointed special advocates (CASA) for background information.

(4) Contact and meet with the parents/legal guardians/caretakers of the child, with permission of their lawyer.

(5) Obtain necessary authorization for the release of information.

(6) Interview individuals involved with the child, including school personnel, child welfare case workers, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses.

(7) Reviewing relevant photographs, video or audio tapes and other evidences.

(8) Attending treatment, placement, administrative hearings, other proceedings involving legal issues, and school case conferences or staffings concerning the child as needed.

See *American Bar Association Juvenile Justice Standards: Counsel for Private Parties* under Standard 2.6.

■ **Commentary**

Standards of Practice for Representing Children (Ann M. Haralambie)

"Where the child's attorney is permitted to conduct discovery on behalf of the child, he or she should consider using all available discovery tools, both to obtain information not voluntarily provided and to limit the issues to be

litigated. Often the parties will voluntarily provide documents and permit interviews without formal discovery. However, formal discovery may be necessary with some professionals and with uncooperative parents."

STANDARD 3.7 — Pretrial Motions

Counsel should research, prepare, file and argue appropriate pretrial motions or responses whenever there is reason to believe the client is entitled to relief. Counsel should file briefs or memoranda in support of such motions or responses.

■ Related Standards and Guidelines

Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1995)

C-3. File Pleadings. Requested relief may include:

(1) A mental or physical examination of a party or the child;
(2) A parenting, custody or visitation evaluation;
(3) An increase, decrease, or termination of contact or visitation;
(4) Restraining or enjoining a change of placement;
(5) Contempt for non-compliance with a court order;
(6) Termination of the parent-child relationship;
(7) Child support;
(8) A protective order concerning the child's privileged communications or tangible or intangible property;
(9) Request services for child or family; and
(10) Dismissal of petitions or motions.

C-4. Request Services. Consistent with the child's wishes, the child's attorney should seek appropriate services (by court order if necessary). These services may include;

(1) Family preservation-related prevention or reunification services;
(2) Sibling and family visitation;
(3) Child support;
(4) Domestic violence prevention, intervention, and treatment;
(5) Medical and mental health care;
(6) Drug and alcohol treatment;
(7) Parenting education;
(8) Semi-independent and independent living services;
(9) Long-term foster care;
(10) Termination of parental rights action;
(11) Adoption services;
(12) Education;
(13) Recreational or social services; and
(14) Housing.

C.-5. Child with Special Needs. Consistent with the child's wishes, the child's attorney should assure that a child with special needs receives appropriate services to address the physical, mental, or developmental disabilities. These services may include, but should not be limited to:

(1) Special education and related services;
(2) Supplemental security income (SSI) to help support needed services;
(3) Therapeutic foster or group home care; and
(4) Residential/in-patient and out-patient psychiatric treatment.

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. The attorney should timely and appropriately file and respond to motions which would be important in the effective representation of the client. Before filing such motions, counsel must discuss with opposing counsel to resolve the issues.

STANDARD 3.8 —Negotiating A Settlement

Counsel should participate in settlement negotiations to seek expeditious resolution of the case and to obtain petition and disposition terms favorable to the client.

■ Related Standards and Guidelines

Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings (American Academy of Matrimonial Lawyers)

1. As a general rule, counsel for an impaired child should encourage settlement and should not undermine settlement efforts by the parties. In exceptional cases, where counsel reasonably believes that the court would not approve the settlement if it were aware of certain factors, counsel should bring those facts to the court's attention.

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. Counsel should be familiar with available mediations services.
2. Counsel should promptly communicate all terms and conditions of any offers of settlement to the client.

Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties

Jurisdiction Hearing: Adjudication Without Trial

1. If the attorney concludes, after full investigation and preparation, that the petition will probably be sustained, the attorney should so advise client and request consent to discuss settlement of case.
2. The attorney should keep client advised of all settlement discussions and communicate all proposals made by other parties.
3. The attorney should explore options to removal of child such as informal supervision, mediation, and intensive in-home services.

Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1995)

C-6 Negotiate Settlements. The child's attorney should participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child. The child's attorney should use suitable mediation resources.

See *American Bar Association Juvenile Justice Standards: Counsel for Private Parties* under Standard 2.8.

■ **Commentary:**

Standards of Practice for Representing Children (Ann M. Haralambie)

"The child's attorney can conduct negotiation with the parents and their attorneys effectively by focusing on the needs of the child . . . In abuse cases, the child's attorney's recommendation of particular types of treatment (generally proposed initially by the therapist or evaluator in the case) as a means of regaining more time with the child and building a better parent-child relationship in the long-term may get the parent refocused on the child's needs in a positive way."

STANDARD 3.9 — Hearings

Counsel should be prepared before and during hearings to provide quality representation and advocacy for the client.

■ **Related Standards and Guidelines**

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. The attorney should be prepared to effectively argue the client's case in court including preparing for direct and cross examination, opening and closing arguments and, when appropriate, filing supporting trial briefs and points and authorities.
2. The attorney should evaluate what discovery is needed at each stage of the proceedings.
3. The attorney should request appropriate court orders at all hearings.
4. The attorney should determine if the child wishes to be present in court, and whether the child wishes to address the court in or out of the presence of other parties.

Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties

1. All attorney should be aware of the statutory requirements regarding time limits and continuances. They should also inquire into local hearing practices.
2. Where circumstances warrant, the attorney should promptly make any motions material to the protection of the client's rights, such as motions to dismiss the petition, to suppress evidence, or for mental examination. Such motions should ordinarily be made in writing and should be scheduled for hearing prior to the jurisdiction hearing.
3. Detention Hearings

   All attorneys should:
   a. Obtain copies of all relevant documents
   b. Interview the client
   c. Present facts and arguments regarding:
      i. Jurisdictional sufficiency of allegations in petition
      ii. The necessity of detention and whether reasonable efforts were made to prevent removal
      iii. A plan for release of child prior to jurisdictional hearing or, if child remains in placement, arrangements for visits
   d. Explore options to detention of child such as informal supervision, mediation, and intensive in-home services.
4. Contested Jurisdiction Hearing
   a. Present all evidence relevant to the allegations in the petition obtained during the attorney's pretrial investigation.
   b. Attorneys should be familiar with those statutes that deal with children as witnesses. These may include statutes regarding:
      i. excluding parents from the courtroom
      ii. support persons in the courtroom for young children
      iii. reasonable periods of relief from testifying
      iv. age-appropriate questions and restriction of unnecessary repetition of questions
      v. permission for leading questions in cases of child molestation
      vi. exceptions to rules of evidence

Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1995)

D-1 Court Appearances The child's attorney should attend all hearings and participate in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child.

D-2 Client Explanation The child's attorney should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during and after each hearing.

D-3 Motions and Objections. The child's attorney should make appropriate motions, including motions *in limine* and evidentiary objections, to advance the child's position at trial or during other hearings.

D-4 Presentation of Evidence The child's attorney should present and cross examine witnesses, proffered exhibits, and provide independent evidence as necessary.

D-5 Child at Hearing In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify.

D-6 Whether Child Should Testify The decision on whether to call the child as a witness should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony of the child, and the child's developmental ability to provide direct testimony and withstand possible cross-examination. Ultimately, the child's attorney is bound by the child's direction concerning testifying.

D-7 Child Witness The child's attorney should prepare the child to testify. This should include familiarizing the child with the courtroom, court procedures, and what to expect during direct and cross-examination and ensuring that testifying will cause minimum harm to the child.

D-8 Questioning the Child The child's attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.

D-9 Challenges to Child's Testimony/Statements The child's attorney should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child.

D-10 Jury Selection If a jury trial is possible, the child's attorney should participate in jury selection and drafting jury instructions.

D-11 Conclusion of Hearing If appropriate, the child's attorney should make a closing argument, and provide proposed findings of fact and conclusions of law. The child's attorney should ensure that a written order is entered.

D-12 Expanded Scope of Representation The child's attorney may request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. For example:

(1) Child support
(2) Delinquency or status offender matters
(3) SSI and other public benefits
(4) Custody
(5) Guardianship
(6) Paternity
(7) Personal injury
(8) School/education matters, especially for a child with disabilities
(9) Mental health proceedings
(10) Termination of parental rights; and
(11) Adoption

STANDARD 3.10 — Disposition

Counsel should be prepared to present a disposition plan on behalf of the client, as well as to respond to inaccurate or unfavorable information presented by other parties, ensuring that all reasonably available mitigating and favorable information is presented to the court and obtaining all appropriate orders to protect the client's rights and interests.

■ Related Standards and Guidelines

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. The attorney should try to familiarize herself/himself with the available resources for assisting clients in overcoming the problems which led to the Dependency Court proceeding or at least be able to insure that the client receives guidance in this area.
2. The child's attorney should independently evaluate the disposition plan and, where appropriate, offer alternative plans to the court.
3. The attorney should explore the possibility of placement with appropriate non-custodial parents and relatives.
4. When placement is an issue, the attorney should be aware of issues related to placement, including but not limited to:
   a. the necessity of placement;
   b. alternatives to placement;
   c. relative placements;
   d. the impact of removal and placement on the child;
   e. the importance of placing siblings together when appropriate;
   f. the appropriateness of the placement;
   g. the efforts made to ensure a smooth, timely and appropriate transition to a new placement;
   h. the effect of the placement on visitation by parents, siblings and other relatives;
   i. the effect of placement on the service needs of the child;
   j. the transracial, transcultural and language aspects of placement.
5. When siblings have been separated, the attorney should, when appropriate, advocate for reunification in order to reduce trauma and to keep part of the family intact.
6. When returning the child to the parent's home, the attorney should consider efforts to ensure a smooth, timely and appropriate transition.
7. The attorney should explore and argue for appropriate visitation orders between the child, parents, siblings and other relatives or significant persons.

Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties

Dispositional Hearing

1. The attorney should be familiar with dispositional alternatives and community services that might be useful in the formation of a dispositional plan.
2. The attorney should investigate all sources of evidence that will be presented at the hearing and interview material witnesses. The attorney also has an independent duty of investigate the client's circumstances, including such factors as previous history, family relations, economic condition and any other information relevant to disposition.
3. The attorney should seek to secure the assistance of psychiatric, psychological, medical or other expert personnel needed for purposes of evaluation, consultation or testimony with respect to formation of a dispositional plan. The attorney should inquire into local procedures for retention and appointment of experts.
4. Counseling of client prior to disposition:
   a. The attorney should explain to the client the nature of the hearing, the issues involved, and the alternatives open to the court. He should also explain fully the nature, obligations and consequences of any proposed dispositional plan.
   b. When psychological or psychiatric evaluations are ordered or arranged by the attorney prior to disposition, the attorney should explain the nature of the procedure and encourage the client's cooperation.
   c. The attorney should examine fully any witness whose evidence is damaging to the client's interests and challenge the accuracy, credibility and weight of any reports or other evidence before the court.
   d. When a dispositional decision has been reached, it is the attorney's duty to explain the nature, obligations and consequences of the disposition to the client, and the need for the client to cooperate with the dispositional orders.

Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1995)

D-13 Obligation after Disposition The child's attorney should seek to ensure continued representation of the child at all further hearings, including at administrative or judicial actions that result in changes to the child's placement or services, so long as the court maintains its jurisdiction.

See *American Bar Association Juvenile Justice Standards: Counsel for Private Parties* under Standard 2.10.

STANDARD 3.11 — Post-disposition

The lawyer's responsibility to the client does not end with dismissal of the petition or entry of a final dispositional order. Counsel should be prepared to counsel the client and provide or assist the client to secure appropriate legal services in matters arising from the original proceeding.

■ Related Standards and Guidelines

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. Attorneys should check on the timely implementation of orders for visitation, special needs services, counseling or other services.
2. If a child's attorney feels that a court's determination is contrary to the child's interests, a notice of rehearing or appeal should be considered to assure that the child's rights are protected.

Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1995)

E-1 Review of Court's Order The child's attorney should review all written orders to ensure that they conform with the court's verbal orders and statutorily required findings and notices.

E-2 Communicate the order to child

E-3 Implementation the child's attorney should monitor the implementation of the court's orders and communicate to the responsible agency and, if necessary, the court, any non-compliance.

See *American Bar Association Juvenile Justice Standards: Counsel for Private Parties* under Standard 2.11.

STANDARD 3.12 — Review Permanent Planning And Termination Of Parental Rights Hearings

Counsel's role is most critical at the review, permanent planning and termination of parental rights hearings, where decisions of whether the family will be reunited or permanently severed are made. Counsel should be fully prepared to represent the client at all reviews and must provide the most zealous and meticulous representation at the termination of parental rights stage of the proceedings.

■ Related Standards and Guidelines

Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties

Review Hearings

1. Planning for the hearing
   a. All attorneys should confer periodically with their client and the social worker and review:
      i. service plan
      ii. extent of compliance with the plan
      iii. continued appropriateness of plan
   b. In monitoring the provision of dispositional services, the attorney should return the matter

to court if necessary to protect the client's interests.

c. Attorneys should make sure they receive a supplemental report and a notice of the hearing from the social worker or probation officer at least 10 calendar days before the hearing.

2. At all review hearings, attorneys for all parties should present evidence relevant to the appropriateness of the child's continued dependency and placement, including but not limited to evidence regarding the provision of reasonable services and ensure that appropriate findings are made.

Rehearings

1. Orders of a referee may be reviewed by a judge of the juvenile court upon application by the child or parents or guardians.
2. A judge may also order a rehearing on the judge's own motion.

Writs\Appeals

1. All attorneys should advise their clients of their right to seek further judicial review by means of a writ or by appeal.

■ **Commentary:**

Standards of Practice for Representing Children (Ann M. Haralambie)

The child's attorney in a child abuse/neglect case frequently can be the most effective in advocating for the child outside of the trial or review hearing process.

The attorney should play an integral role in the case management or case review team, which is typically compose of at least the social worker and all professionals treating the family members. Multidisciplinary teams, either standing groups or groups convened for each particular case, are clearly the best way to treat child abuse/neglect cases in the legal system. If such a team is not already in place, the child's attorney should propose or convene one to assist with the case. A multidisciplinary team, with its members' varying experience and expertise, is necessary to fully appreciate the family dynamics and the needs of the child and his or her family and to fully explore placement and treatment options.

Especially if the child is in an out-of-home placement, the attorney should insist on thorough review of the child's case and speedy creation and implementation of a case plan to provide services that will enable the child to be returned home as soon as possible or a permanent plan for out-of-home care if return home is not feasible . . .

Caseworkers are almost always overburdened, and the attorney who actively advocates for services for a child client, being the squeaky wheel, stands a good chance of moving the client's case higher on the caseworker's priority list."

Performance Standards

Chapter 4
Specific Standards For Representation
In *Civil Commitment Proceedings*

STANDARD 4.1. — Pre-requisites For Representation

In addition to being proficient in substantive and procedural law, counsel should possess knowledge, skill, training and experience commensurate with the nature of the allegations and the complexity of the case.

STANDARD 4.2. — Counsel's Role

It is counsel's role to act as a zealous advocate for the client's ultimate goals and objectives in the commitment proceedings and to advise the client on how best to achieve them.

STANDARD 4.3. — Initial Client Interview

Upon being retained or appointed by the court, counsel should conduct an initial interview with the client as soon as possible, in most cases within 24 hours, but in all cases prior to the hearing.

STANDARD 4.4. — Obligations Of Counsel Prehearing

Counsel should obtain documents filed in the case, review reports and records of relevance, prepare pre-trial motions and engage in negotiations at the client's direction.

STANDARD 4.5. — Commitment Proceedings

Counsel should provide quality representation and advocacy for the client at commitment proceedings.

STANDARD 4.6. — Obligations Of Counsel Posthearing

It is counsel's responsibility to represent or obtain representation for any residual legal matters relating to the case.

Secretary of State

State of Oregon

INDIGENT DEFENSE

Office of the State
Court Administrator



Audits Division

The Honorable John Kitzhaber
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This report makes specific recommendations to the State Court Administrator that will improve operations and reduce the costs to the state for providing legal representation to indigent defendants. Specifically, our audit found that:

- Significant variations exist in the costs of providing legal services to indigent defendants among contract attorneys and appointed private bar attorneys that suggest cost savings can be achieved;
- Appointed private bar attorneys are charging unreasonable amounts to provide legal services to indigent defendants;
- Contractors are not complying with the terms of their indigent defense contracts; and
- Contractors are working without contracts.

These conditions occurred because the Office of the State Court Administrator (office) has not developed cost guidelines and standards for controlling the costs of providing legal services to indigent defendants or compiled and maintained comparative data on contractors and appointed private bar attorneys. In addition, the office is not conducting financial and performance audits of indigent defense contracts to ensure that contractors are complying with the terms of their indigent defense contracts. By implementing our recommendations, the office can improve its administration of the indigent defense program and reduce the cost of providing legal services to indigent defendants.

OREGON AUDITS DIVISION

Don Waggoner

Don Waggoner, CPA
State Auditor

Fieldwork Completion Date:
October 10, 1994

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SUMMARY

The state may be spending more than necessary to provide legal representation for indigent defendants. In fiscal year 1992-1993, the state spent approximately $38 million to provide legal representation for indigent defendants in non-death penalty cases. Legal representation is provided for indigent defendants by contract attorneys and appointed private bar attorneys. Our review of the costs incurred by 64 contractors and over 133 appointed private bar attorneys suggest that the state may be spending more than necessary to represent indigent defendants. For example, we reviewed two contractors with similar caseloads and found that their average cost per case differed by $84, resulting in an overall cost difference of over $1 million. In addition, we found large differences in the average cost per case for appointed private bar attorneys. The average cost per class A felony[1] case for 133 appointed private bar attorneys in Lane, Marion, and Multnomah counties ranged from $230 to $2,078 per case.

The State Court Administrator can provide greater assurance that indigent defense funds are being spent in a manner that is both reasonable and related to providing direct services required under the contracts by ensuring that contractors comply with the terms of their contracts. Our review of ten contractors found that five did not maintain accounts and records that reflect how they spent contract funds. These five firms combined their contract funds with their private practice funds and failed to maintain separate accounts and records of contract funds. Also, two of the ten contractors in our review worked without contracts for several months in 1994.

To better manage the indigent defense program the State Court Administrator needs to establish cost guidelines and standards, obtain better caseload and financial information on contractors and appointed private bar attorneys, and conduct studies and evaluations of the various methods for providing legal services to indigent defendants. Furthermore, the State Court Administrator can ensure that contractors comply with all the terms of their contracts by developing a system for reviewing and conducting financial and performance audits as required by state statute.

[1] Examples of class A felony cases include manslaughter I, kidnapping I, rape I, robbery I, burglary I, and arson I.

INTRODUCTION

The United States and the Oregon Constitutions guarantee indigent individuals facing criminal prosecution the right to legal representation at state expense. In addition, indigent juveniles and adults who face involuntary civil commitment proceedings or proceedings in juvenile court involving allegations of delinquency, child abuse, or child neglect are entitled by law to legal representation at state expense. Individuals seeking post-conviction, habeas corpus, or appellate relief in a case originally eligible for state-paid representation are also entitled by law to legal representation at state expense. Individuals who cannot retain adequate legal counsel without causing substantial financial hardship in providing for themselves or their families are considered indigent. In fiscal year 1992-1993, the state spent approximately $38 million to provide legal representation for indigent defendants in non-death penalty cases. Of the $38 million, approximately $34.1 million was for contractors and appointed private bar attorneys and approximately $3.9 million was for other fees such as interpreters, expert witnesses, and investigators.

BACKGROUND

The Judicial Department is responsible for ensuring that legal representation is provided to indigent defendants. The Judicial Department, under the direction of the chief justice of the Supreme Court, administers and supervises the appellate, circuit, district, and tax courts. The Office of the State Court Administrator (office) assists the chief justice in exercising administrative authority and supervision over the courts of this state. According to *Oregon Revised Statutes* (ORS) 151.430 (2), the state court administrator shall develop for each judicial district a plan for the provision of appointed counsel compensated by the state to represent indigent defendants in the state courts.

On July 18, 1987, the governor signed legislation returning the responsibility of managing the indigent defense program from the State Indigent Defense Board to the office. The new law established in the general fund an indigent defense account that is appropriated to the office to pay compensation of counsel and other expenses connected with indigent representation in state courts. This account is separate and independent from other Judicial Department accounts. The office is responsible for monitoring expenditures from the account and for preparing budget requests for the Legislative Assembly.

The indigent defense program is administered by the state court administrator, with the assistance of the Indigent Defense Services Division (division), judges, and court staff. The division is comprised of a director and six support staff. The chief justice, the state court administrator and the division are responsible for the promulgation of policies and procedures relating to the determination of indigence by judges. The state court administrator and the division are also responsible for qualification standards for indigent defense providers, payment of indigent defense services, and negotiation of contracts for indigent defense services.

Contract attorneys and appointed private bar attorneys provide legal representation to indigent defendants. In fiscal year 1992-1993, contractors accounted for approximately 81 percent of all expenditures directly related to providing legal representation to indigent defendants. The division is responsible for managing indigent defense contracts. During 1993, the division contracted with 73 contractors to provide legal services to indigent defendants. Eight of these contractors provided legal representation in death penalty, murder, or other complex criminal cases. One was a Native American program that provided legal services primarily to children and parents in juvenile court proceedings. Our review focused on the remaining 64 contractors that provided legal representation to indigent individuals in non-death penalty cases. These 64 contractors consisted of 15 public defenders, 22 law firms, 19 consortiums, and 8 sole practitioners. Following is a description of each:

- Public defenders are nonprofit organizations established solely to provide legal representation to indigent defendants.
- Law firms and sole practitioners provide indigent defense services in addition to maintaining their private practices.

- Consortiums are groups of attorneys or law firms that have joined together to provide indigent defense services. In addition to participating jointly to provide indigent defense, individual attorneys and firms retain their separate identities and continue to provide legal services for their private clients.

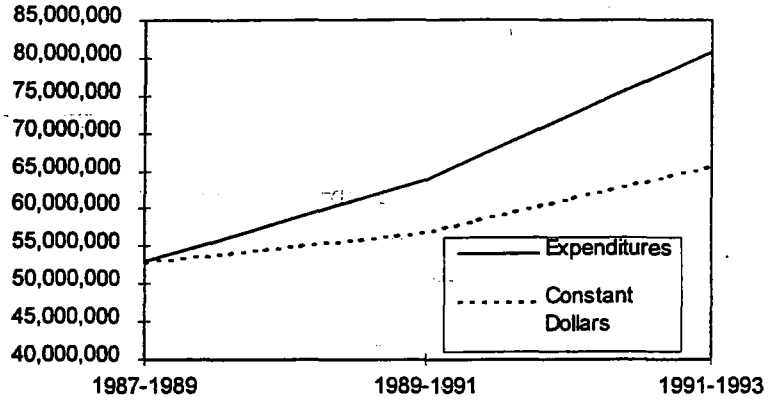
Indigent defense contracts specify the approximate number of cases to be handled, the kinds of cases to be handled, and the total amount of fees to be paid to contractors during the contract period. About one-third of all contracts expire every six months, except during the legislative session. The contract period is normally two years and is maintained on either a calendar or fiscal year basis. Contractors are paid monthly. In fiscal year 1992-1993, contractors who represented indigent defendants in non-death penalty cases handled approximately 87,000 cases and were paid approximately $27.5 million.

Appointed private bar attorneys are compensated on an hourly basis: $40 per hour for non-death penalty representation and $55 per hour for death penalty representation. In fiscal year 1992-1993, appointed private bar attorneys who represented indigent defendants in non-death penalty cases handled approximately 16,400 cases and were paid approximately $6.6 million.

For the 1993-1995 biennium, the Legislative Assembly appropriated $80,965,342 to the Judicial Department for the payment of indigent defense expenditures. In addition, the Legislative Assembly appropriated $6,935,655 to the Emergency Board to be allocated to the Judicial Department for the payment of indigent defense expenditures. Of the $6.9 million, the Judicial Department may use $900,000 for obligations that were incurred during the 1991-1993 biennium.

Indigent defense expenditures have increased by 59 percent since the 1987-1989 biennium. Adjusting for inflation, indigent defense expenditures have increased by 30 percent since the 1987-1989 biennium. Table I shows actual and inflation-adjusted expenditures for indigent defense from the 1987-1989 biennium through the 1991-1993 biennium.

TABLE I
Indigent Defense Expenditures
For Three Bienniums



Our audit did not focus on all the reasons for the cost increase; however, a report published in 1989 by the Spangenberg Group[2] credited much of the increase in indigent defense expenditures from 1982 to 1988 to increasing caseloads. According to the Spangenberg report, indigent defense expenditures increased by 86.9 percent, from $12,639,051 in fiscal year 1981-1982 to $23,625,770 in fiscal year 1987-1988. Adjusting for inflation, indigent defense expenditures increased 52 percent,[3] from $12,639,051 in fiscal year 1981-1982 to $19,215,626 in fiscal year 1987-1988. Since fiscal year 1988-1989, the indigent defense caseload has increased by 22 percent,[4] from 84,614 cases in fiscal year 1988-1989 to 103,426 cases in fiscal year 1992-93.

The majority of indigent defense cases handled in fiscal year 1992-1993 were criminal cases. Of approximately 103,000 indigent defense cases handled in fiscal year 1992-1993, approximately 59,500, or 57 percent, were criminal cases.

[2] The Spangenberg Group is a national private consulting firm conducting research, providing technical assistance, and studying indigent defense systems throughout the country.

[3] To adjust indigent defense expenditures for inflation, we used the Historical Consumer Price Index for All Urban Consumers (CPI-U): Portland-Vancouver OR-WA, All items less food and energy, *CPI Detail Report*, January 1994, Bureau of Labor Statistics.

[4] This percentage is an approximate because the way contractors count cases has changed twice since 1990.

SCOPE AND METHODOLOGY

The objectives of our audit were to determine whether the Office of the State Court Administrator could provide legal representation to indigent defendants more efficiently and whether indigent defense contractors complied with specific terms of their contracts during 1993.

We interviewed the state court administrator, the director of the Indigent Defense Services Division (division), staff from the Office of the State Court Administrator, circuit and district court judges and staff, audit staff from the Judicial Department, and contractors. We reviewed laws, regulations, policies and procedures pertaining to providing legal services to indigent defendants, requests for proposal for indigent defense legal services contracts, Indigent Defense Legal Services Model Contracts, and audit reports from other states.

To determine whether the office could provide legal representation to indigent defendants more efficiently, we reviewed the costs of indigent defense contractors and appointed private bar attorneys. We compared the costs of indigent defense contractors to determine whether variations existed in their average cost per case. Also, we attempted to compare contractors' average cost per hour, but could not because of the unreliability of the time reports provided by the contractors to the division. We compared appointed private bar attorneys to determine the extent of variation in their average cost per class A felony, class B and C felony, and misdemeanor cases. Following are examples of each:

Class A Felony - Manslaughter I, Kidnapping I, Rape I, Robbery I, Burglary I, Arson I.

Class B Felony - Manslaughter II, Kidnapping II, Rape II, Robbery II, Arson II.

Class C Felony - Criminally Negligent Homicide, Sexual Abuse III, Robbery III, Burglary II, Driving with a Revoked Driver's License.

Misdemeanor - Driving under the Influence of Intoxicants, Driving with a Suspended Driver's License, Prostitution, Theft II and III, Criminal Trespass.

We also judgmentally selected seven appointed private bar attorneys with higher average costs per case to determine whether the number of hours they charged daily during fiscal year 1992-1993 appeared reasonable. We provided the division with documentation on those attorneys that charged questionable daily hours. The division will conduct a review to determine if possible abuses occurred. For the one attorney that charged 24.9 hours in a day, we are conducting a special investigation with the office and the results will be reported by the office in a separate report.

For our analyses of indigent defense contractors and appointed private bar attorneys, we used contract comparison reports generated on the Indigent Defense Services Division's personal computer and expenditure and caseload reports generated on the state's Executive Accounting System. We performed limited reviews of the computer processed data used in these reports and found that the data was sufficiently reliable for the purposes of this review. For our analyses of contractors' costs per hour, we used time reports prepared by the contractors.

In addition, we attempted to compare the costs of contractors with those of appointed private bar attorneys to determine which method of providing services to indigent defendants was more cost efficient. However, because contractors and appointed private bar attorneys count cases differently, we were not able to make the comparison.

We reviewed the records of ten indigent defense contractors (three public defenders, three firms, three consortiums, and one sole practitioner) to determine whether they complied with specific terms of their indigent defense contracts in 1993.[5] However, our review was delayed several months because seven of the ten contractors initially refused to allow us access to their financial records. With assistance from the Department of Justice, we conducted limited

[5] Contract terms may be for either a calendar or fiscal year, depending on when the contracts were signed.

reviews of only a portion of the contractors' financial records. We identified some areas of noncompliance during our limited review of the ten contractors; however, if we had had access to more of the contractors' records, we might have found additional areas of noncompliance.

We limited our compliance review to a few of the more significant contract terms. Specifically, we reviewed compliance with the contract terms regarding attorney staffing, case inventory recordkeeping, and financial recordkeeping. We interviewed contract attorneys and reviewed contractor documentation such as payroll records, capital asset records, six-month expenditure reports, general ledgers (or other financial reports showing actual expenditures), vouchers, canceled checks, and caseload reports.

We conducted this audit according to generally accepted government auditing standards. We were forced to modify the scope of our audit because contractors would not provide us full access to their financial records. As a result, we may not have identified all areas of noncompliance. We limited our review to those areas specified in this section of the report.

CHAPTER I

THE STATE COURT ADMINISTRATOR CAN PROVIDE LEGAL SERVICES TO INDIGENT DEFENDANTS MORE EFFICIENTLY

Opportunities exist for the Office of the State Court Administrator (office) to provide legal services to indigent individuals more cost-effectively. Significant variations in the cost of contractors and appointed private bar attorneys suggest that cost savings are possible. For example, our review of two contractors with similar caseloads found that their average cost per case differed by $84, resulting in an overall cost difference of over $1 million. In addition, the average cost per class A felony case for 133 appointed private bar attorneys in Lane, Marion, and Multnomah counties ranged from $230 to $2,078. Applying fee guidelines developed by Multnomah County to Lane and Marion counties, the state might have saved approximately $59,000 in fiscal year 1992-1993 if appointed private bar attorneys in these two counties had achieved Multnomah County's fee guidelines.

To improve the control over the costs of providing legal representation to indigent defendants, the office needs to establish cost guidelines and standards, obtain better caseload and financial data on contractors and appointed private bar attorneys, and evaluate the various methods for providing legal services to indigent defendants. By doing so, the office can better ensure that contracts are awarded to the most efficient contractors, that costs of indigent defense contractors and appointed private bar attorneys are better controlled, and that the most efficient method for providing legal services to indigent defendants is used.

COST OF REPRESENTING INDIGENT DEFENDANTS

The cost of providing legal services to indigent defendants has steadily increased since July 1987. According to *Oregon Revised Statutes* (ORS) 151.430(6), the state court administrator may establish cost guidelines and standards. However, the State Court Administrator has not developed statewide standards for determining reasonable costs for indigent defense cases. Our analysis of the cost of providing legal services to indigent defendants by contractors and appointed private bar attorneys suggests that the state may be spending more than necessary.

ANALYSES OF COSTS

COST COMPARISON OF CONTRACTORS

Based on costs and caseload information contained in the indigent defense contracts, we determined the average cost per case of all cases for 64 indigent defense contractors for 1993,[6] minus investigative expenses and any additional funds the contractors received for complex cases. Murder cases and termination of parental rights cases were considered complex.

The average cost per case for the 64 indigent defense contracts in 1993 varied from $182 to $533. Table II shows the average cost per case for the 15 public defenders, 19 consortiums, 22 firms, and 8 sole practitioners.

Table II
Average Cost Per Case
By Type Of Contractor

Number Of Contractors	Type Of Contractor	Average Cost Per Case Range
15	Public Defenders	$255 - $380
19	Consortiums	$182 - $355
22	Firms	$205 - $495
8	Sole Practitioners	$282 - $533

We would expect some variation in the average cost per case because some contractors' caseloads are more complex and require more time than others. For example, class A felony cases are generally more complex and require more time than misdemeanor cases; consequently, a contractor who primarily handles class A felony cases would have a higher average cost per case than a contractor who primarily handles misdemeanor cases. However, a $351 variation between the lowest average cost per case of a consortium and the highest average cost per case of a sole practitioner ($533 minus $182) suggests that there are opportunities for the office to reduce costs.

[6] Contract terms may be for either calendar year or fiscal year, depending on when the contracts were signed.

An even better method of comparing the costs of contractors would be to compare the average cost per case by type of case, such as class A felony or misdemeanor or by the seriousness of the crime; however, the office does not compile this information. Therefore, we identified some contractors who had similar caseloads and compared their average costs per case. Table III shows three instances where contractors had similar caseloads. Appendix A shows the comparison of these contractors' caseloads. The differences in their average costs per case ranged from $33 to $119. If the contractors with the higher average costs had completed their 1993 caseloads at the lower average costs of the contractors with similar caseloads, a savings of approximately $1.5 million would have been possible.

Table III
Comparison Of Contractors
With Similar Caseloads

Two Contractors With Similar Caseloads	Average Cost Per Case	Difference In Average Cost Per Case	Potential Savings
Contractors A and B	$245 and $278	$ 33	$ 75,471
Contractors C and D	$265 and $349	$ 84	$1,010,100
Contractors E and F	$212 and $331	$ 119	$ 462,434
Total			**$1,548,005**

CONTRACTOR TIME REPORTS

Each year, the Indigent Defense Services Division (division) requires contractors to submit time reports that include the time attorneys and investigators spent on cases assigned to them during a two-month period as set forth in their indigent defense contracts. Using these time reports, contract amounts, and contract caseloads, the division can estimate for each of the contractors the average cost per hour for indigent defense cases assigned to them as reported on the time reports.[7] This information can be used

[7] The analysis using the two-month time reports is based on information provided to the division by the contractors.

to ensure that the state is not paying some contractors excessive rates for providing indigents legal services.

We obtained the 1993 time report information for a sample of 21 contractors to determine the average cost for indigent cases assigned to them. After performing our analysis and presenting our preliminary conclusions to the division, the director of the division informed us that the hourly rates looked very high and the time reports may not be accurate. The division director subsequently contacted 2 of the 21 contractors and obtained additional information that indicates that the original time reports for these 2 contractors were grossly in error. For example, 1 contractor's original time report showed that they took approximately 27 hours to handle 9 class A felony cases. The additional information indicates that the division understated the hours taken per class A felony by 149 percent. Because of the doubt cast on the validity of these time reports, we were unable to analyze, summarize, and present the hourly costs of these contractors. Additionally, because the division does not monitor, review or use this information, it cannot justify the costs of accumulating and reporting this information.

COST COMPARISON OF APPOINTED PRIVATE BAR ATTORNEYS

We also reviewed appointed private bar attorneys to determine the extent of variation in their average costs per case. Specifically, we determined the average cost per class A felony, class B and C felony, and misdemeanor cases for each appointed private bar attorney in Lane, Marion, and Multnomah counties. As shown in Table IV, the average cost per class A felony cases for these attorneys ranged from a low of $230 in Lane County to a high of $2,078 in Multnomah County; the average cost per class B and C felony cases ranged from a low of $117 to a high of $913 in Marion County; and the average cost per case for misdemeanor cases ranged from a low of $100 to a high of $711 in Marion County.

Table IV

AVERAGE COST PER CASE BY ATTORNEY

County	Range Felony A	Range Felony B/C	Range Misdemeanor
Lane	$230-$1,779	$140-$856	$124-$447
Marion	$257-$1,484	$117-$913	$100-$711
Multnomah	$479-$2,078	$150-$808	$112-$498

The large variation in the appointed private bar attorneys' average cost per case suggests that costs savings are possible.

REVIEW OF SEVEN APPOINTED PRIVATE BAR ATTORNEYS

In fiscal year 1992-1993, over 700 appointed private bar attorneys represented indigent defendants in non-death penalty cases. These attorneys handled approximately 16,400 cases and were paid approximately $6.6 million. According to the Judicial Department's internal auditor, until recently the office had not reviewed the costs of appointed private bar attorneys to determine whether the costs appeared reasonable. Currently, the Judicial Department's internal auditors are reviewing the hours of five private bar attorneys. According to the Judicial Department's audit staff, a standard has not been established for the total hours billable in a day. The office is recommending two standards: one for in-court time in a day and one for total hours in a day. With the exception of complex trials, the following limits reflect the recommended standards for maximum billable hours in a day: 7 hours for in-court hours per day and 12 or fewer hours for total hours per day.

We judgmentally selected seven appointed private bar attorneys with higher-than-average costs per case and reviewed the hours they billed daily during fiscal year 1992-1993 to determine whether their billable hours appeared reasonable. We questioned the reasonableness of the charges if attorneys charged more than 12 hours in a day. In total, the seven attorneys worked 1,955 days. Out of 1,955 days, the attorneys worked more than 12 hours in a

day 92 times or approximately 5 percent of the time. One attorney submitted charges for working more than 12 hours in a day, 10 percent of the time. On one occasion the attorney charged 24.9 hours in one day for work on multiple cases.

The number of days the attorneys in our sample worked more than 12 hours suggests that some attorneys may be charging unreasonable amounts to provide legal services to indigent defendants. For the seven attorneys in our sample who worked more than 12 hours per day, the excess time represented approximately $7,700 in billable hours. The number of days the attorneys worked over 12 hours during the review period ranged from 2 days for one attorney to 43 days for another.

OPPORTUNITIES TO IMPROVE EFFICIENCIES

The cost variations we identified for contractors and appointed private bar attorneys suggest that savings are possible. The office has an opportunity to better control the costs of providing legal representation to indigent defendants by establishing cost guidelines and standards, compiling and maintaining comparative data on contractors and appointed private bar attorneys, and by evaluating the methods of providing legal services to indigent defendants.

GUIDELINES AND STANDARDS

The office awards contracts based on a set of criteria outlined in the Office of the State Court Administrator's request for proposal (RFP). One criteria for selection is that the cost for services is reasonable. However, the office has not established cost guidelines and standards in order to determine what costs it considers reasonable. By establishing cost guidelines and standards, the office can ensure that contracts are awarded to the most efficient contractors. For example, the office can use cost guidelines and standards, such as cost per case by type of case, during contract negotiations to determine whether contractors have submitted reasonable costs. If contractors submit costs above the guidelines, the office can use the guidelines and

standards as criteria for negotiating the contract amounts or awarding the contract to another contractor.

In addition, the office has not established guidelines or standards for appointed private bar attorney charges. We contacted courts in nine counties and spoke with the presiding judge or court staff to determine who approves the appointed private bar attorney charges, whether guidelines exist for approving the charges, and whether it is possible to determine if attorneys have billed excessive hours in a day. Judges in seven of the nine counties approve appointed private bar attorney charges; the trial court administrator and the indigent defense staff approve attorney charges in the remaining two counties. Six of the seven judges approve attorney case charges based on their professional judgment. Only one judge approves attorney case charges according to established hourly standards per type of case. The judges we contacted indicated that they are not provided sufficient information for determining whether an attorney has billed excessive hours in a day. By establishing cost guidelines and standards such as cost per case, hours per case, and hours per day, judges or persons approving appointed private bar attorney charges can better assure that the case costs are reasonable. If the attorney charges exceed the guidelines and standards, the judge or designated person approving the charges has justification for questioning the attorneys and requiring additional support for the costs.

The state has an opportunity to reduce the cost of providing legal services for indigent defendants by establishing cost guidelines and standards. For example, Multnomah County has developed fee guidelines for appointed private bar attorneys to use for the various types of cases. In unusual cases such as complexity or unique legal issues, the court can consider payment in excess of the guidelines. We applied Multnomah County's fee guidelines to Lane and Marion counties and estimated that the state might have saved $59,000 in fiscal year 1992-1993 had the appointed private bar attorneys in these two counties attained Multnomah County's guidelines of $600 to $1,000 per class A felony case.

MANAGEMENT INFORMATION

The office also needs to compile and maintain better data on the costs of providing legal representation to indigent defendants in order to establish cost guidelines and standards, monitor and control the costs of contractors and appointed private bar attorneys, and evaluate the various methods of providing legal representation to indigent defendants.

Some management information on indigent defense can be found on the Accounts Payable System; however, the office does not use this system as a management tool. In 1987, the Legislative Assembly approved funding for an Indigent Defense Tracking and Accounting System. Also known as the Accounts Payable System (APS), this system was to provide detailed information on cases handled by both contractors and appointed private bar attorneys, including the in-court and out-of-court attorney hours spent, the type and disposition of the case, the investigative and extraordinary expenses associated with the case, the number of cases that were reassigned because of attorney conflict, and the total hours and compensation billed and approved.

The Indigent Defense Services Division (division), which is responsible for managing indigent defense contractors, does not use the APS to track detailed information on cases handled by contractors. Instead, the division uses a personal computer to:

- Track the number of attorneys, investigators, and support staff, and the number of cases per attorney and nonattorney;
- Maintain information on the time attorneys and investigators spent on cases assigned to them during a two-month period set forth in their indigent defense contracts; and
- Prepare and maintain caseload data including the number and types of cases assigned to contractors each month.

According to the director of the division, staff use the contractors' staff information during contract negotiations to determine if the contractors' proposed staffing levels appear reasonable. Also, division staff occasionally use the time reports during contract negotiations. For example, if a contractor requests an increase in pay from the prior contract, division staff might use information from the time reports to calculate an average cost per case and compare it with the cost per case calculated from the contractor's request for proposal. Division staff also use the caseload summaries to monitor and ensure contractors fulfill their contract obligations.

The division needs better cost information on contractors. For example, the division maintains information on the actual amount paid to contractors and on the expenditures reported by contractors every six months. However, the division maintains this information in each individual contractor's files; it does not track the information on any statewide report or data base. In addition, the division does not compile information on contractors' cost per case by type of case or seriousness of the crime. By compiling and maintaining this type of information, the division could compare contractors' costs and identify and question those contractors with higher costs. It could also use this information during contract negotiations to assist in establishing or revising cost guidelines and standards.

In addition, the office does not use the APS to monitor the costs of appointed private bar attorneys. According to the director of the division, until recently the division did not utilize the APS because staff did not have a thorough understanding of the system. Division staff are trying to gain a better understanding of the system so they can determine how best to use it. The office could use the information contained on the APS to establish cost guidelines and standards for appointed private bar attorneys and to monitor the reasonableness of charges billed by appointed private bar attorneys.

STUDIES AND EVALUATIONS

According to ORS 151.430(1), "The State Court Administrator shall conduct a continuing study and evaluation of various methods for the provision of appointed counsel compensated at state expense to

represent indigents in the state courts." Contractors and appointed private bar attorneys provide legal services to indigent defendants. In fiscal year 1992-1993, contractors accounted for approximately 81 percent of all expenditures directly related to providing legal representation to indigent defendants. According to the director of the division, the division has not conducted continuous studies of the various methods for providing legal representation to indigent defendants because it lacks the information to make the comparisons.

It would be very difficult for the office to compare contractors with appointed private bar attorneys because the way contractors count cases differs from the way appointed private attorneys do. Contractors count cases based on the date(s) of occurrence. Each alleged specific calendar day of criminal conduct counts as one assigned case. All charges filed on the charging instrument(s) that occurred on the same day, count as one case, regardless of the number of criminal incidents, transactions, occurrences, episodes, or number of victims involved. However, appointed private bar attorneys count cases based on the charging instrument. Each charging instrument counts as one case regardless of the number of charges or days of occurrence. If there is a pattern of similar incidents involving one defendant within a given period of time, the county district attorney may consolidate these separate incidents onto one charging instrument.

To determine the percent difference between how contractors count cases versus how appointed private bar attorneys count cases, we reviewed all adult criminal cases filed during the week of February 28, 1994, through March 4, 1994. We determined the number of cases filed during this one-week period based on the way both contractors and appointed private bar attorneys count cases. If contractors had handled all indigent defense criminal cases filed during that week, they would have counted them as 900 cases. If appointed private bar attorneys had handled all indigent defense criminal cases filed during that week, they would have counted them as 831 cases. The contractors' case count would have been at least 8 percent more than the appointed private bar attorneys' case count for handling the same cases.

In order for the office to conduct continuous studies and evaluations of the various methods for providing legal services to indigent defendants and to ensure the office is using the most efficient method for providing legal services to indigent defendants, the office needs to be able to compare contractors with appointed private bar attorneys. However, the office cannot compare contractors with appointed private bar attorneys unless there is some consistency in the way cases are counted.

CONCLUSION

The Office of the State Court Administrator has an opportunity to improve the efficiency and reduce the costs of providing legal representation to indigent defendants. To do so, the office needs to establish cost guidelines and standards for contractors and appointed private bar attorneys, obtain better caseload and financial data on contractors and appointed private bar attorneys, and conduct studies and evaluations of the various methods for providing services to indigent defendants. The office needs this information to better ensure that contracts are awarded to the most efficient contractors and to identify and require contractors and appointed private bar attorneys with higher than normal case costs to justify those costs.

RECOMMENDATIONS

To improve the efficiency of providing legal representation to indigent defendants, the office should do the following:

1. Establish cost guidelines and standards. The office can use the cost guidelines and standards, such as cost per case by type of case, during contract negotiations to determine whether contractors submitted reasonable cost proposals. In addition, the judge or person approving the charges of appointed private bar attorneys can use the guidelines and standards to assess the reasonableness of case costs.

2. Compile and maintain better cost information on contractors. To do so, the office needs to include information on contractors' actual expenditures and cost per case by type of case or seriousness of the crime.

3. Gain a better understanding of the Accounts Payable System. The office needs to determine what information it needs to obtain from the APS so that staff can better manage and control the cost of providing legal services to indigent defendants by appointed private bar attorneys. The office also needs to determine how best to use the APS to compile information on contractors.

4. Evaluate the various methods for providing legal services to indigent defendants to determine which method is most cost-effective. To do so, the office needs to require contractors and appointed private bar attorneys to count cases consistently so that all case costs are comparable.

5. Conduct more periodic audits of the hours billed by private bar attorneys to ensure attorneys charge reasonable costs.

CHAPTER II

INDIGENT DEFENSE CONTRACTS

The Office of the State Court Administrator (office) can better manage the state's indigent defense program by ensuring that contractors comply with all the terms of their indigent defense contracts, by ensuring that contractors are operating under current contracts, and by developing a system for conducting audits of indigent defense contracts.

During 1993, the office contracted with 64 contractors for $28.4 million to provide legal services to indigent defendants in non-death penalty cases. The office can provide better assurance that these funds are being spent in a manner that is both reasonable and related to providing direct services required under the contract by ensuring that contractors comply with all the terms of their indigent defense contract, especially the contract terms regarding financial records. For example, the contract requires contractors to maintain accounts and records that reflect receipts and disbursements of contract funds. In addition, contractors are required to submit at the end of each six-month period a report of how they expended contract funds. We reviewed the records of ten indigent defense contractors to determine if they complied with specific terms of their contracts in 1993. Five of the ten contractors did not maintain accounts and records that reflected how they spent contract funds. Of the five contractors that did maintain accounts and records that reflected how they spent contract funds, their total reported expenditures differed slightly from their actual expenditures. However, several categories of reported expenditures differed significantly from the actual expenditures for those same categories. In addition, during our contract compliance review, we found that two of the ten contractors in our sample worked without contracts for several months in 1994.

The office can ensure contractors comply with all the terms of their indigent defense contracts by developing a system for reviewing and conducting financial and performance audits of indigent defense contracts as required by *Oregon Revised Statutes* (ORS) 151.450(2). The office has conducted only three audits since 1987 and is currently working on a fourth. However, these audits were not the result of planning but the result of problems reported to the office.

INDIGENT DEFENSE CONTRACTS

The Indigent Defense Services Division (division) of the Office of the State Court Administrator is responsible for managing indigent defense contracts. During 1993, the division contracted with 64 contractors to provide legal services to indigent defendants in non-death penalty cases.

These 64 contractors consisted of 15 public defenders, 22 law firms, 19 consortiums, and 8 sole practitioners. Contract expenditures in fiscal year 1992-1993 accounted for approximately 81 percent of all expenditures directly related to providing legal representation to indigent defendants.

The office requires all contractors to sign a standardized model contract. Contractors may request amendment(s) to the model contract as long as they can justify the reason for the amendment(s). However, the office has the right to accept, reject, or negotiate exceptions to the terms and conditions. Contractors that do not accept one of the model contracts may be disqualified.

CONTRACT COMPLIANCE

We reviewed the records of ten indigent defense contractors (three public defenders, three law firms, three consortiums, and one sole practitioner) to determine if they complied with specific terms of their indigent defense contracts during 1993. These ten contractors accounted for 40 percent of all cases assigned to contractors handling non-death penalty cases in fiscal year 1992-1993. We limited our compliance review to a few of the more significant contract terms, specifically:

Contractor Staffing - Attorney Staff

- The contract shall include the names of all attorneys approved at the date of the contract to perform legal services under the contract.

Recordkeeping - Case Inventory

- Within 20 days of the end of each month, the contractor shall provide to the office and the court a reasonably accurate monthly case inventory report for the preceding month.

Recordkeeping - Financial Records

- The contractor shall maintain accounts and records that reflect all receipts and disbursements of contract funds. The accounts and records we reviewed included property and financial records.

- The contractor's records shall show that all disbursements or expenditures of contract funds were ordinary, reasonable and necessary, and related to providing direct services required under the contract.

- The contractor shall provide to the office a six-month budget report on how the contractor expended contract funds for the six-month period.

RESULTS OF COMPLIANCE REVIEW

Our contract compliance review of the ten contractors found that none of them complied with all of the terms of their contracts. For example, none of the ten contractors complied with the contract terms regarding financial records. However, nine of the ten contractors provided us with documentation confirming that the attorneys providing legal services to indigent defendants were the same attorneys agreed upon in the terms of their indigent defense contracts. One contractor would not allow us to review the records necessary to determine compliance with this specific term. In addition, all ten contractors provided to the division reasonably accurate monthly indigent defense case inventory reports. Following is a description of the areas of noncompliance by type of contractor.

PUBLIC DEFENDER

Public defenders are nonprofit organizations established solely to provide legal representation to indigent defendants. Normally, public defenders are the only contractors that request indigent defense funds for capital assets. According to the director of the Indigent Defense Services Division, consortiums, firms, and sole practitioners generally purchase capital assets with funds from their private practice because if they use state funds to purchase capital assets, the assets then belong to the state. All three public defenders in our sample maintained records

of their capital assets; however, we found that one contractor had purchased a 1992 Ford Escort automobile without written authorization from the division. We brought this matter to the attention of the division, which has since resolved the matter with the contractor.

All three public defenders in our sample did maintain accounts and records that reflected receipts and disbursements of contract funds. However, the reports submitted to the division by the contractors showing their expenditures for calendar year 1993 did not reflect the contractors' actual expenditures. The total differences between the reported expenditures and the actual expenditures for the three public defenders were less than 2 percent. However, there were several categories of reported expenditures that differed significantly from the actual expenditures for those same categories. For example, one contractor reported to the division that its total expenditures for 1993 were $2,237,636, only $41,937 or about 2 percent less than its actual expenditures of $2,279,573. But, for this same contractor, there was one category, health insurance, where the reported expenditures of $191,403 were $27,718 or about 17 percent more than the actual expenditures.

FIRMS

Firms and sole practitioners contract to provide indigent defense services in addition to maintaining private practices. Two of the three firms in our sample did not comply with the contract term stating they maintain accounts and records that reflect all receipts and disbursements of contract funds. These firms combined their contract funds with their private practice funds and failed to maintain separate accounts and records of contract funds.

To determine whether these firms spent a reasonable percentage of contract funds on services directly related to providing legal services to indigent defendants, we calculated the percentage of indigent defense revenues each contractor received in either fiscal or calendar year 1993[8] from the contractor's total revenues for that year. This

[8] Contract terms may be for either a calendar year or a fiscal year, depending on when the contracts were signed.

percentage was used to test the reasonableness of the contractor's expenditures. Next, we determined the percentage of indigent defense expenditures, as reported on each contractor's expenditure report to their total expenditures for that same period for each category of the expenditure report. If the expenditure percentage differed significantly from the revenue percentage, we questioned the reasonableness of the expenditure. We also reviewed vouchers supporting some of the actual expenditures to verify the accuracy of their expenditure records.

For the two firms that did not keep separate expenditure records for contract funds, their percent of indigent defense revenue to total revenue was within 3 percent of a ratio of reported expenditures to total expenditures. However, we did find significant differences within some individual expenditure categories. For example, for one contractor, indigent defense revenue provided 69 percent of its total revenue in fiscal year 1993. Therefore, it would be reasonable to expect this contractor to charge about 69 percent of its expenditures to indigent defense; however, for two expenditure categories the contractor charged significantly more. The contractor reported indigent defense expenditures of $1,772 for unemployment insurance when its total expenditures were only $1,592. This contractor also reported indigent defense expenditures of $9,311 for health insurance when its total expenditures were only $8,569. In both cases, the contractor reported that its indigent defense expenditures were more than its actual expenditures for those categories.

Although, one of the firms in our sample kept separate records of its indigent defense expenditures, the expenditure reports it submitted to the division for calendar year 1993 did not reflect actual expenditures as recorded on its accounting records. The total difference between the firm's reported expenditures and actual expenditures was less than one percent. Even though the firm's reported expenditures differed from its actual expenditures by less than one percent, several categories of the firm's six-month expenditure report differed significantly from its accounting records. For example, the reported expenditure of $2,271 for workers' compensation was 58 percent more than the actual expenditure of $1,435 as recorded on the firm's accounting records.

SOLE PRACTITIONER

The sole practitioner we reviewed also kept separate records of its indigent defense expenditures. The contractor's reported expenditures for calendar year 1993 agreed with the contractor's actual expenditures in every category except salaries and benefits. The expenditures reported on the six-month reports for salaries were 0.8 percent more than the actual expenditures and the expenditures reported on the six-month reports for benefits were 5.7 percent less than actual expenditures. The total difference between the reported expenditures and the actual expenditures was not significant.

CONSORTIUMS

Consortiums are groups of attorneys or law firms that have joined together for the purpose of contracting to provide indigent defense services. These attorneys and or firms maintain their private practices and provide legal services to indigent defendants while retaining their separate identities. The three consortiums in our sample did not comply with the contract term stating they maintain accounts and records that reflect all receipts and disbursements of contract funds. The attorneys within these consortiums combined their contract funds with their private practice funds and did not maintain separate accounts and records of their contract funds. In addition, the consortium administrators were not able to provide us with documentation showing they spent a reasonable percentage of contract funds on services directly related to providing legal services to indigent defendants. The expenditure reports the consortium administrators prepare for the consortiums are based on estimates. Without the individual expenditure reports for each attorney within the consortium, we could not test the reasonableness of each consortium's expenditures.

REASONS FOR NONCOMPLIANCE

The division allows the contractors to not comply with all the terms of their indigent defense contracts. The contract requires contractors to provide the division with an expenditure report every six months of how they spent contract funds. However, according to some contractors and the director of the Indigent Defense Services Division, staff have informed some contractors that they could report estimates of expenditures or merely one-half of their yearly budget for their six-month expenditure reports. The division needs to verify the accuracy of the information submitted by the contractors. The division does not conduct site visits to verify the accuracy of the information being submitted by contractors but instead relies on the contractors to submit accurate information. According to the director of the division, the division does not have the resources available to conduct site reviews of contractors.

AUDITS OF INDIGENT DEFENSE CONTRACTS

According to ORS 151.450 (2), "The State Court Administrator shall develop a system for conducting financial and performance audits of indigent defense contracts." However, the Internal Audit Division of the Office of the State Court Administrator has completed only three audits of indigent defense contractors since December 1987 and is currently working on a fourth. These audits were not the result of a planned system for conducting routine audits but were the result of problems reported to the office. Analysts for the division do desk reviews of contractors' caseloads and expenditures but they do not conduct field audits. According to the director of the Indigent Defense Services Division and the Judicial Department's internal auditor, resources are not available to conduct field audits of indigent defense contractors.

CONTRACT PROVISIONS

In addition, some provisions of the contract may not be appropriate to the operations of all types of contractors. According to the director of the Indigent Defense Services Division, "nonprofit public defender contractors are in the best position to report actual six-month expenditures from contract funds, due to the fact that they have no other significant sources of revenue. The vast majority of indigent defense contractors are not nonprofit public defenders but rather are private law firms, sole practitioners, or consortia of attorneys— all of whom have sources of revenue other than indigent defense contract monies.... The model contract indigent defense terms, in many regards, are geared toward and as a result, are more easily complied with by nonprofit public defender contractors. This fact has made contract negotiations and compliance auditing generally more difficult with nonpublic defender contractors." Several contracting firms and consortiums also told us that some provisions of the contract are not appropriate to their operations. For example, because they combine their indigent defense funds with their private practice funds and do not account separately for their contract funds, they are unable to comply with the specific contract term requiring them to maintain accounts and records that sufficiently and properly reflect all receipts and disbursements of contract funds.

WORKING WITHOUT CONTRACTS

During our contract compliance review of the ten contractors, we found that two contractors that provided legal services to indigent defendants worked without contracts for several months in 1994. One contractor worked without a contract from January 1994 until June 1994, when it signed an extension to its 1992-1993 indigent defense contract. This contractor signed a 1994-1995 preliminary contract agreement in September 1994. The other contractor operated without a contract from January 1994 until September 1994, when it signed a 1994-1995 preliminary contract agreement with the office. According to the director of the division, staff did not complete all contract negotiations on time because of heavy workloads.

EFFECTS OF NONCOMPLIANCE

The office needs to ensure contractors comply with the terms of their indigent defense contract in order to guarantee that indigent defense funds are being spent in a manner that is ordinary, reasonable, necessary, and related to providing direct services required under the contract. Based on our limited review of the three public defenders, three law firms, and one sole practitioner in our sample, we identified discrepancies of approximately $61,000 between reported expenditures and actual expenditures. The three consortiums in our sample were not included because the attorneys within the consortiums were not able to provide us with reported or actual expenditure documentation.

The office also needs to ensure contractors are submitting accurate information so that it will have historical data from which to efficiently control indigent defense costs. The division awards contracts based on a set of criteria outlined in the Office of the State Court Administrator's request for proposal (RFP). One criteria for selection is that the cost for services is reasonable. According to the director of the Indigent Defense Services Division, for those contractors reapplying for contracts, division staff compare the contractors' previous expenditure reports to the budget report they submit with their RFPs. If staff identify significant differences, they question the contractors. Without accurate expenditure reports, division staff do not know whether the budget report is reasonable.

ACCESS TO CONTRACTORS' RECORDS

The indigent defense contract states that contractors' shall maintain accounts and records that reflect all receipts and disbursements of contract funds. Also, contractors shall provide to the Indigent Defense Services Division a six-month report on how they spent contract funds for that period. In addition, the contract states that the contractor shall keep records in such a manner as to allow reasonable access to information other than client records for purposes of review.

The Oregon Constitution provides that the Secretary of State "shall be by virtue of his office, Auditor of Public Accounts." According to Attorney General Opinion No. 8154, "the Secretary of State's constitutional audit authority extends to all funds collected by the government and administered for a mandated public purpose, regardless of whether those funds are administered by public officials, state-aided institutions, or private bodies." The Secretary of State's constitutional audit authority extends to indigent defense contractors because the Indigent Defense Account within the general fund is the source of contract funds, and the contractors' use of those funds is limited by the contract to payment of compensation to counsel and other expenses reasonably incurred in providing legal representation to indigent defendants.

Our audit of the indigent defense program was delayed several months because seven of the ten indigent defense contractors we selected for review refused to allow us access to their financial records. One contractor sought an opinion from the General Counsel of the Oregon State Bar. This contractor's primary concern was whether contractors were violating their ethical responsibilities by allowing the Audits Division to examine income and expenditure records, telephone records, open case files, closed case files, and case files of private clients. The Oregon State Bar issued an informal opinion stating that the contractors may under certain conditions allow the Audits Division to inspect income and expenditure records and telephone records; however, contractors may not allow the Audits Division to inspect open case files, closed case files, and case files of private clients.

The Oregon Audits Division was forced to seek assistance from the Attorney General to gain even limited access to a portion of the contractors' records. We were granted limited access to the contractors' financial records only after several months of discussions with several contractors. Because we did not have full access to the contractors' financial records, we may not have identified all areas of noncompliance.

CONCLUSION

The Office of the State Court Administrator (office) contracts with public defenders, consortiums, law firms, and sole practitioners to provide legal services to indigent defendants. During 1993, the office contracted with 64 contractors for $28.4 million to provide legal services to indigent defendants in non-death penalty cases. Our limited contract compliance review of ten contractors found that none of them complied with all the terms of their contracts. In addition, during our contract compliance review, we found that two of the ten contractors worked without contracts for several months in 1994. The office cannot guarantee that indigent defense funds are being spent in a manner that is ordinary, reasonable and necessary, and related to providing direct services required under the contract unless it ensures contractors are complying with all the terms of their indigent defense contracts. The office can ensure contractors are complying with the terms of their contracts by conducting site visits or performing financial and performance audits of contractors as required by ORS 151.450(2). Finally, the extent of the audit was limited because contractors denied the Audits Division full access to their financial records.

RECOMMENDATIONS

To improve its administration of indigent defense contracts, the office should do the following:

1. Assure that contractors comply with the terms of their indigent defense contracts. To do so, indigent defense analysts need to conduct periodic on-site reviews of contractors' operations to ensure that they are submitting accurate reports and complying with contract terms;

2. Review the model contract requirements and evaluate whether all provisions are appropriate for all types of contractors;

3. Assure contractors are working under a current contract;

4. Establish a system for conducting financial and performance audits of contractors; and

5. Include a provision in all indigent defense contracts allowing the office and the Audits Division full access to contractors' financial records.

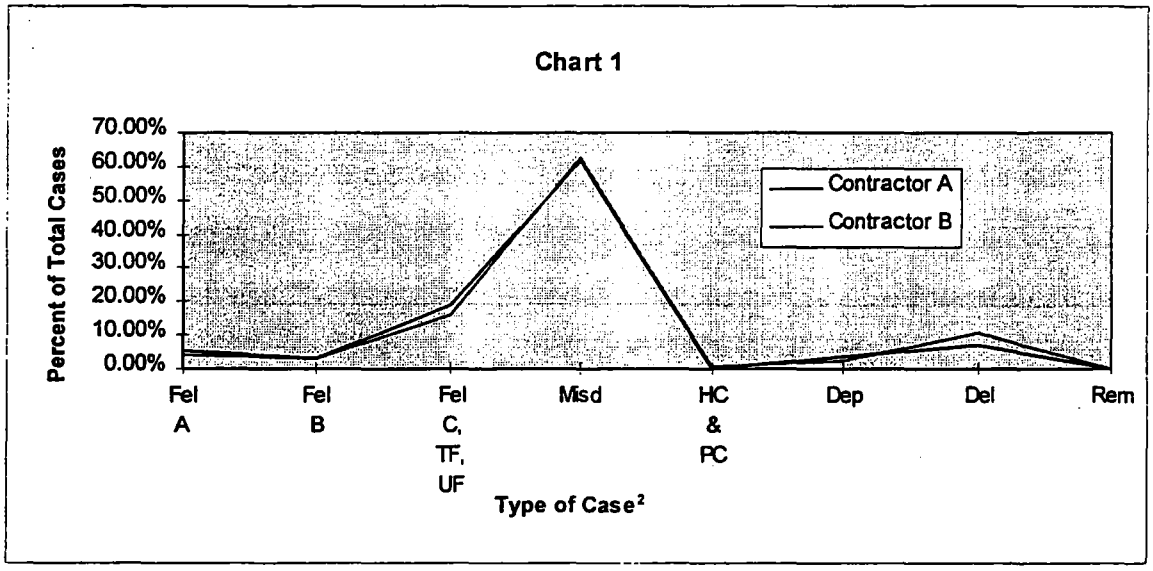
AUDIT TEAM

The courtesies and cooperation extended by the management and staff of the Office of the State Court Administrator are much appreciated.

Gary Colbert, Audit Administrator
Lauralee Carson
Jacqueline Lefevre
Kathy Newcomb
Paul Ballek
Leilani Reisling

APPENDIX A

The following charts show the contractors we identified that had similar caseloads[1]:



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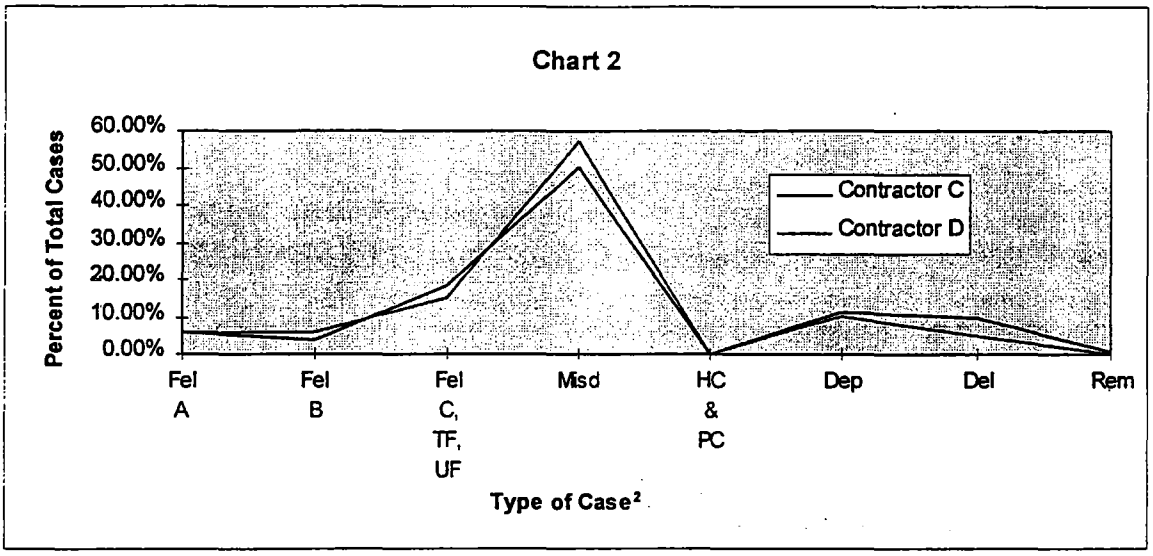
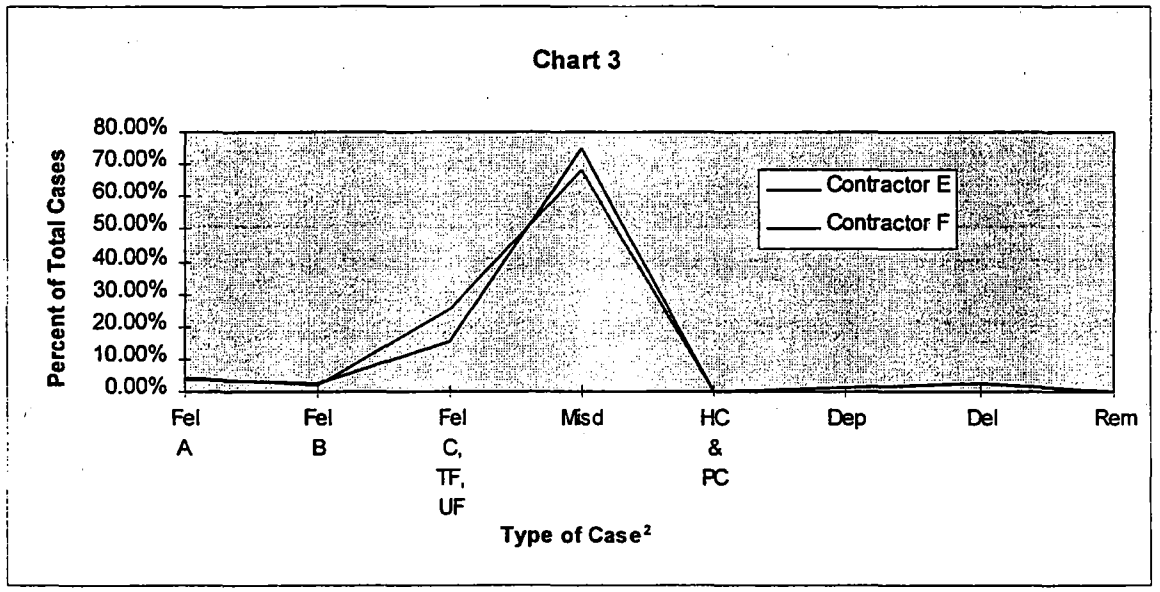
1 Source: *Indigent Defense Services Division - 1993 Contractor Case Reports.*

2

Abbreviation	Description
Fel A	Felony A
Fel B	Felony B
Fel C, TF, UF	Felony C, Traffic Felony, Unclassified Felony
Misd	Misdemeanor
HC & PC	Habeas Corpus, Post Conviction
Dep	Dependency
Del	Delinquency
Rem	Remand





[2]

Abbreviation	Description
Fel A	Felony A
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Misd	Misdemeanor
HC & PC	Habeas Corpus, Post Conviction
Dep	Dependency
Del	Delinquency
Rem	Remand

RESPONSES TO THE AUDIT REPORT

KINGSLEY W. CLICK
Acting State Court Administrator

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JUDICIAL DEPARTMENT

Supreme Court Building
1163 State Street
Salem, Oregon 97310

February 6, 1995

Don Waggoner, Director
Audits Division
Secretary of State
255 Capitol Street NE, Suite 500
Salem, OR 97310

RE: Response to Audits Division's 1994 Performance Audit of Indigent Defense

Dear Mr. Waggoner:

We appreciate the opportunity to respond to the Audits Division's draft report of its performance audit of indigent defense services.

We first wish to acknowledge the considerable time and effort your office expended in performing this audit. We agree with your auditors' verbal assessment that the indigent defense system and its administration are very complex. Since the transfer of responsibility for providing indigent defense services from the counties to the state, the Oregon Judicial Department has been striving to improve the system.

Enclosed please find our formal response to the draft audit. We have made every effort to provide you with a concise response that draws upon information that was available to your auditors and addresses any concerns or clarifications regarding the analyses and findings that were thought to be useful to your and our efforts. In addition, we have taken the opportunity to provide a limited number of historical perspectives which we believe reflect upon the improvements in our performance of administering Oregon's indigent defense program.

We generally agree with the recommendations included within the draft audit report and will be providing periodic updates with respect to the implementation of recommendations that have not already been initiated. We anticipate being able to implement all of the recommendations or alternatives to certain recommendations within the next biennium. Those improvements that are relevant to the report and which are already underway are provided in the enclosed response.

Oregon's indigent defense system represents what appears to be one of the state's most extensive efforts to provide governmentally mandated services under a privatized model of service delivery. A small number of state employees and judges perform the administrative

functions of the indigent defense program. The private sector is utilized exclusively to provide the state and federally mandated legal services for criminal defendants, children and parents who are before the state's juvenile courts, persons facing involuntary civil commitment, and others who are indigent. It is our hope that your and our office's efforts will prove to be beneficial to the state as a whole, as the focus on providing government services shifts more toward privatization.

We look forward to working with the Audits Division on the matters presented in the draft audit. As the Oregon State Bar's Indigent Defense Task Force recently concluded after almost two years' review of Oregon's indigent defense system, this system has received the benefit of significant scrutiny, review and recommendations undertaken by judicial and legislative committees, task forces, national experts and others. We welcome the review and suggestions made by all and appreciate your office's efforts in this regard.

Sincerely,

Kingsley W. Click
Acting State Court Administrator

Ann S. Christian
Indigent Defense Services Division

KWC:ASC:bkv/E7B95012.F

Enclosure

cc/enc: Chief Justice Wallace P. Carson, Jr.
Jef Faw
Jerl Cate

RESPONSE

OF THE

OFFICE OF THE STATE COURT ADMINISTRATOR

TO THE DRAFT PERFORMANCE AUDIT

OF

INDIGENT DEFENSE

CONDUCTED BY THE SECRETARY OF STATE'S AUDITS DIVISION

RESPONSE TO AUDITS DIVISION'S 1994 PERFORMANCE AUDIT OF INDIGENT DEFENSE

The following has been prepared by the Office of the State Court Administrator, Indigent Defense Services Division (hereafter, "OSCA" and "IDSD"), in response to the December 1994 draft performance audit report of indigent defense, prepared by the Audits Division of the Secretary of State's office.

OVERVIEW

In February 1994 the Secretary of State's Audits Division began its performance audit of the administration of, and to a more limited degree, the delivery of, "indigent defense" services in Oregon. The scope of the review did not include the State Public Defender Committee or its state employee-based indigent defense program. Rather, the audit was limited to those indigent defense functions mandated pursuant to ORS 151.430-495 (hereafter, "indigent defense program").

Specifically, the audit was limited to the costs and the administration of such costs which are associated with the constitutional and statutory mandates for attorney versus nonattorney indigent defense provider expenses (examples of the latter are foreign language translation, investigation, and court transcription services). The delivery and quality of direct services provided by Oregon's indigent defense program were not subject to review by the audit. We would welcome reviews by the Audits Division of these and other areas in the future.

SECTION I: OBSERVATIONS, CONCERNS OR CLARIFICATIONS GENERALLY AND WITH RESPECT TO THE "INTRODUCTION" SECTION OF THE DRAFT REPORT

The draft audit report, in the introduction at pages three and four, correctly states that indigent defense costs have increased 59 percent (30 percent when adjusted for inflation) since the 1987-89 biennium; i.e., from FYE 1989 to FYE 1993. The report acknowledges only one reason, other than inflation, for the increase in expenditures, stating that the indigent defense caseload increased 22 percent from FYE 1989 to FYE 1993. This increase in caseload is correct for the indigent defense caseloads in each year that excluded death penalty and appellate cases; in other words, the FYE 1989 and FYE 1993 caseloads that were compared and which accounted for a 22 percent increase in caseload were for trial level, nondeath penalty cases only. (Please note: all subsequent references to specific years (1989) represent fiscal years ending in the stated year (FYE 1989).)

Two of the major difficulties that OSCA/IDSD continues to encounter in its efforts to effectively and efficiently administer the indigent defense program are ensuring that "apples are compared to apples" and that significant changes are taken into account when making comparisons of costs and workloads. The following factors, other than increases in caseload, have contributed significantly to the increase in indigent defense expenditures from 1989 to 1993.

The expense to the Indigent Defense Account of providing representation to defendants facing the potential of a death sentence increased 103 percent in 1993 over that expended in 1989. In addition, total expenditures for 1993 include approximately $2.5 million which was specifically appropriated by the 1991 Legislative Assembly to increase the hourly rate paid to private bar, hourly rate (noncontract) attorneys providing legal representation. This increase represented the first increase in hourly rates since 1979. Finally, the portion of total indigent defense expenses that comprise nonattorney defense costs ("extraordinary expenses") in nondeath penalty cases (e.g., investigation, foreign language translation, etc.) increased 88 percent between 1989 and 1993.

After adjusting for the increases in death penalty expenditures, private bar hourly rate funding, and nonattorney service expenditures, and costs attributable to indigent defense appellate cases, the 59 percent total increase in indigent defense expenditures between 1989 and 1993 represents a 43 percent increase. In "constant dollars," adjusted for inflation, this represents a 23 percent increase in expenditures. This percentage increase more closely correlates to the 22 percent increase in the nondeath penalty, trial level indigent defense caseload during the same period of time.

In addition to taking into account the one-time or extraordinary factors listed above, this type of comparison more closely mirrors the focus of the audit report--that is, those indigent defense costs that are associated with the provision of nondeath penalty, trial level attorney services by independent contractors and private bar attorneys.

The following chart is provided in support of the conclusion that when comparing "apples to apples" between 1989 and 1993 indigent defense expenditures, the increase equals 23 percent in constant dollars. Even this comparison is not a strictly "apples to apples" comparison, because of the fact that indigent defense caseloads since 1989 have increasingly been handled by contractors rather than private bar attorneys. Many of the contracts include investigation and foreign language translation services which would otherwise be included within extraordinary (nonattorney) services.

AMOUNT OF ID EXPENDITURES		FYE 1989	FYE 1993	PERCENTAGE INCREASE
I.	TOTAL	$26,602,378	$42,387,732	59%
II.	ALL DEATH PENALTY ("DO") AND APPELLATE EXPENSES, TRIAL LEVEL NONATTORNEY, EXTRAORDINARY EXPENSES ("EXTRA"), AND PRIVATE BAR HOURLY RATE INCREASE ("PB INCR")			
	DO	$1,676,690	$ 3,400,516	103%
	APPELLATE	$ 797,045	$ 1,148,343	44%
	EXTRA	$1,732,230	$ 3,255,041	88%
	PB INCR	N/A	$ 2,500,000	N/A
	SUBTOTAL	**$4,205,965**	**$10,303,900**	**145%**

III. TRIAL LEVEL, NONDEATH PENALTY ATTORNEY SERVICE COSTS, ADJUSTED DOWNWARD BY PRIVATE BAR HOURLY RATE INCREASE ("REGULAR") AND CONSUMER PRICE INDEX ("CPI") INCREASE

REGULAR	$22,396,413	$32,083,832	43%
CPI	120.4	144.7	20%

PERCENTAGE INCREASE IN REGULAR COSTS/CONSTANT DOLLARS 23%
PERCENTAGE INCREASE IN REGULAR CASES 22%

Finally, the following information is presented as evidence that OSCA/IDSD's efforts to contain the **total** cost of indigent defense services have been increasingly successful, in spite of significant increases in death penalty and extraordinary expenses.

YEAR	% INCREASE PRIOR YEAR	$ INCREASE PRIOR YEAR	TOTAL ANNUAL EXPENDITURES
1989	N/A	N/A	$26,602,378
1990	18.9%	$5,018,844	$31,621,222
1991	10.1%	$3,182,869	$34,804,091
1992	12.4%	$4,298,791	$39,102,882
1993	8.4%	$3,284,850	$42,387,732
1994	1.4%	$ 614,499	$43,002,231

The second and final general response to the draft audit report concerns a frequent misperception concerning indigent defense mandates and those caseloads that are subject to those mandates. The state is responsible for providing indigent defense services to individuals other than just criminal defendants. The report's introduction begins by correctly stating the scope of court case types in which indigent individuals are entitled to legal representation at state expense.

Specifically, the report acknowledges, at page four, that only 57 percent of the 1993 indigent defense caseload accounted for criminal defendants. The remainder of the indigent defense caseload is primarily comprised of probationers facing probation revocation court proceedings, children and parents who are the subject of juvenile court dependency or termination of parental rights proceedings, persons facing involuntary civil commitment, and juveniles against whom a juvenile delinquency petition has been filed. The remainder of the draft audit report is worded in terms of "defendants," which may be interpreted to suggest that only criminal defendants receive indigent defense services.

SECTION II: RESPONSE TO CHAPTER 1 OF THE DRAFT AUDIT REPORT

This chapter of the draft audit report concludes that the State Court Administrator (SCA and IDSD) can provide indigent defense legal services more efficiently. This conclusion is based upon the Audit Division's (hereafter, "AD") determination that significant variations exist in unit costs associated with indigent defense contractors and attorneys who provide services on an hourly rate basis. As examples, the report correctly states that average costs for the 1993 contracts AD reviewed range from $182 to $533 per case and that the costs for representation by a sampling of private bar, hourly rate attorneys for Class A felony cases ranged from $230 to $2,078.

With respect to the variation in contractor per case costs, the draft report acknowledges that some variation would be expected based upon the complexity of the caseload mix that a particular contractor agrees to handle. This is best evidenced by reviewing the types of cases primarily handled by the contractors whose per case amounts in 1993 were $182 (probation violation proceedings) and $533 (postconviction relief proceedings).

In determining per case costs, the AD did take into account, as does IDSD, those cases that generally are most time-consuming (i.e., murder and termination of parental rights cases) for which the contracts specifically provide a separate value for such a case. Payment for such cases does not occur until the case is actually appointed and completed or is apportioned in the monthly contract amounts, subject to being paid back to the state if the contractor does not in fact receive such number of these case types.

In addition, nonattorney services provided within an indigent defense contract contribute to variations between contractors who provide such services (primarily investigation and foreign language translation) and those who do not. AD took into account investigation services in its per case comparisons by applying a presumed value of $30,000 per contract staff investigator. IDSD, in reviewing contract bids and making comparisons of contractors, uses the figure of $40,000 per staff investigator (salary, benefits, and overhead costs). IDSD does not propose that use of the $40,000 versus the $30,000 amount for staff investigators accounts for the entire variation in per case amounts.

IDSD has negotiated an increasing number of specialty contracts; i.e., Spanish-speaking clients only, felony, juvenile, probation violation, and postconviction relief. This specialization partially influences the variances between contractors' per case amounts. However, at the same time, IDSD has reduced the variances between contractors in 1989 from a $509 per case difference between high ($622) and low ($113) per case cost (variance of 450 percent) to a $351 per case difference between high ($533) and low ($182) in 1993 (variance of 193 percent).

One other comparison that is illustrative of IDSD's efforts to contain costs associated with indigent defense contracts is that the overall average cost per case for nondeath penalty contracts has increased only 9 percent from 1989 ($297 per case) to 1993 ($324 per case) with no adjustments for murder or other complex cases and no adjustments for nonattorney services, such as investigation.

The draft audit report, at page ten, provides a comparison of average costs per case for contractors based upon the type of organization providing the services: nonprofit, public defender; consortia of attorneys; law firms; and sole practitioners. Other than the fact that public defender providers include investigation services within their contracts, whereas most nonpublic defender contractors do not provide such nonattorney services, IDSD has determined that the types and volume of cases handled and local and historical factors (discussed below) are of greater significance in comparing contractor per case costs than the type of provider engaged to provide the service.

The draft report, at page 11, acknowledges that a better method of comparing indigent defense contractor per case costs would be to take into account the mixture of cases handled by each contractor; i.e., recognizing that a contractor who handles only civil commitment or probation violation cases cannot be directly compared to one who provides services in felony cases only. The report correctly states that IDSD currently does not compile specific costs per Class A felony case, for example, for each contractor that includes representation in that case type.

This is discussed in detail below concerning IDSD's efforts to-date to value certain case types in negotiating indigent defense contracts.

The draft audit report, in an effort to take into consideration the differences in per case costs that different case mixes may engender between contractors, sets forth per case comparisons for three sets of contractors who appear to have similar mixtures of caseloads. As noted above, in determining per case amounts for each contractor, AD did adjust those contracts that include investigation services and murder and termination of parental rights cases.

Contractor E (a small law firm) and Contractor F (a large consortium of attorneys) have the greatest difference in per case costs ($119). In reviewing the mixture of cases each contractor receives, the following is noteworthy. Contractor E has a full mixture of indigent defense case types; e.g., felonies, misdemeanors, probation violations, juvenile, and civil commitment. Contractor F's caseload excludes juvenile and civil commitment cases. Contractor E's total caseload is approximately one-third as large as that of Contractor F. However, Contractor E's felony caseload is approximately one-fifth of Contractor F's felony caseload. Stated another way, Contractor E's felony caseload comprises 22 percent of the total caseload. Contractor F's felony caseload comprises 35 percent of the total caseload.

Contractor C (a small consortium) and Contractor D (a large public defender) differ in per case cost by $84 per case. Contractor C's felony caseload comprises 27 percent of its total caseload. Contractor D's felony caseload comprises 38 percent of its caseload. While the case mix differences between Contractor E and F and between Contractor C and D are responsible for a portion of the difference between the two sets of contractors, IDSD acknowledges that other factors (local and historical, discussed below) also contribute to the difference.

Finally, the case mix of Contractor A (a small consortium of attorneys) compared to that of Contractor B (a small public defender office) is comparable. Other than the fact that public defender offices generally tend to have higher per case costs than other types of providers (often, in part due to the fact that nonprofit, public defender offices do not have the opportunity to realize revenue generated by nonindigent defense cases), local and historical factors would serve as the only bases for the per case cost difference between Contractors A and B.

The draft audit report concludes that approximately $1.5 million could have been saved if the contractor with the higher per case cost in each of the three comparisons had provided the services at the lower per case cost of the "comparable" contractor. This statement is true, on the surface. What it does not take into consideration are the actual differences in case mixes and the local and historical factors that have impacted the higher and the lower per case contractor costs. Absent more precise measures of what per case costs ought to be, it may be as true to say that the state has been receiving a subsidy from the lower per case contractors based upon their ability to engage in private, retained work which generates greater revenue per case than indigent defense work.

A number of local factors influence the cost of providing indigent defense services, many of which are interrelated to some degree. Some of these factors are susceptible to being "quantified." The practical difficulty is that IDSD currently does not have the means by which to collect uniform data on such local factors that would allow for comparisons between counties and regions that could be used for statistical analysis and caseweighting.

As a first step in the direction of being able to factor in and compare local variants that impact workload, IDSD, with the assistance of a State Justice Institute grant, is developing a forecasting model for total state indigent defense costs and caseloads for criminal representation only. This model will focus primarily upon larger picture factors such as offense and arrest rates, staffing and budget levels for other system components (law enforcement, District Attorney, courts), poverty rates, and population levels that are termed "at risk." The knowledge gained as a result of this project will further IDSD's efforts to establish a core/base cost per case type in the locale that has the most favorable variants for reduced indigent defense per-case costs. Contracts would be negotiated based upon the core/base per case costs with incremental increases that take into consideration local variations that adversely impact the delivery of indigent defense services.

The following provides only a few of the local factors that can influence contractors' and other system components' (for example, District Attorneys, Children's Services Division, corrections, and court) costs and staffing levels. Included in the discussion of each of the local factors is at least one example of specific instances that illustrate the potential for adverse or positive impacts on indigent defense contract costs. These factors also influence private bar attorney costs.

LOCAL FACTORS #1, 2 AND 3: Availability of qualified attorneys locally--"supply and demand." Geographical area covered by contract. Mixture of contract caseload. The "supply and demand" factor is best illustrated in Eastern Oregon, where the number of attorneys generally and the number of attorneys qualified and interested in performing indigent defense services are limited. The additional variable of geographical area to be covered by indigent defense contractors is best illustrated, again, by the contractors in Eastern Oregon. In order to cover conflict caseloads in Eastern Oregon counties, contractors must agree to provide services in more than one county. The time associated with travel to county seats that are considerable distances apart is a factor contributing to the generally higher than average per case costs of these contractors. Finally, Baker and Grant Counties in Eastern Oregon have no state district (lower) courts where misdemeanor cases are filed. Rather, these counties have justice courts that are county funded (as are the indigent defense costs associated with representation in those courts). Misdemeanor cases proceed in the county justice courts, leaving the generally more serious felony cases in state court for the state indigent defense contractors in those counties.

LOCAL FACTOR #4: Number of jails in a community. Multnomah County has four jail facilities which range in distance from the courthouse from one block to 15 miles. Housing of clients of an indigent defense contractor or private bar attorney in multiple facilities (with periodic transfers between facilities) adds to the workload of attorneys and their staff. Wasco County recently closed its jail and is housing Wasco County defendants in Goldendale, Washington (approximately 30 miles away).

LOCAL FACTOR #5: Number of jail beds available. This factor can influence indigent defense attorneys' workloads. Lincoln County's reported experience after the building of a new jail illustrates two of these impacts: longer jail sentences (the likelihood of significant jail sentences on conviction results in an increase in the number of cases that are resolved by trial versus a negotiated plea) and increases in probation violation cases.

LOCAL FACTOR #6: District Attorney (DA) charging and negotiation practices. The best example of the impact on indigent defense costs that DA charging practices can have is the Multnomah County DA's policy to charge most first offense, property (versus person) misdemeanors as violations--for which there is no right to state-paid appointed counsel. The impact on those contractors in Multnomah County is two-fold: their misdemeanor caseloads are proportionately less than those in other counties and the seriousness of their misdemeanor caseloads is greater than in other counties. Failure to return a video rental within the prescribed time which is charged by the DA of one county may or may not be charged in another county, or may be charged as a violation. The workload of an indigent defense contractor who practices in a county where the DA encourages diversion and conditional discharges in property and drug cases as a part of plea negotiations is less than a contractor in a county where the DA does not engage in such negotiation.

Historical factors also have played a role in the per case costs associated with indigent defense contracts. There appear to have been significant disparities between county funding and caseload levels for contractors who were shifted from county to state funding in 1983. Briefly, while some contracts provided sufficient funds for contractors to have 15 percent retirement programs and salary levels that were above federal poverty levels, others included no funding for retirement and salaries of less than $12,000 for entry-level lawyers. Such disparities remained to a large degree in 1989 and to a lesser degree in 1993. Three of the 1993 public defender contracts that the AD reviewed contain the following differences in key areas.

	PD #1	PD #2	PD #3
Salary Ranges			
Attorneys	$34,356-$58,152	$24,600-$42,720	$25,428-$50,292
Investigators	$26,460-$33,804	$15,456-$23,712	$18,084-$32,436
Retirement	10%	0%	5%
Total K $ Per Staff	$61,415	$43,542	$50,079
Cases Per Attorney	303*	296*	337
Est. % Admin. Costs	10%	13%	11%

* Caseload and attorney FTE exclude that attributable to Early Disposition and STOP Diversion programs.

Since 1989, IDSD has undertaken three approaches to reviewing and comparing indigent defense contract amounts. First, the "per case cost" approach continues to be used for "ballpark" comparison purposes.

Primarily because of the vagaries of using per case cost comparisons only, IDSD began reviewing contract bids and existing contracts with a "zero-base budgeting" approach in 1992. This approach works best for public defender organizations where employees of the contractor devote 100 percent of their time to indigent defense work. It also has been beneficial with non-public defender contracts, in which the contractor must submit estimated "Full Time Equivalent" (FTE) percentages for attorneys and staff based upon the percentages of their time that are devoted to providing indigent defense services versus private, retained work. By using

this approach, set levels for certain budget line items have been established as maximum amounts to be funded by contract; i.e., $525 per year for continuing legal education which is multiplied by the number of attorney FTEs committed to indigent defense work.

The third approach taken by IDSD to review and better ensure comparability of some contractors' costs is utilization of a valuing system based upon case types. This approach, as the draft audit report suggests, is the one that best ensures that cost efficiencies are realized. In 1989, the first indigent defense contract in which there were different values established for different types of cases was negotiated. That contract provided for a generic felony value per case and a generic nonfelony value. This was followed by separately valuing murder and other complex cases such as termination of parental rights cases in virtually all contracts. In 1992 negotiations for juvenile caseload contracts in Multnomah County were conducted on a value per case type basis. The primary reason for this was that the number of juvenile review hearings (which on average require less time and resources than other juvenile case types) were increasing dramatically. Contractors, as well as IDSD, recognized that applying an overall per case rate to a caseload where the mixture of cases overall was becoming less time consuming on an average per case basis was unjustifiable. The valuing approach was next applied in negotiations for nonjuvenile contracts in Multnomah County in an effort to ensure that the numerous contractors in that county receive comparable amounts for the mixture of cases included in their contracts. The valuing approach has been increasingly used in other counties.

Eventually, IDSD will have established base case costs by types of cases that will take into account more detailed classifications of case types than just Class A, B, and C felonies, misdemeanors, felony and misdemeanor probation violations, etc. The largest public defender and one of the smallest law firm contractors have agreed to run a dual system of case reporting during their contract terms; e.g., case reporting as currently required under the contracts (generic case types as set forth above) and case reporting on each case's "Case Seriousness Level" (CSL) which takes into account the differences in workload between Sex Offense and Driving While Suspended felonies and Driving Under the Influence of Intoxicants (DUII) and Criminal Trespass misdemeanors, for example.

Once core/base costs are established for specific case types, factors such as nonattorney services included within the contract and local variants can be negotiated as "add-ons" to the base costs.

Establishing contracts based upon different case type values also has the benefit of taking into account shifts in workload over the course of a contract. For example, if the number of felony probation violation cases (which generally are valued at $135 per case (without investigation)) increase significantly over the course of a contract, but DUII cases decrease, the contractor can accept almost two additional felony probation violation cases for each decrease in DUII cases, without renegotiation of the contract price.

The draft audit report, at page 13, identifies significant variations in private bar, noncontract attorney costs per case. IDSD will be requesting the AD's work papers for review by that division and the Internal Audit Section (hereafter, "IA") of the OSCA. As the draft audit report indicates, adequate time has not historically been allocated toward the systematic review of private bar costs per case. This is in large part due to the fact that IDSD, with four analysts and two support persons, has targeted its resources primarily to indigent defense contracts; e.g., contract negotiation and review of contractors' monthly case inventory reports to ensure accurate case credits. Indigent defense contractors handle 89 percent of the total trial level

caseload and approximately 84 percent of the total trial level costs of contract and private bar representation.

As noted in the draft audit report, the IA of OSCA has begun (beginning in April of 1993) detailed reviews of hours billed by private bar attorneys to detect attorneys who bill greater than a "presumed reasonable" number of hours per day (both for incourt and total daily hours), as well as reviewing potential duplicative billings where an attorney is appointed on more than one case for a defendant. This work will be enhanced if the Judicial Department's decision package to add two auditors solely for indigent defense reviews and audits is approved by the 1995 Legislative Assembly.

While uniformity has been established statewide for reporting indigent defense contract cases, the same cannot be said with respect to private bar billings. Although the "Indigent Defense Compensation Policies and Procedures" addresses billing requirements for private bar attorneys, those requirements (as well as the entire policy statement) are currently open for review and comment, with IDSD planning to provide recommendations for revisions to the policy statement to the SCA this summer. Private bar billing requirements definitely will be revised. Specific attention will be provided regarding the manner in which private bar attorneys report and bill on cases, toward the end of better ensuring that contractor case counts and private bar case costs are consistent and, therefore, comparable. Trial courts and OSCA staff will be better trained regarding those requirements. In addition, IDSD hopes to have fee guidelines with respect to average, mean, and 90 percentile historical costs and the standard deviation method suggested in the draft audit report included within that policy revision.

Per case guideline amounts for private bar billings have been in effect in Multnomah County since the state assumed responsibility for indigent defense. Those guidelines were most recently revised in August of 1993, to take into account the fact that a Class A felony that is resolved by trial takes a greater number of hours, on average, than a Class A felony that is resolved by guilty plea. Despite the fact that guidelines have been established in only Multnomah County, the AD determined that private bar attorney fees in Multnomah County for Class A felony cases are greater than those found for Lane and Marion Counties. At least a portion of the disparity may be attributable to the fact that in Multnomah County, unlike Lane and Marion Counties, the private bar is only appointed to cases when all of the indigent defense contractors have a conflict of interest; i.e., the recent 17 codefendant Racketeering case filed in Multnomah County.

IDSD, with IA's assistance, will be reviewing AD's work papers and continuing on with IA's audits of private bar attorney billings toward the anticipated end of identifying common billing issues and providing clear requirements, as needed, to private bar attorneys that are geared toward resolving such issues up-front. For example, a felony case generally is first filed in district court. That district court case frequently is dismissed and the same case may or may not be filed in circuit court. Private bar attorneys may be billing for services delivered at the district court level separately from those billed for circuit court representation.

With respect to establishing a method for trial courts or the OSCA to review the number of hours billed by an attorney in a particular day, IDSD has acquired a software program from the San Francisco Superior and Municipal Courts that includes this function. Performing this type of review requires data entry of the backup detail listings of time that attorneys currently append to their fee statements. In order to obviate the need for such re-data entry, IDSD will be exploring the use of a scanner for those attorney detail reports that are typewritten or computer

generated and will be implementing, on a pilot basis, private bar fee reporting that includes provision of the backup information on a computer diskette.

SECTION III: RESPONSE TO CHAPTER 2 OF THE DRAFT AUDIT REPORT

This chapter of the draft audit report concludes that OSCA/IDSD can better manage the indigent defense program by ensuring that: contractors comply with the terms of their contracts; all contracts are kept current; and a system for conducting routine audits of indigent defense contracts is developed.

The AD reviewed three different areas for contract compliance. The draft audit report briefly concludes that the ten contractors who were subject to AD's review did, in fact, provide reasonably accurate monthly case inventory reports. IDSD has expended considerable time and effort toward ensuring the accuracy of these reports, with the assistance of the courts and the contractors themselves. Proper case counting and monthly reporting has been given highest priority by IDSD since 1992, in an effort to ensure uniformity of case counting and because indigent defense monies are directly tied to the number of cases appointed to contractors. Occasionally, IDSD staff rotate to cover different contractors, one of the purposes of which is to have fresh eyes review contractor case reports for accuracy. IDSD staff recently conducted a training session for those contractor staff who actually maintain and provide the monthly reports--the evaluation of this session by the attendees was excellent. These types of training sessions and onsite visits by IDSD analysts to review contractors' compliance with contract terms, as recommended by the draft audit report, will be given as high a priority as resources allow during the next biennium.

With respect to the second area AD reviewed for contract compliance--that attorneys listed in the contract document in fact were the attorneys providing legal services--the AD found that nine of ten contractors surveyed complied with this contract term. With respect to the tenth contractor, the draft audit report states that the ". . .contractor would not allow us to review the records necessary to determine compliance. . . ." IDSD does not know what, in fact, occurred during this contractor's meeting with AD auditors. The contractor in a response letter to the AD suggests there may have been a misunderstanding regarding provision of the requested records. IDSD has requested the contractor provide payroll and other records to substantiate compliance with this contract term.

As the director of IDSD acknowledged early on during AD's audit, the indigent defense model contracts currently used by OSCA/IDSD are best suited to those contractors who perform indigent defense work exclusively (nonprofit, public defender organizations), particularly with respect to the financial record keeping and reporting contract terms.

A working group of indigent defense contractors (with representatives from each of the different types of indigent defense providers) was first convened in the fall of 1993. This working group was called back for more extensive work last fall and has met monthly thereafter. One of this group's primary goals is to provide input and recommendations for the SCA's review, regarding one area of contract compliance that AD identified (and which IDSD has identified in the past) as of concern; e.g., financial record keeping and reporting requirements for nonpublic defender contractors. IDSD and the working group are reviewing whether contracts with nonpublic defender attorneys ought to be structured and administered more in the fashion of a grant. To the extent that improvements are made in IDSD's establishment of core/base costs by type of case (discussed in Section II., above), contracts may be rewritten, as the AD has suggested,

that remove the more stringent financial record keeping and reporting requirements which IDSD intends to maintain in the public defender contracts.

OSCA's Internal Audit Section (IA) and IDSD intend to provide closer scrutiny of all indigent defense contractors, particularly with respect to financial matters. This joint goal will be accomplished more quickly if the two additional auditor positions are approved for the next biennium. However, even if the positions are not approved, IA has been engaged in a reorganization effort that is likely to result in more routine audits of contractors, with IDSD staff assistance as needed. The fact that the discrepancies AD found in the financial records of contractors who were able to provide detailed accounting records were less than 1 percent, cumulatively, speaks well of the contractors.

With respect to the draft audit report's finding and recommendation concerning contractors working without a current contract, contract negotiations have become more and more difficult because of budgetary constraints. For the past two years, no indigent defense contractor has received a new contract that provides for any additional money (including, nondiscretionary inflationary increases) absent an increase in workload. IDSD has not reached new agreements with all contractors and new bidders for contracts that expired December 31, 1994. However, IDSD has a fully executed contract addendum for each contractor with whom IDSD continues to seek a new contract.

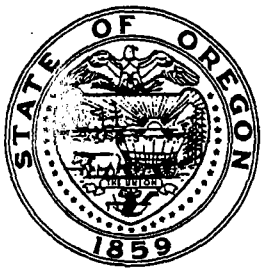
ASC:bkv/D1B95017.F

Secretary of State

Oregon Judicial Department

INDIGENT DEFENSE PROGRAM

Special Review



Audits Division

No. 96-22

June 18, 1996

Secretary of State

Audits Division

Auditing for a Better Oregon

The Honorable John Kitzhaber
Governor of Oregon
State Capitol Building
Salem, Oregon 97310

Kingsley W. Click, Administrator
Office of the State Court Administrator
1163 State Street
Salem, Oregon 97310

This report makes recommendations for the Office of the State Court Administrator to increase fiscal accountability for the Indigent Defense Program. The review, which included the billings of two private attorneys who provided indigent defense services through the program, was prompted by the results of a previous audit of the program which we issued May 31, 1995.

During the current audit, we reviewed two attorneys' fee statement certifications (billings) for several years of indigent defense services provided to the state. Our review found overbillings totaling more than $41,000, which resulted from misrepresentation of hours worked and inaccurate recordkeeping. Due to a lack of adequate review, oversight, and auditing of attorneys' billings by the individual courts and the Office of the State Court Administrator, these billings were paid by the state.

We recommend the Office of the State Court Administrator take corrective action, including seeking reimbursement from the attorneys for overbillings to the state and increasing fiscal accountability over the Indigent Defense Program resources. The State Court Administrator generally agrees with the findings and recommendations of this report and is taking corrective actions to improve the billing and payment process.

OREGON AUDITS DIVISION

Don Waggoner, CPA
State Auditor

Fieldwork Completion Date:
December 13, 1995

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SUMMARY

Over $41,000 was overbilled to the state by two court-appointed private attorneys, including claims in excess of 24 hours in a day, in excess of eight hours in-court for a day, and in-court hours on weekends. Factors contributing to overpayments included misrepresentation of hours worked and inaccurate record keeping by the attorneys as well as lack of review, oversight, and auditing of attorney billings by courts and the Office of the State Court Administrator. The State Court Administrator should review our detailed analysis, establish final amounts overpaid, then ensure payment by the attorneys. Furthermore, the State Court Administrator should implement administrative and financial controls to systematically identify inappropriate attorney billings in the future, as well as provide for an adequate program of post-audit coverage.

The State Court Administrator is responsible for providing legal representation to indigent defendants and others within the state. The Indigent Defense Services Division of the State Court Administrator's Office is primarily responsible for coordinating the Indigent Defense Program with the assistance of judges and court staff. For the fiscal year ending June 30, 1995, the department expended $47,138,520 on 121,693 indigent defense cases.

Our special review encompassed the indigent defense billings of two court-appointed private attorneys, with the objective of identifying whether overpayments occurred and recommending corrective action where appropriate. We reviewed these attorneys' fee statement certifications from January 1991 through May 1994. Effective November 30, 1993, the State Court Administrator's Office began contracting with a consortium rather than with individual attorneys for providing legal representation to indigents in Marion County. The consortium is a group of attorneys or law firms that have joined together for the purpose of contracting to provide indigent defense services.

The State Court Administrator generally agrees with the findings and recommendations of this report and is taking corrective actions that should increase fiscal accountability over program resources and decrease future occurrences of overpayments to attorneys.

INTRODUCTION

BACKGROUND

The Oregon Judicial Department (department), under the direction of the chief justice of the Supreme Court, administers and supervises Oregon appellate, circuit, district, and tax courts. The Office of the State Court Administrator (office) assists the chief justice in exercising administrative authority and supervision over the courts. The office is responsible for providing legal representation to indigent defendants and others within the state. According to *Oregon Revised Statutes* (ORS) 151.430 (2), the state court administrator shall develop for each judicial district a plan for providing state-funded legal representation to indigent defendants in state courts.

On July 18, 1987, the governor signed legislation returning the responsibility of managing the Indigent Defense Program from the State Indigent Defense Board to the Office of the State Court Administrator. The new law established in the general fund an indigent defense account appropriated to the office to compensate legal counsel and pay other expenses connected with indigent representations. The office is responsible for monitoring expenditures from the account and preparing budget requests for presentation to the Legislative Assembly.

The office coordinates the Indigent Defense Program with the assistance of judges and court staff and the Indigent Defense Services Division (division). The chief justice, the office, and the division are responsible for promulgating policies and procedures to be used by judges to determine a defendant's indigence, or inability to pay for representation. The office and the division are also responsible for developing qualification standards for indigent defense providers, negotiating contracts, and paying for indigent defense services. For the fiscal year ending June 30, 1995, the department spent $47,138,520 on indigent defense case fees for 121,693 cases.

SCOPE AND METHODOLOGY

Our previous audit of the state's Indigent Defense Program, issued on May 31, 1995, uncovered instances of questionable billings by a court-appointed private attorney. During that audit, we judgmentally selected seven attorneys with high average costs per case to determine whether the number of hours they charged daily during fiscal year 1992-1993 appeared reasonable. One of these attorneys (hereafter referred to as attorney B) had billed 24.9 hours in one day for work on indigent cases. As a result, we initiated a special review of the indigent defense payments made to this attorney. At the same time, the State Court Administrator's Internal Audits Division had been conducting a detailed review of attorney B and another attorney (hereafter referred to as attorney A) who had similar billing practices. Using information we previously obtained, together with copies of billings and database information from the State Court Administrator's Internal Audits Division, we began a special review of both attorneys' indigent defense billings.

The objective of our special review was to examine the indigent defense billings of two court-appointed attorneys to identify instances of overpayments and recommend corrective action where appropriate. We tested the attorneys' billings against the following criteria: billing the state more than 24 hours of representation in a day, billing more than eight hours in-court for a day, and billing hours not supported by adequate documentation.

To meet our audit objective, we reviewed relevant laws, regulations, administrative rules, and department policy. We interviewed attorney A, attorney B, and department staff and reviewed independent court records and the attorneys' time and billing records. We limited our review of attorney A's fee statement certifications to the period of January 2, 1991, through December 29, 1993, and attorney B's fee statement certifications to the period of March 24, 1992, through May 6, 1994. On November 30, 1993, the office began contracting with a consortium for providing legal representation to indigents in Marion County. This consortium is a group of attorneys or law firms that have joined together for the purpose of contracting to provide indigent defense services.

AUDIT RESULTS

Two attorneys overbilled the state more than $41,000 in legal fee statement certifications. Overbillings included billing the state in excess of 24 hours in a single day and billing in excess of eight in-court hours in a single day. Instances of misreported time were also identified, such as billing in-court hours on weekend dates.

ATTORNEY BILLING PRACTICES

Individual courts usually assign a number (case number) to each case issued by the district attorney against a defendant and appoint an attorney to handle legal representation if the defendant is determined to be indigent. A particular case can include one or more charges. The court-appointed private attorneys receive compensation on an hourly basis: $40 per hour for non-death penalty representation ($35 per hour prior to May 31, 1991), and $55 per hour for death penalty representation ($50 per hour prior to May 31, 1991). In addition, according to the office's policy statement, the attorney's actual out-of-pocket expenses, such as postage, long distance telephone calls, and copying services related to a specific case, are reimbursable.

Within 30 days of the disposition of a case, the appointed attorney files a provider's fee statement certification and affidavit to the trial court for review and approval. The fee statement certification shows total hours billed in- and out-of-court by the attorney, reimbursable charges, and the total compensation due for hours spent on the case. The accompanying affidavit, or detailed report, then itemizes the in- and out-of-court hours, as well as the reimbursable expenses reported in the fee statement certification. Before submitting the billing to the court, the attorney signs the fee statement certification stating the information reported is true and accurate. Court-approved fee statement certifications are then sent to the department where the total hours billed on the fee statement certification are agreed to the itemized hours on the affidavit, or detailed report, then payment is made.

ATTORNEY A

Based on documentation we reviewed, attorney A overbilled the state for $40,033 in legal fees for representing indigent defendants during the period of January 2, 1991, through December 29, 1993. attorney A submitted 554 fee statement certifications, billing the state $153,965 during this period. In 212 instances on the 554 fee statements certifications, attorney A overbilled the Indigent

Defense Program. Examples of inappropriate billings for attorney A include the following:

- Claiming more than 24 hours billed to one day;

- Claiming more than eight in-court hours in a day on 52 days. For example, attorney A billed the state 33.1 hours for in-court hearings in a single day. According to Marion County Court Operations Manager, the courts rarely hold sessions lasting more than eight hours;

- Time for in-court hours not supported by court records in two instances. On May 28, 1991, attorney A billed 2.2 hours in-court for representing an indigent defendant. Court records for that date do not support attorney A's claimed in-court appearance. In another instance, attorney A billed 15 hours for a trial that court records reflect as being 12 hours in length; and

- Misreporting hours billed in fee statement certifications. For example, court records reflect that attorney A appeared in-court for an arraignment hearing to represent an indigent with three separate cases. The attorney's supporting documentation reflects that he spent a total of three hours representing the indigent for all three cases. However, in three separate fee statement certifications, attorney A billed the state three hours in-court for each of the three cases, a total of nine hours. Thus, the attorney received $240 in compensation for six hours not worked. Additionally, our review identified at least 10 instances where attorney A billed a first-class postage stamp costing 29 cents (in 1991-1994) as 0.1 hour of time devoted to an indigent's case. In each instance, the state compensated attorney A $4 for the stamp (0.1 hour at $40 per hour).

Table 1 summarizes the number of occurrences, hours, and costs associated with attorney A's overbillings.

Table 1

Overbillings Identified for Attorney A
January 2, 1991 through December 29, 1993

Description	Occurrences	Hours	Cost to the State
• over eight hours in-court and over 24 hours in a day*	14	63.4	$ 2,536
• over eight hours in-court and less than 24 hours in a day**	38	138.5	5,540
• over 24 hours billed in a day	1	0.8	32
• billed in-court hours not supported by court records	2	5.2	208
• other misreported hours	157	760.7	31,717
Total	212	968.6	$ 40,033

* Calculation includes only hours billed exceeding 24 hours per day times $40 per hour rate.

** Calculation includes only in-court hours billed exceeding eight hours per day times $40 per hour rate.

In addition to the $40,033 above, another 98 of attorney A's 554 fee statement certifications (or 18 percent), amounting to $26,444, were inadequately supported. The office's policy statement Volume I, Section 02, Chapter 13, 3.6A states, "the State Court Administrator may request that counsel provide additional information for audit, statistical, or any other pertinent purpose ... to ensure the proper use of state funds...". Attorney A was unable to provide documentation for these billings and we were unable to determine through any other means whether these billings were reasonable and allowable charges to the program.

Auditors from our office met with attorney A and discussed these findings. Although attorney A was given the opportunity to respond to our audit findings in writing, we received no formal response from him.

ATTORNEY B

Of 67 fee statement certifications we reviewed for the period of March 24, 1992, through May 6, 1994, attorney B overbilled the state in 11 instances. The 67 certifications selected for testing totaled $59,304; the 11 overbillings represented $1,132 of that total. Examples of overbillings for attorney B include the following:

- Claiming more than eight in-court hours in a day in seven instances. For example, attorney B billed 10.5 hours in-court to a single day. According to Marion County Court Operations Manager, the courts rarely hold sessions lasting more than eight hours;
- Time for in-court hours not supported by court records. Attorney B billed the state for 17 hours of in-court service that court records indicate lasted 13.5 hours; and
- Misreporting hours billed in fee statement certifications. On 10 dates, attorney B billed for appearing in-court on Saturdays and Sundays. A review of court records revealed attorney B had actually appeared in-court on weekdays, but had erroneously recorded and billed the in-court appearances to weekend dates.

Table 2 summarizes the number of occurrences, hours, and costs by type associated with the inappropriate billings.

Table 2

Overbillings Identified for Attorney B
March 24, 1992 through May 6, 1994

Description	Occurrences	Hours	Cost to the State
• over eight hours billed in-court in a day	7	5.4	$ 216
• billed in-court hours not supported by court records	1	3.5	140
• other misreported hours	3	19.4	776
Total	11	28.3	$ 1,132

According to information obtained from the State Court Administrator's Office, attorney B repaid $776 of the $1,132 overbillings on April 3, 1996.

Auditors from our office met with attorney B and discussed these findings. On April 11, 1996, we received a formal response from attorney B. Attorney B states that the audit is correct in its finding that a duplicate billing was made on one case. Attorney B sent a check to the state of Oregon for reimbursement of this overbilling. However, attorney B does not agree with any of the other overbillings identified in the report. Attorney B stated that the other apparent overbillings may be caused by poor record-keeping: hours recorded as in-court hours were really worked as out-of-court hours. Attorney B further stated that, due to the information gained from this audit, more effort will be given to better reporting.

FACTORS CONTRIBUTING TO OVERPAYMENTS

Several factors contributed to the state's overpayments to these two attorneys, including inadequate review and oversight of attorney billings by state courts and the State Court Administrator's office (office). State courts are responsible for ensuring amounts billed for fees and expenses are appropriate for case representation. According to the Marion County Court Operations Manager, the accounting clerk reviews the total time on the front of each fee statement certification for reasonableness. The accounting clerk does not review the attorney's supporting documentation or compare each fee statement to prior fee statement certifications to determine whether duplicate or excessive billings were made. Courts review attorney billings on a case-by-case basis for reasonableness; however, the time billed for a given case may not appear unreasonable unless the time billed by the same attorney for other cases during the same time period is also considered.

The office receives the court-approved fee statement certifications and affidavits for payment. A clerk manually compares the time reported on each detail report to its corresponding fee statement certification prior to paying the attorney. This comparison could not determine if the attorney has billed the same time to more than one fee statement certification or billed more time to one day than is reasonable. For example, attorney A billed the state 33.1 hours for work performed on January 25, 1993, on 29 separate fee statement certifications. The department approved each of the 29 fee statement certifications after reviewing the hours billed.

The office is responsible for establishing policies and procedures including, but not limited to, cost guidelines and standards for approval and payment of compensation and expenses incurred in the indigent defense program. While the office has billing guidelines for the attorneys, these guidelines are not used for reviewing the fee statement certifications. For example, the State Court Administrator's Office in the past has had an unwritten policy that limits time charged for arraignment hearings to two-tenths of an hour; therefore, billing reviewers at the courts and the office should be rejecting billings that are submitted without evidence to support higher amounts of time charged. In addition, the reviewers should reject hours billed by an attorney for over 24 hours in a day, over eight hours in-court in a day, and weekends.

Without specific procedures to compare and analyze fee statement certifications, the courts and the office are unable to identify excessive billings prior to payment. Additionally, as part of its administrative oversight responsibilities for the state indigent defense program, a system should be established for auditing the supporting records for attorneys' billings after payment has been made. Although the department's Internal Audit Division participated in this audit and is currently working on additional court-appointed counsel billings, no other Internal Audit Division audits of these billings have been completed in the past five years according to the director of Internal Audits.

We recommend the State Court Administrator:

- Review our detailed analysis, establish final amounts overpaid, and ensure reimbursement by the attorneys.

- Develop and implement written guidelines for use by state courts and department personnel in evaluating the allowability of billing information submitted by indigent defense attorneys. From these guidelines, specific procedures should be developed to question or deny costs billed by indigent defense attorneys. For example, billings should be reviewed in a manner that ensures total hours for all cases billed by an attorney for a single day do not exceed 24 hours.

- Review the court's current automated payment processing system and implement modifications that will help eliminate overbillings.

- Conduct audits of indigent defense attorney billings and take appropriate corrective actions, such as recovery of any identified overbillings.

REPORT DISTRIBUTION

This report is public record and is intended for the information of the Oregon Judicial Department management, the governor of the state of Oregon, the Oregon Legislative Assembly, and all other interested parties.

COMMENDATION

The courtesies and cooperation extended by the officials and employees of the Oregon Judicial Department during the course of our audit were very commendable and sincerely appreciated.

AUDIT TEAM

Gary Colbert, Audit Administrator
Margaret Kane, CPA
Craig Stroud, CPA
Karen Trussell

AGENCY'S RESPONSE TO THE AUDIT REPORT

OREGON JUDICIAL DEPARTMENT
Office of the State Court Administrator

May 10, 1996

Don Waggoner
Director
Audits Division
Secretary of State's Office
255 Capitol Street NE, Suite 500
Salem, OR 97310

RE: Response to Audits Division's Special Review of the Indigent Defense Program Hourly-Rate-Paid Attorney Over Billings

Dear Mr. Waggoner:

We appreciate the opportunity to formally respond to the Audits Division's report of its special review of two hourly-rate-paid indigent defense attorneys and the indigent defense program. We first wish to acknowledge the time and effort your office expended in performing this review. We too commend and appreciate the courtesies and cooperation extended by your auditors and by you.

Billing and paying for services on an hourly-rate basis, regardless of whether it is the method used for the services of a lawyer, a mechanic, a plumber, or a psychiatrist, is fraught with the potential for error, ambiguity, inconsistencies, and fraud. On an administrative level, hourly billing historically has been labor-intensive for the lawyers and their staff in maintaining records and preparing billings and for Judicial Department staff who preaudit and process the billings. Despite these disadvantages, there are some advantages to hourly-rate billing when comparing this method to that used in the majority of indigent cases; i.e., billing and payment based upon an agreed upon flat-rate amount per case or per type of case.

As the Audits Division's audit report on the indigent defense program last summer and our formal response to it discusses, neither method of payment has been determined to be the best overall. As we also discussed in our response last year and touch on briefly in the enclosed response, the majority of the Indigent Defense Services and the Internal Auditing Divisions' work toward improving the program has focused on the contract ("per case-paid") versus the private bar, hourly-rate payment subsystem of the program. This has been true because of the fact that "per case" cases account for 86 percent of the trial-level, nondeath penalty caseload and 82 percent of the total amount spent for this caseload. With limited resources, we have concentrated our efforts toward improvements in the larger of the two subsystems based upon the greater potential "rate of return." As indicated in the response, however, recent

developments and technology may allow us to begin addressing the "per hour" accounts in a more economical and feasible manner for the future.

As we indicated in our formal response to the performance audit of the indigent defense program last summer, Oregon's indigent defense system appears to be one of the state's most extensive efforts to provide governmentally mandated services under a privatized model of service delivery. A small number of state employees and judges provide the administrative functions of the indigent defense program. The private sector is utilized exclusively to provide the state and federally mandated legal services for criminal defendants, children, and parents who are before the state's courts on juvenile matters, persons facing involuntary civil commitment, and others who are indigent. Since the transfer of responsibility for providing indigent defense services from the counties to the state, the Oregon Judicial Department has been striving to improve the system.

In closing, we generally agree with the recommendations provided at the conclusion of your report, we have additional ideas on how best to address the deficiencies noted in the report, and we will be providing periodic updates on our efforts to improve the indigent defense program. It is our hope that your and our offices' efforts over the past two years will continue to prove to be beneficial to the state as a whole.

Enclosed please find our formal response to the Audits Division's special review report which has been prepared at my request by our Indigent Defense Services Director, Ann Christian, with consultative input from our Internal Auditing Director, Jerl Cate, on matters specific to internal auditing.

Sincerely,

Kingsley W. Click
State Court Administrator

KWC:ak/E7A96059.F

Enclosure

cc/enc: Ann Christian
Jerl Cate
J. E. Faw

RESPONSE

OF THE

OFFICE OF THE STATE COURT ADMINISTRATOR

TO THE SECRETARY OF STATE AUDITS DIVISION'S

SPECIAL REVIEW OF THE INDIGENT DEFENSE PROGRAM

(HOURLY-PAID ATTORNEY BILLINGS)

RESPONSE
OF THE
OFFICE OF THE STATE COURT ADMINISTRATOR
TO THE SECRETARY OF STATE AUDITS DIVISION'S
SPECIAL REVIEW OF THE INDIGENT DEFENSE PROGRAM
(HOURLY-PAID ATTORNEY BILLINGS)

The following has been prepared by the Office of the State Court Administrator in response to the May 1996 "Special Review of the Indigent Defense Program" report, prepared by the Audits Division of the Secretary of State's office. This response was prepared by the Indigent Defense Services Director, Ann Christian, with consultative input from the Internal Auditing Director, Jerl Cate, on matters specific to internal auditing.

OVERVIEW

In February of 1994, the Secretary of State Audits Division began a performance audit of the administration of indigent defense services in Oregon. A report, dated May 31, 1995, was issued as a result of that audit which included the identification of excessive hours being billed by and paid to some attorneys who provide indigent defense legal representation on an hourly rate basis.

Specifically, after reviewing billings for a sample of seven attorneys, the Audits Division determined, inter alia, that the attorneys had billed greater than 12 hours in one day approximately five percent of the time. These presumed "over billings" represented approximately $7,700 in billable hours. In addition, the review of these billings disclosed that one attorney had billed 24.9 hours in one day.

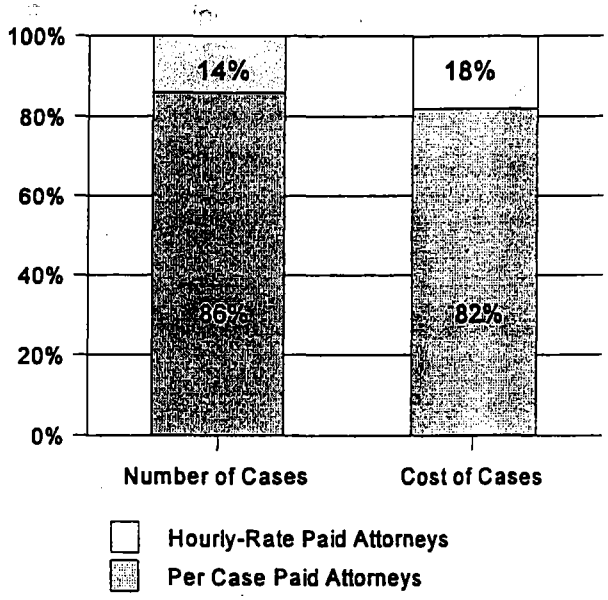
Prior to the performance audit report being issued in 1995, the Internal Auditing Division (IAD) of the Office of the State Court Administrator (OSCA) had undertaken a review, at the request of OSCA's director of the Indigent Defense Services Division (IDSD), of the attorney who had billed greater than 24 hours in one day and other attorneys. Because the Audits Division indicated its intent to conduct a "special review" of the attorney who had billed greater than 24 hours in one day, the OSCA's IAD provided its work product and supporting records to the Audits Division for the attorney identified as Attorney B in the special review report. In addition, the IAD forwarded to the Audits Division the work product and backup that had been completed by IAD on one other attorney (Attorney A in the special review report). This was done in order to demonstrate to the Audits Division OSCA's willingness to participate in a cooperative team effort in investigating apparent billing irregularities.

RESPONSE TO THE SPECIAL REVIEW AUDIT RESULTS AND RECOMMENDATIONS

Many seem to agree that paying for services on an hourly basis, regardless of whether the service provider is a lawyer, a mechanic, a plumber, or a psychiatrist, is fraught with the potential for error, ambiguity, inconsistencies between persons billing on an hourly basis and fraud. The Oregon State Bar and its members continue to grapple with issues associated with hourly billing practices, as well as flat fee billing.

Indigent defense legal services in Oregon are primarily provided by non-profit public defenders, law firms and others who contract with the SCA and are paid on a "per case", rather than on an hourly-rate, basis. For Fiscal Year Ending (FYE) 1995, only fourteen percent (17,079 cases) of the total number of trial-level, non-death penalty indigent defense cases (121,693 cases) were handled by attorneys who provide and bill for their representation on an hourly-rate basis. The remainder of the total caseload (86 percent or 104,614 cases) was handled by attorneys pursuant to a contract with the OSCA on a per case rate basis.

Comparison of Percentage Caseloads and Costs
for Indigent Defense
Hourly-Rate Paid and Per Case Paid Attorneys
(Trial Level Non-Death Penalty)



Notes: 1. Marion County Association of Defenders' contract is included in hourly-rate paid cases and costs.

2. Some per case paid attorney contracts include non-attorney services, such as investigation or foreign language translation. The cost of such services is not factored out of the total cost.

Of the 17,079 hourly-rate paid cases in FYE 1995, over one-half (8,719) were cases from Marion County that were handled by a consortium of attorneys who, since November 30, 1993, have provided the legal services pursuant to a contract between the SCA and Marion County Association of Defenders, Ltd. (MCAD). Unlike the other 73 contracts between OSCA and attorney groups which provide for payment on a per case basis, the contract with MCAD provides for compensation on the basis of hourly billing.

As was noted in the Audit Division's 1995 report, adequate time and resources have not historically been allocated by IDSD toward the systematic review of hourly-rate paid attorney costs per case. The findings of that audit and this most recent special review clearly indicate the need to

shift even more OSCA resources -- both on the front end and on the auditing end -- toward the hourly-rate paid subsystem, versus the contract per-case paid subsystem, of the indigent defense program.

The historical inadequacy of resources directed at hourly rate costs and billing issues has been primarily the result of concentrating what we feel to be significantly limited resources for the administration of the indigent defense program in the "per case" subsystem where the majority of cases and overall costs are incurred. IDSD is staffed by the director and 5.9 full-time equivalent (FTE) staff and the IAD is staffed by the director and 2.0 FTE staff. (The additional two audit positions referenced in our response to the Audits Division's 1995 audit report were not forthcoming.) With 74 indigent defense contracts in place currently, both divisions' resources had been primarily targeted toward the per case contract subsystem. This was based primarily upon the greater rate of return expected from improvements made in the per case subsystem that is responsible for 86 percent of the "regular" indigent defense caseload and 82 percent of the associated costs.

The number of contracts in place has almost doubled since 1988. One of the reasons for this increase has been the concern of the IDSD director since the late 1980s that hourly-rate paid cases may be:

1. more susceptible to errors or other problems;

2. less susceptible to efficient monitoring; and

3. less susceptible to budgetary forecasting.

Specifically, once a case is assigned to a per-case contractor, one knows how expensive that case will be (per case rate) and one can easily verify that the contractor in fact was appointed by the court to the case. On an hourly-rate basis, it is equally easy to verify that a particular attorney was in fact appointed to a particular case, but the actual cost of the appointment is not known until the legal representation is concluded -- when the attorney bills for the hours claimed.

In addition to the problem areas identified above, the vagaries of providing legal services to an individual who may have a number of criminal and non-criminal (for example, probation violations or juvenile abuse and neglect) matters pending at one time result in issues, for example, of how an attorney bills for services that benefit the client overall. Does a 15-minute telephone conversation between the attorney and the client which overall addresses the client's legal status get split between the multiple cases to which counsel has been appointed? Or is the conversation randomly billed to only one case. The third option, which is one of the Audits Division's findings with respect to Attorney A, billing the 15-minute telephone conversation to <u>each</u> of the multiple cases, resulting in a total billed in excess of 15 minutes, is clearly not billing for actual time expended.

In 1993, both IDSD and IAD were able to begin addressing the hourly rate subsystem in two significant ways, <u>albeit</u> still on a more limited basis than desired. The IAD, after completing a substantial audit of an indigent defense contractor, began developing an auditing process for hourly-rate paid attorneys. IDSD undertook the effort to move Marion County's hourly-rate paid attorneys into a consortium of attorneys, governed by a board of directors and providing services pursuant to a contract with OSCA.

Although the final contract agreements with MCAD from November 30, 1993, to-date have continued the prior practice of receiving compensation on an hourly-rate basis, significant improvements have been realized as a direct result of the agreements. Those improvements that directly relate to the Audits Division's report are:

1. client-based, as opposed to court case-based, billings (all cases assigned to an attorney for one client are billed and tracked by the client, not by individual court case);

2. establishment of average guideline amounts for types of cases;

3. special review of billings that attorneys have submitted that exceed the guideline amounts within a certain standard deviation by the director of MCAD or his designee;

4. more accurate and comprehensive data collection due to greater requirements and more thorough review of billings for completeness and accuracy of information by MCAD staff; and

5. enhanced abilities to statistically review billing information.

The computer program and forms that were developed under OSCA's agreement with MCAD are expressly the property of the OSCA. It has taken some (although in the scheme of things, a relatively limited) time to "build" the computer program, to establish sufficient tests and data collection, and for its review by OSCA's IAD director. We believe that use of the computer system in other locations will result in improvements similar to those resulting in Marion County.

We agree that the establishment of per case, presumptive guidelines for hourly-rate cases must be established on a more widespread basis. MCAD's experience with establishing such guidelines and the historical information that is available from other counties on our Accounts Payable System will provide the basis for establishing such guidelines.

Prior to the contract in Marion County with MCAD and during the timeperiod that was the subject of the Audits Division's special review, the Marion County courts did have an albeit very general guideline rate in place; i.e., billings exceeding a total of ten hours, unless the reason were obvious (for example, day-long jury trial), were subjected to review by a judge. As the Audits Division determined as a part of its performance audit in 1994-95, per case guideline amounts for private bar billings have been in effect in Multnomah County since the state assumed responsibility for indigent defense. Those guidelines were most recently revised in August of 1993, to take into account the fact that a Class A felony that is resolved by trial takes a greater number of hours, on average, than a Class A felony that is resolved by guilty plea.

During the course of the previous performance audit, the Audits Division determined that private bar attorney fees in Multnomah County for Class A felony cases are greater than those found for Lane and Marion Counties. At least a portion of the disparity may be attributable to the fact that in Multnomah County, unlike Lane and Marion counties, the private bar is only appointed to cases when all of the indigent defense contractors have a conflict of interest; for example, the first gang-based 17 co-defendant racketeering case prosecuted in Multnomah County. This only points out

the need, when establishing specific guidelines per county, that local differences do need to be taken into account.

Although guideline amounts will be adopted, establishment of such amounts will not ensure against excessive hours being billed for a specific day. This is supported by the fact that during the time periods covered by the special review of the two attorneys' billings, there was the albeit very general guideline in place in Marion County. In addition, even if there had been very specific guidelines in place at the time, the 24.9 hour day that originally was discovered during the course of the performance audit would not have been caught by applying guideline amounts. Specifically, Attorney B submitted interim billings, as is allowed, in a death penalty case. Two of these interim billings overlapped with respect to days covered by each billing. Interim billing #1 was for services provided February 21, 1993 through March 23, 1993 and interim billing #2 began with services provided March 22, 1993. Particularly since the actual trial of the death penalty case occurred during the March 22 and March 23 overlaps, the sum of the two totals for individual days was significant. The Audits Division's report does not include the 24.9 hour day for Attorney B as an adverse finding, apparently based upon the nature of the over billing and the fact that Attorney B has issued repayment to the state for the overlap.

When this type of potential for over billings in interim billing cases (death penalty and other more serious cases, if the SCA authorizes such billings) came to OSCA's attention in early 1995, a procedure was put in place for the OSCA staff who preaudit indigent defense billings to double check for overlapping dates.

OSCA views the primary problem with attorney hourly-rate based billings is the fact that the detail of time expended by an attorney in an indigent defense case, although submitted as an attachment to a fee certification, has not been captured in a data base that allows an efficient review of time billed based on "hours per day". Attachments #1 and #2 are copies of the fee certification (summary hourly information) that each attorney submits for billing and an example of the detail submitted as backup supporting the summary information. The information contained on the fee certification, total in-court and total out-of-court hours is captured in a computer system. The detail is not. As Attachment #2 displays, data entry of such detail at the courts or at the OSCA would require significant data entry personnel. Requiring attorneys to submit legible, typed detail is an option that would help with data entry but would still require significant resources. IAD and IDSD are currently reviewing the cost-effectiveness of hiring temporary data entry staff in light of the potential amounts identified as over billings.

The SCA's most recent contract with MCAD includes the agreement that the detail submitted by all 53 attorneys will be submitted in typed form beginning with all billings submitted June 1, 1996, and thereafter. In addition, MCAD will begin to fill the void that remains with respect to more ready access to the detail that underlies the billings by "piloting" a system where the detail of hours recorded by attorneys will be electronically captured by MCAD/SCA's computer system. The SCA owns the improvements that will be made to the MCAD system to allow such electronic billing and data capture. This will allow automatic computer checks to be programmed so that an error or notice report is issued if an attorney reaches a point for a particular day of exceeding 10 hours, as an example.

As noted in our response to the Audits Division's 1995 report, the potential for use of scanners to capture the detail of attorney hours is worth pursuing. Since our response to that report, we have reached agreement with respect to the use of existing hardware, software and personnel for the

"piloting" of capturing such detail in Multnomah County indigent defense hourly-rate cases by use of scanning technology. The agreement fortuitously will result in no additional resources, capital or monies being needed.

Even once MCAD/SCA's electronic billing system is piloted and hopefully, exported to other counties and even after the Multnomah scanning pilot, again hopefully, proves to be successful, there will remain the potential for excessive billings such as the billing of .1 hour ($4) for a 32 cent postage stamp by Attorney A. The Audits Division identified this anomaly only by auditing the attorney's own case file records.

To-date, OSCA's IAD has not had the resources available to perform auditing such as reviewing attorney case files against the detail submitted with the attorney's billing. The results of the Audits Division conducting such a review indicate that such reviews can be quite productive. The IAD will be assessing and analyzing the costs and benefits of such further review. IAD will be presenting this cost/benefit analysis to the SCA for her review with respect to considering additional internal audit resources within the office. It is noteworthy that detailed historical billing reviews are labor intensive because the detail must be input manually to a database. For example, Attorney A's billing analysis provided to the Audits Division took in excess of 10,000 lines of data entry.

IDSD, with IAD's assistance, will be reviewing the Audits Division's work papers and continuing on with IAD's audits of private bar attorney billings toward the anticipated end of identifying common billing issues and providing clear requirements, as needed, to private bar attorneys that are geared toward better resolving hourly-rate billing issues upfront.

Finally, IAD will reopen its own reviews of Attorneys A and B that were placed on hold pending the Audits Division's special review. The IAD's program and policies with respect to its audits of indigent defense attorney billings differ from those utilized by the Audits Division for its review of the two attorneys' billings in two primary ways. IAD subjects the detailed hours data to certain "rebuttable presumptive" parameters; i.e., no more than 8 hours in-court time, as was adopted by the Audits Division, and no more than 14 hours total hours in any one day. IAD also, in reviewing the actual billings, checks for patterns of billing that appear to be excessive; for example, billing for .4 hours in every single case to "request discovery". When IAD identifies such an excessive-appearing billing pattern, it adopts a presumed to be more accurate amount of time for the particular activity, for example .2 hours to request discovery, and runs a program that accumulates the excess amount of time billed in all cases for requesting discovery. This amount is then added into the amounts that exceed the 8 and 14 hour parameters discussed above.

The Audits Division was able to accumulate some additional information to that identified by IAD in its original reviews of the two attorneys' billings. IAD will be requesting the Audits Division's work papers so that IAD will have the benefit of that additional information and to reconcile IAD's reviews to those conducted by the Audits Division.

Finally, OSCA will pursue recovery of all funds determined, by the Audits Division and IAD, to be over billings by Attorneys A and B.

Attachments

AC:dc/AC96062

IN THE _____ COURT OF THE STATE OF OREGON FOR _____ COUNTY

INDIGENT DEFENSE PROVIDER'S FEE STATEMENT/CERTIFICATION

NAME _____ CASE NUMBER _____

APPEARANCE NO. _____

PREVIOUS CASE NO. _____

1. APPOINTMENT INFORMATION: P___ D___# __ I___

Name/Side of Indigent _____ Vendor No. _____ Tax I.D. No. _____

Birth Date ___/___/___ Contractor Code _____ Credit Code ___

Name of Appointed Counsel: _____ Name of Provider: _____

OSB Number _____ Date Appointed _____ Mailing Address: _____

ORS Authority for Appointment _____ _____

Withdrawal Date _____ Reason _____ _____

2. CASE INFORMATION:

Appointment Type _____

ORS _____ Charge Date _____

ORS _____ Charge Date _____ Number of Incidents _____ Trial _____

ORS _____ Charge Date _____ Number of Charges _____ Appeal _____

Date case/proceeding disposed _____ Type of Disposition _____ Trial Hours _____

DEFENSE COSTS:

A. Attorney Time	Hours Worked by .10 Hours	Rate	Amount Requested	Court-Approved Amount
In-Court (ATIC)	_____	$_____	$_____	$_____
Out-of-Court (ATOC)	_____	$_____	$_____	$_____
SUBTOTAL TIME/FEES	_____	$_____	$_____	$_____

B. Case Expenses	ORS				
_____	_____	_____	_____	$_____	$_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
SUBTOTAL CASE EXPENSES				$_____	$_____
C. TOTAL FEES AND EXPENSES (A plus B)				$_____	$_____

I certify that the information above is true. I have not received and will not accept direct or indirect compensation for these services other than is approved by the court or authorized by contract under ORS 151.460.

ate _____, 19____

_____
Signature of Indigent Defense Provider

On the basis of the sworn statement of financial eligibility on file with the court and it appearing to the court that the person for whom counsel was appointed is indigent, the court certifies that payment of $ _____ is reasonable and necessary and is properly payable out of State Indigent Defense Funds.

Dated _____, 19____ _____

ATTORNEY AT LAW

TELEPHONE

94-
94-

Appt'd

Rep: Mother:

ATTY DATE	ITEM	TIME		Billed Equiv	To Court	Explanation
10-25	T. Conf. client Steve	1	1			
10-25	Letter		4			
10-28	p. client		1			
11-7	p. AG's office		2			
11-21	Conf. Client	1	1			
11-21	p. AG's office		4			
11-27	p. SCP		2			
11-28	p. AG's office		3			
11-28	p. pleading		8			
12-14	Conf. client	1	8			
12-20	Case review	1	8			
12-22	Case review	2	8			
12-28	p. witness + client + trial prep	2	4			
12-29	p. AG	1	4			
12-29	Conf witness + client	1	4			
1-2-96	prep subpoenas		8			
1-2	Obtain medical records		5			
1-2	p. transcript		3			
1-3	p. letters, p. witness		5			
1-4	p. witness prep. subpoenas		8			
1-5	p. witness, prep subpoenas	1	9			
1-5	Letter + Prep		7			
1-6	Trial prep	1	4			
1-7	"	1	4			
1-7	p. witness + Trial prep.	1	1			
1-8	p. witness		4			
1-8	p. client, p. AG, trial prep	1	5			
1-8	Trial prep	2	8			
1-8	pick up reports - read supt:		1			
1-9	Trial prep 3.6 + 4.5	8	1		X	
1-9	Supplemental prep	1	1			
1-11	trial 2.4 + 4.2	6	6		X	
1-10	Trial prep	1	0			
1-10	p. witness, p. client	1	2			
1-11	Trial prep	1	4			
1-11	Trial 2.4 + 4.1	6	6		X	
1-11	Trial prep.	1	2			
1-11	p. witness		3			
1-12	Trial prep.	2	4		X	
1-12	Trial	4	6		X	
1-15	Trial prep 2.3 + 2.5	5	1			
1-17	p. witness		4			
1-15	Prep Exhibits (Pltf-X)		3			
1-18	Trial Prep	1	6			
1-19	Trial prep	2	4			
1-19	Trial	1	0		X	
1-19	Trial	4	4		X	
1-22	Trial	5	4		X	
1-23	Conf client		4			
1-24	Trial	4	4		X	

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the best possible management of public resources.

Oregon Audits Division
Public Service Building
Salem, Oregon 97310
503-986-2255 Hotline: 800-336-8218
Internet: Audits.Hotline@state.or.us

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Oregon

CRIMINAL
JUSTICE
COUNCIL

RECONFIGURATION OF THE CURRENT SYSTEM OF PROVIDING INDIGENT DEFENSE SERVICES:

A REPORT TO THE PRESIDENT OF THE SENATE AND THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

Respectfully Submitted by the
Oregon Criminal Justice Council

February 1995

John A. Kitzhaber
Governor

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Introduction

During the 1993 Legislative Session the House Appropriations Committee reviewed the activities of the Oregon Criminal Justice Council (the Council). The House Committee asked the Council to review several criminal justice policy issues during the interim which were the subject of legislation proposed but not enacted in the 1993 Session.[1]

Among the policy issues to be evaluated was the current system of providing indigent defense services. The Legislature has regularly visited this issue, seeking solutions to the vexing problem of how to deliver these services in a way that is efficient and cost-effective. During the 1993 Regular Session, for example, five separate bills relating to indigent defense were introduced. At least one bill will be before the 1995 Assembly.

The sections which follow provide a description of the current system, along with a brief historical account of the administration of indigent defense services. This discussion includes an overview of caseloads and costs. The final sections outline some of the recent work being done on this issue as well as the evaluation by the Oregon Criminal Justice Council.

History of Administrative Authority and Costs

Historically, local governments in Oregon bore the burden of funding most indigent defense services. Cases were largely handled on a pro bono basis by attorneys, but as the numbers of cases grew this system proved insufficient. Local governments began struggling with the budgetary demands that indigent defense represents.[2]

Legislative efforts to shift fiscal responsibility for indigent defense to the state began as early as 1969. A bill to establish a state public defender authority for trial level cases failed, as did subsequent efforts in 1977 and 1979. Finally, in 1981, local governments' legislative efforts were successful. Effective January 1, 1983, administrative authority over indigent defense was vested with the Chief Justice of the Oregon Supreme Court and the State Court Administrator.[3]

This placement proved to be merely interim. While continuing state responsibility for the program, the 1985 Legislative Assembly shifted the administrative functions associated with indigent defense to the newly created State Indigent Defense Board. By 1987, however, the legislature was reconsidering this decision. In spite of a deficit reduction management program and aggressive cost containment measures,[4] the Emergency Board was required to

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[1]SB 5506, n. 3, 67th Leg. Assy., Reg. Sess., 1993 Or Laws 486.

[2]Oregon State Bar Indigent Defense Task Force, Final Report 1 (July 1994) [hereinafter OSB Task Force].

[3]Id. at 2.

[4]Efforts began in 1985 to create structure and uniformity in decisions regarding eligibility for the appointment of counsel at the trial level. A subcommittee of the Executive Committee of the Judicial Conference formulated guidelines which were then tested in a handful of counties around the state. The guidelines received the approval of the full Executive Committee in June 1987, and were implemented statewide in November 1987.

Under the guidelines, applicants completed affidavits of indigence. Judges made appointment decisions, often when time-pressured, based only on the information provided in the affidavit. On July 1,

provide additional funding to close an $8-10 million deficit. The 1987 Legislative Assembly returned responsibility for indigent defense to the Chief Justice and the State Court Administrator.[5] This has been home for the program since 1987, though at least one bill has been introduced in each subsequent legislative session that would have returned responsibility for indigent defense to a commission within the executive or judicial branch.[6]

Indigent defense has become such a lonely stepchild, in part, because its management is so complex. Cost containment has been only minimally successful due to rising caseloads and evolving constitutional dictates.[7] While costs per case have remained fairly stable, overall costs have continued to rise in spite of such measures as indigence verification. In 1990 for example, costs across all categories of cases increased 18.9% over 1989 levels. Costs rose 10.1% in 1991, 12.4% in 1992 and 8.4% in 1993. Costs rose only 1.4% in 1994 and are projected at a relatively modest 6.6% for 1995.[8]

The Current System of Indigent Defense Service Delivery

Indigents accused of crimes in Oregon are entitled to state-paid legal services under the Sixth Amendment to the United States Constitution and Article I, Section 11 of the Oregon Constitution. Such services were provided in 108,136 trial level cases in 1994. This is compared to 104,206 cases in 1993 and 103,128 in 1992.[9]

1988 the Indigent Defense Services Division implemented a one year pilot project in four counties to verify the eligibility of applicants for court-appointed services. During that year, 35% of the applications received were reviewed. Of those, 14% were determined to not qualify for counsel under the guidelines. The net savings to the Indigent Defense Fund over the one year period for not providing services to ineligible persons was over $157,000.

There are now 27.40 full time Verification Specialists working in trial courts around the state. For the period July 1992 to June 1993, 12.3% of the applicants were found to be ineligible for court-appointed counsel. Indigent Defense Services Division, Office of State Court Administrator, 1 Indigent Defense Services Division Manual, Indigence Verification 1-2. Please see the attached document "Indigence Verification Program Statistics: Analysis of Indigent Defense Cost Avoidance."

[5]OSB Task Force, supra note 2, at 4.

[6]Indigent Defense Services Division, Office of State Court Administrator, Report to the Nov. 1994 Emergency Board on the Operational and Financial Desirability of Establishing a State Agency Public Defender System in Oregon (Trial and Appellate Levels) 1 (Nov. 7, 1994 [hereinafter IDSD E. Board Rpt.].

[7]In 1935 Oregon law only required that counsel be provided for indigent persons charged with felonies. In 1969 the Constitution was interpreted as also extending this entitlement to those accused of misdemeanor crimes. In 1972, this right was extended further to indigent persons facing involuntary commitment proceedings. OSB Task Force, supra note 2, at 3.

[8]IDSD E. Board Report, supra note 6, attachments. In actual numbers, costs increased from $26,602,378 in 1989 to $45,831,426 projected for 1995. Considerable data is available through the office of the Indigent Defense Services Division. Samples are attached to this report.

[9]Indigent Defense Services Division, Office of State Court Administrator, Comparisons of Indigent Defense Caseloads 1-2. These numbers include original trial level death penalty cases. Of the 108,136 cases in 1994: 31 were original death penalty cases; 102 were murder cases; 29,709 represents all felony cases; 7,277 were DUII; 24,320 were non-DUII misdemeanors; 18,772 combined felony and misdemeanor probation violations; 1776 were contempt cases; 1819 were civil commitments; 21,879 represents all juvenile cases; 628 cases involved post-conviction relief; and 337 were habeas corpus cases.

An accused individual seeking counsel at state expense is required to complete an affidavit disclosing all assets, liabilities, current income, and any dependents.[10] Based on this information, the court makes a determination of indigence, subject to verification.[11] An accused is deemed indigent if that individual "is determined to be financially unable to retain adequate counsel without substantial hardship in providing basic economic necessities to the person or the person's dependent family."[12] One is presumed indigent if that individual qualifies for food stamps according to the Federal Food Stamp guidelines. Others qualify if their assets are not sufficient to hire an attorney according to established retainer guidelines.[13]

The majority of indigent defense services are provided by attorneys under contract with the State Court Administrator. Contractors include nonprofit public defender organizations, law firms, and individual attorneys. There are also a limited number of contracts for nonattorney indigent defense services, such as investigation, forensic services, and translation. There are currently 84 contracts for indigent defense legal services statewide.[14]

Compensation for indigent defense services is set according to a schedule of "fair compensation" established by the State Court Administrator.[15] Contractors are compensated on a per case basis, whereas non contract providers[16] are paid at an hourly rate.

Seeking Solutions

The problem of effective and cost-efficient management of indigent defense service delivery has suffered no lack of scrutiny. Since the shift of responsibility from the counties to the state in 1983, answers have been sought by legislative and judicial committees, national experts, think tanks and task forces.[17]

The issue has been the subject of legislation during each Session since 1987. The 1993 Legislative Assembly was invited to consider five separate proposals for the administration of indigent defense.[18] The 1995 Legislature will, no doubt, revisit the issue.[19]

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[10]ORS 151.485(2).
[11]See supra note 4.
[12]ORS 151.485(1).
[13]These guidelines are established and periodically reviewed by the Chief Justice. The guidelines list likely retainer rates on particular kinds of cases. These guidelines are available through the Indigent Defense Services Division.
[14]IDSD E. Board Rpt., supra note 6, at 1-2.
[15]ORS 151.430(5).
[16]Cases in which there is a conflict of interest for the contractor may be assigned to qualified attorneys in private practice. IDSD E. Board Rpt., supra note 6, at 1-2; OSB Task Force, supra note 2, at 10.
[17]See attached list excerpted from the Oregon State Bar Task Force Final Report.
[18]These were: Senate Bill 224, which would have created the Public Defender Services Commission; Senate Bill 415, which prohibited the court from conscripting attorneys to represent indigent persons; House Bill 3434, which reduced indigent defense costs and the budget of the Judicial Branch; House Bill 3425, which dealt with the allocation of money for the representation of indigents in juvenile courts; and House Bill 3664, which would have created an independent public defender board within the Executive Branch. All died in committee.
[19]The Judicial Department plans to forward a bill which will create a Public Defender Services Commission and abolish the Public Defender Committee and Office of the Public Defender. Under the

The Oregon State Bar Task Force, established in 1992, studied the issue of indigent defense service delivery over a two year period. In studying the issue and arriving at its recommendations, the Task Force reviewed volumes of literature, listened to public testimony and engaged in heated debate among its membership. The Task Force ultimately decided that the most effective, cost-efficient system of indigent defense service delivery would be accomplished through a system that is primarily state-employee based at trial and appellate levels, administered by an independent commission.[20] Services currently provided by judges and court staff, such as reviewing and authorizing extraordinary expenditures, would be shifted to the agency created to perform such administrative functions. Eleven regional offices would be established across the state to handle trial level cases, with 21 additional satellite offices. One appellate office would be established, along with an office housing central administration.[21]

Proponents of this system claim that it would eliminate or significantly reduce time spent negotiating contracts and would, therefore, free these resources for use in other ways. In addition, the state employee based system would offer uniform salaries, benefits, and supplies and equipment, eliminating the disparity among contractors that currently exists. A centralized system would also lend uniformity to the authorization of indigent defense funds--a task currently performed by as many as 155 judges around the state.[22]

Opponents of the state employee based scheme counter that such a system would eliminate the healthy competition that exists among prospective contractors. For example, for the Fall 1994 contract negotiation period, the Indigent Defense Services Division received almost three times as many bids as there were contracts due to expire. Such competition provides the Division significant leverage in negotiating costs and assuring quality service by contractors.[23]

In addition, a state employee based system would reduce or eliminate participation by attorneys in private practice. Under the current system, some attorneys provide indigent defense services under a contract along with their retained caseloads. In so doing, these providers subsidize the indigent contract work with the retained work, thereby actually reducing costs to the state.[24]

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bill, duties currently performed by the State Court Administrator are transferred to the Commission. S.B. 188, 68th Leg. Assy., Reg. Sess. (1995).

[20]OSB Task Force, supra note 2, at 2, 18-21; IDSD E. Board Rpt., supra note 6, at 5.

[21]IDSD E. Board Rpt., supra note 6, at 8. This is one scenario provided by IDSD to the Emergency Board in November 1994.

[22]Id. at 3-4.

[23]Id. at 5.

[24]Id. at 5-6.

Action of the Council

At its meeting on April 1, 1994, Council members participated in a panel discussion with key players in the administration and analysis of indigent defense service delivery. Participating were Bill Linden, State Court Administrator; Ann Christian, Director of the Indigent Defense Services Division; Sally Avera, State Public Defender; Jane Aiken, Co-Chair of the Oregon State Bar Indigent Defense Task Force; and Holly Robinson, Counsel to the House Task Force on Judicial Reform.

Council members noted some of the shortcomings of the current system. For example, where there is a duplication of services, as in cases where multiple lab tests are run on a single drug sample, options for one provision of service agreeable to all parties must be explored. Members also noted a lack of coordination among system components. As an example, increasing the number of police officers on the street results in more arrests and prosecutions which, in turn, directly impacts indigent defense costs.

Council members were equally impressed by the success of the State Court Administrator's Office in administering the indigent defense program under very difficult circumstances. Those successes include the savings effected by the indigence verification program and containment of costs per case.

In view of the thorough study undertaken by the Oregon State Bar Task Force and others in recent years, the Council elected not to apply its limited resources to an additional independent study of this issue. The Council has reviewed the thoughtful work done by other groups and urges the Legislature to draw on what is now a considerable body of information generated by others working intensively on the issue.

ATTACHMENTS

*Summary Listing of Studies, Committees and Task Forces
re: Oregon's Indigent Defense System

*Indigence Verification Program Statistics

*Comparisons of Indigent Defense Caseloads

*Indigent Defense Expenditures

NOT included in PDSC notebook

*Minutes: Meeting of OCJC April 1, 1994

Summary Listing of Studies, Committees and Task Forces re: Oregon's Indigent Defense System.

Pre-1983 -- Prior to State Takeover from Counties

OSB Committee on the Defense of the Indigent Accused. (Existed until 1992, when OSB Indigent Defense Task Force was created.)

Various county level reviews, conducted with funding and assistance by the Law Enforcement Assistance Administration and National Legal Aid and Defenders Association, primarily addressing cost and quality of service issues.

1977-81: various interim committees specifically addressing state takeover of indigent defense; for example, Joint Judiciary Interim Judicial Administration Committee (1977-78 interim).

Post-1983 -- After State Takeover from Counties

1983-85: Interim House and Senate Judiciary, Representatives Mason and Springer.

1985-87: Representative Hooley Group (time period of State Indigent Defense Board (SIDB), indigent defense fiscal crisis in the spring of 1985, and legislative transfer of responsibility from SIDB back to SCA and Chief Justice.

1987-89: Representatives Burton and Bauman Group

Spangenberg (national expert on indigent defense) Report -- "Oregon's Adult Criminal Indigent Defense System" -- commissioned by SCA and legislature.

EMT Report (Bureau of Justice Assistance Technical Assistance Report): "The Potential Impact of Prosecutorial and Court Practices and Procedures on Indigent Defense Costs in Oregon: A Preliminary Assessment."

Portland City Club Report on Indigent Defense.

1989-91: SJI Spangenberg Legislative Task Forces on Indigent Defense in Oregon and Washington.

Chief Justice's Indigent Defense Committee.

1991-93: Interim Senate Judiciary Subcommittees on Indigent Defense. Three subcommittees: Juvenile/Family Law; Technology; Caseload Management.

Ongoing Committees/Task Forces/Reviews

Chief Justice's Indigent Defense Committee.

Interim House Judiciary -- primarily, administrative placement of indigent defense.

OSB Indigent Defense Task Force.

Oregon Criminal Justice Council -- recommendations regarding administration and provision of indigent defense services, required by budget note.

Secretary of State, Audits Division -- performance audit.

Criminal Justice Advisory Committees (CJACs) -- mandated by statute last legislative session. Each judicial district must establish a CJAC, with representatives of the various criminal justice system components serving as members. CJACs are advisory and educational only. Members must provide budget and caseload information, for informational purposes of other system components.

Excerpted from: Final Report of the Oregon State Bar Indigent Defense Task Force (July 1994).

Oregon

CRIMINAL
JUSTICE
COUNCIL

MINUTES

OREGON CRIMINAL JUSTICE COUNCIL

April 1, 1994
Salem, Oregon

Members attending: Hon. James Ellis, Acting Chair (Circuit Court Judge, Multnomah County), Daniel Ahern (County Commissioner, Jefferson County), Senator Jim Bunn, Lee Coleman (Chairperson, Board of Parole and Post Prison Supervision), Tom English (Executive Director, Oregon Council on Crime and Delinquency), Frank Hall (Director, Dept. of Corrections), LeRon Howland (Superintendent, State Police), Barry Kast (Acting Administrator, Mental Health Division), Ted Kulongoski (Attorney General), William Leary (Principal, Roosevelt School, Klamath Falls) Rochelle Lessner (Attorney at Law, PGE, Portland), Ronald Louie (Chief of Police, Hillsboro), Jack Morris (Defense Attorney, Morris & Assoc., Hood River), Lori Nelson (Director, Victim's Services Program, Lane County), Dr. Stephen Scherr (Chairperson, Psychiatric Security Review Board), Patricia Sullivan (District Attorney, Malheur County), Lee Vasquez (Sheriff, Yamhill County), Billy Wasson (Director, Marion County Community Corrections) and Rudy Westerband (Workers' Compensation Board).

Staff attending: David Factor (Executive Director), Craig Mosbaek (Research Manager, Sentencing Guidelines), Stephen Willhite (Research Director), Pat McConnell (Office Manager), and Donna Martin (Office Specialist).

Guests attending: Mark Graham (Sheriff's Office, Lane County), Gary Colbert (Secretary of State's Office, Audits Division), Faye Fagel (DOC, State Director), Mike Hall (OADCP), Erik Wasmann (Department of Justice), Holly Robinson (House Judiciary Committee), Bob Oleson (Oregon State Bar), Danny Bisgaard (Oregon State Police), Elyse Clawson (Department of Corrections), John Hutzler (Office of Criminal Justice Planning, Washington County), Teri K. Martin (Law & Policy Associates) Jim Masters (Oregon State Hospital) and Michael Ramson (Oregon State Police).

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PANEL DISCUSSION

Options for Delivery of Indigent Defense Services

Invited Participants: Ann Christian (Director, Indigent Defense Services), Bill Linden (State Court Administrator), Jane Aiken (OSB Task Force on Indigent Defense), Sally Avera (State Public Defender) and Holly Robinson, Counsel to House Task Force on Judicial Reform.

In response to a question from Wasson, Factor noted the Council had been directed by the Legislature, via a budget note attached to the

Council appropriations bill, to consider a bill (HB 3664) introduced last session by Rep. Mannix. The bill would create a public corporation model for delivery of indigent defense services.

Linden presented a brief historical perspective of indigent defense services in Oregon and noted that over ten years of state administration indigent defense costs have increased rapidly. He noted that despite the dedication of indigent defense providers caseloads continue to soar and it remains one of the most studied areas of the criminal justice system. He said because of judicial concern about the potential "conflict of interest" in the present system, where the judiciary is so closely tied to the funding and management of one side of the adversary process, the courts have been promoting the idea, since 1985, that the indigent defense system is misplaced in the judicial branch and ought to be placed under the executive branch of government. He noted that the Oregon Judicial Conference supports that notion.

In response to a question from Kulongoski, Linden noted that restructuring of indigent defense is not addressed in the Governor's Budget directives for the next biennium. Robinson noted Interim Judiciary Committee on Indigent Defense will be looking at the restructuring issue.

Christian outlined the structure of indigent defense service delivery and noted the percentage for types of cases contained within the 104,000 cases administered in 1993 as follows: 40 cases were new death penalty cases; 22% of the cases were probation violation cases; 21% of the cases were lawyers appointed to represent individuals facing "involuntary civil commitment" and attorneys appointed to represent children and parents in juvenile court. She indicated indigent defense is also responsible for some appeals.

Approximately 85% of the trial level cases are covered by attorneys who have entered into contracts with the State Court Administrator. Of the 69 contracts that currently exist, eight of those contracts are for death penalty cases. There are nine non-profit, fulltime public defenders who provide services under contract to 14 counties. The remainder of the contracts are with sole practitioners or attorney consortiums. Non-attorney services associated with cases are decided by judges on an individual basis.

Christian reported that five years ago, the Judicial Department and the Legislature embarked on a pilot program in an attempt to "tighten up on the number of individuals who were provided counsel." Court personnel were assigned to assist in making the indigent determination. Because of the success of that pilot program there is now a statewide verification program. In response to a question from Kulongoski, Christian said the verification program has saved the state approximately two-million dollars to date.

In response to a question from Wasson, Christian indicated, as a result of SB 139, there had been a decrease in the appointments for Class C Felonies in eastern Oregon and in felony probation violations.

Vasquez noted he would be interested in the impact of SB 139 further into the project. Christian noted they have projected a savings of one million over the biennium.

Kulongoski noted that raising the statute of limitations on post convictions from 120 days to two years has almost tripled the caseload on post-conviction filings in the system which is in turn showing up as additional costs to indigent defense because attorneys are being appointed to represent offenders. Any savings, i.e. SB 139, must be balanced against other changes in the system that have driven the indigent costs up. He also indicated he is not convinced that it makes any difference who administers indigent defense unless cost containment is addressed.

In response, Christian noted the involvement of the judiciary and the possible conflict of interest connected with it is a separate issue from which branch of government can better administrate the program.

Ellis observed that indigent defense is more than just compensating the defense lawyers. He suggested costs for non-lawyer services are growing the fastest. He noted how appellate decisions can effect the indigent defense system.

In response to a question from Howland, Linden noted that Virginia is the only other state that has the judiciary involved to the degree that Oregon does in indigent defense, however, cost containment is being addressed nationwide. He noted that Oregon has very broad statutory rights to indigent defense services over and above the federal constitution.

Morris cautioned against any curtailment of rights.

Ellis noted that different parts of the system sometimes work at cross purposes--that swift resolution of cases does not allow defendants enough time to pay up front for their legal representation. He noted judges feel compelled to authorize defense spending in order to minimize appeals.

Morris noted that indigent defense area has been studied to death and that it is non-productive to study it in a vacuum. He also noted that the folks running indigent defense are doing a good job under very difficult circumstances. He talked about the social services link that is provided to the indigent population free of charge in many cases.

Vasquez questioned the use and expense of expert witnesses.

Linden responded, "there is no line the judge can see in considering these requests. Each case has its own circumstances, there's no way to do that . . . . we know what we spend on these cases for extraordinary expenses and it is not a whole lot over the whole caseload but it is a lot in some particular cases. . . It's a good reason why the trial judge ought to be out of making that decision about how much is going to be spent on those kinds of ancillary services. The crime lab is a good example. Defense counsel will argue, and I tend to agree with them, that as long as the lab is within the law enforcement component of state government, it may be malpractice per se to rely on the results of that work, as opposed to seeking independent analysis. Now, if we had an independent state forensic lab that served both sides, that's different, but I'm not certain that there's any more interest in that idea today than there has been before. . . the indigent defense lawyers do not believe they are serving the needs of the client by relying on a report that was produced within the law enforcement community."

Vasquez noted, "to me its a duplication of services because on the majority of those cases you get the same results."

Linden responded, "you make a good point. What we ought to do is take the money we spend on the crime lab and figure out if there is a way to provide these services that both sides of the process need and less expensive . . . I think that would be well worth pursuing."

Vasquez added, "under a contract basis of doing defense work, I think that's the way to go, you get so much and that's what you have to work with. In our area, where there is no contract, it is just an open funnel. There is no control."

Linden responded, "the contracts don't regulate the amount of funds that lawyers may receive for extraordinary expenses. . . in individual cases you have individual trial judges making the decision. . . the contracts provide a real stability in terms of how the caseload has to be covered and what that costs us . . the contractors find that that stability works to their advantage as well."

Aiken distributed report entitled Proposed Recommendations of OSB Indigent Defense Task Force (report on file in Council offices), noting that it focused on the following: 1) who's currently being served by indigent defense services; 2) how well are they being served; and 3) what should the delivery system look like in the future? She briefly outlined the Task Force's recommendations as follows: 1) "Oregon Justice Plan" Study be undertaken; 2) promulgation and adoption of "Standards for Providing Indigent Defense Services"; 3) establishment of a permanent OSB Indigent Defense Committee or Task Force; 4) Encourage Law Enforcement/Prosecution Guidelines; 5) Mandatory Fiscal (System) Impact Statements, and 6) Development of Integrated Budgetary and Workload Data Network; and 7) Placement, Administrative Structure, and Service Delivery System for Indigent Defense Services.

Avera began with a brief overview of the State Public Defender's system, noting that it has the longest history in the indigent defense field in Oregon. Avera reported that even though the State Public Defender's system is small it sets a good model for a commission statewide. She said the agency functions in a stable and consistent manner, noting that the quality of their services are driven by an employee based system. She also noted that the agency is fiscally accountable to the Legislature and has a record of returning money to the general fund more often than it goes to the E-Board for additional appropriations.

Avera said, "while in terms of cost savings, perhaps a contractor based system is efficient, in the long run, an employee based system gives greater control and greater efficiency. I am concerned that the quality of representation at the appellate level may suffer by an incomplete definition of a Commission bill. Our office will continue to resist its placement within a Commission unless there is some assurance provided that it will sit as an independent unit in the same way that the appellate division of the Attorney General's office sits, and that it will be employee based as the appellate division of the Attorney General's office is, since we compete against the appellate division of the Attorney General's office. Anything that places us at risk for being second best to the Attorney General's office we will fight. It took us a long time to get comparative salaries, we've got them, we're happy with them and we don't want to turn lose of them.

If I were making a recommendation, I would prefer that there be a study of a more complete definition and description of the administration of such a Commission and, in fact, if it goes to an employee based system, as is suggested by the Bar's draft report, that that system get up and running . . . . that at some point in the future, move the State Public Defender over as an independent unit."

In response to Howland's question about what's going on in other states, Avera said "of the thirty commission, state program sorts of states, there are five that have stand alone public defender offices exactly like ours. There are some 15 commissions and nine statewide programs, integrated programs, all but two of which, have independent appellate units. . . there's one non-profit group but all appellate units are state employee or government employee based, not contractors."

Kulongoski, referring to the "Oregon Justice Plan" idea, asked Avera what she wanted studied and what she thinks should be done with the study? Avera responded, that they would expect a comparison of interrelationships between the various functions of the criminal justice system: by adding police how that pushes the costs for prosecution, the cost and need for court staff, judges, attorneys. . . . in order to be able to make some policy choices at the legislative level."

In response to a question from Nelson, Avera said the State Public Defender's caseload has gone up since 1988. "It dropped in 1991 and 1993 and it appears to be dropping again or at least below expectations again in 1994. The types of cases have changed--there was a very large felony probation violation caseload during the 1991-93 biennium. That percentage has gone down--it is now a much smaller component of our mix than was anticipated. We have a greater number of aggravated murder and murder cases, both death penalty and otherwise. We are on the hook for six death penalty cases per biennium and because we have a caseload shortfall, we've agreed to accept more death penalty cases."

Howland responded, "I think all of us in the criminal justice area share the same values . . . that innocent people should not be charged with a crime, that everybody is entitled to a competent defense in this country . . but if you tie the linkage between law enforcement policy and the charging discretion of a district attorney too tightly, too closely, with the cost of indigent defense, to where indigent defense costs start driving policy in terms of protection of the people, where fiscal impacts on a legislative bill that might be a good law but would circumvent the will of the people because it cost too much to enforce public safety issues because of indigent defense costs. It's just an issue and concern that people outside of your committee are going to have extreme concerns about."

Avera responded, " . . . we see this as truth in policy . . . . it is not an attempt to cut back public safety choices but to honestly tell the public here's what it is going to cost to do that."

Howland responded, "I'm all for truth in policy. If the crime lab came out from underneath the umbrella of the state police and moved over to the Executive Department, and there was some kind of overriding stipulation by all the defense attorneys and all the prosecutors in the State of Oregon, simply because a crime lab report came out of a part of administration which, by fact, oversees the Oregon State Police that everybody would agree then that they accept this report maybe that's a cost saving truth . . . I'm not sure that the Oregon defense bar could guarantee, or any judge could guarantee that that would occur as a result of that."

Avera responded, "I'm glad you brought that back up . . . there are many things that the State Court Administrator's office is doing right now to independently contract with private crime labs who provide those services to the defense bar in a fiscally sound way and they are independent of the State Police Crime Lab but it has some parallel functions."

In response to a question from Wasson about the money constraints on the prosecutorial side, Linden responded that the prosecution can "decline to prosecute" for lack of funding, however, defense cannot "decline to defend" because of budget constraints. Linden noted that there are a lot of competing interests that relate to public safety in

Oregon . . . safety at the local and state level is a priority. Everyone needs to address the expense that comes with that safety. . we need to make sure that these expenses are as limited as they can possibly be.

Robinson noted that cost containment has two parts, one is the per case cost that Oregon has, Oregon's cost per case is very low, and the other is the caseload numbers. While increased arrest levels and crime rates have increased caseloads the cost per case has remained steady in Oregon.

Wasson noted that the criminal justice system would eventually have to prioritize funding in the same way the health system addressed its increased costs.

Christian reported juvenile cases are the fastest growing caseload for indigent defense. Continuing, she underscored Linden's remarks and noted the restructuring Multnomah County undertook to address their escalating drug caseload. She stressed the advantages of converting the indigent defense system to a state employee based system.

Sullivan noted the wide disparity between indigent defense services offered at the county level versus the state level because of lack of funding at the county level.

Robinson reported the House Interim Task Force on Judicial Reform to study indigent defense system at the direction of Rep. Parks.

Kulongoski noted his concern that criminal justice policy would be decided by iniative petition unless policymakers make a concerted effort to involve the public in the criminal justice public policy debate.

Sullivan and Linden note the funding possibilities related to structured fines.

Council meeting adjourned and State Sentencing Guidelines Board meeting convened.

REPORT TO THE NOVEMBER 1994 EMERGENCY BOARD

ON

THE RIGHT TO COUNSEL AT GOVERNMENT EXPENSE

COMPARISON OF OREGON'S PROVISIONS

TO

FEDERAL PROVISIONS

Submitted By: Indigent Defense Services Division
Office of the State Court Administrator

November 9, 1994

I. Overview of Indigent Defense Services and the Right to Counsel in Oregon

Attorneys provide legal services at state expense in over 100,000 cases per year in Oregon. The majority of these indigent defense cases at both the trial and appellate levels are criminal in nature. However, noncriminal indigent defense cases (generally, juvenile, civil commitment, probation violation, postconviction relief, and habeas corpus cases) accounted for approximately 40 percent of the trial-level indigent defense caseload in FYE1994.

The types of cases, instances, or court proceedings in which there is clear legal authority in Oregon to appoint state-paid counsel to represent indigent persons are as follow:

1. Death penalty and other criminal (felony and misdemeanor) prosecutions.
2. "Critical stages" of a criminal investigation.
3. Probation violation proceedings.
4. Some parole violation hearings.
5. DUII show cause/termination proceedings.
6. Extradition and contested detainer proceedings.
7. Material witness proceedings.
8. Criminal and some civil contempt proceedings.
9. Postconviction relief proceedings.
10. Habeas corpus proceedings.
11. Involuntary commitment and recommitment proceedings for the mentally ill and mentally retarded.
12. Proceedings to determine a person's ability to consent to sterilization.
13. Psychiatric Security Review Board proceedings.
14. Juvenile court proceedings.
    a. Delinquency.
    b. Probation violation.
    c. Dependency and review hearings.

d. Termination of parental rights.

e. Emancipation.

15. Contested adoption proceedings.

16. Contested permanent guardianship proceedings.

17. Direct appeals from all of the above.

The legal basis for the appointment of state-paid counsel in Oregon in the case types listed above is one or more of the following: federal constitutional provisions; Oregon constitutional provisions; Oregon statutory provisions; and in a limited number of juvenile cases, federal statutes.

The notion of government being responsible for the provision of counsel to represent an indigent criminal defendant predates Oregon's statehood. 1849 territorial law provided that "[t]he court shall assign counsel to defend the prisoner, in case he cannot procure counsel himself." Court decisions holding that such provision of counsel and the attendant costs thereof are mandated as a matter of federal and state constitutional law are much more recent. Mandates regarding the provision of counsel at state expense for noncriminal matters are the result of decisions made by courts and legislators in recent history, as well.

Since 1935 Oregon law has required that courts provide defense counsel to anyone charged with a felony and financially unable to retain an attorney. Since the mid-1960s the types of court and other proceedings in which an indigent party is entitled to counsel at state expense have been recognized by courts and legislative assemblies to be broader than criminal felony prosecutions. For example, the right to appointed counsel in Oregon for persons facing involuntary civil commitment was recognized in 1972.

II. Background for This Report

Representative Mannix, at the December 1993 meeting of the Emergency Board, requested that the Office of the State Court Administrator prepare a report for the November 1994 Emergency Board that addresses how Oregon's law on the right to counsel at state expense differs from the "federal right" to counsel. This request envelopes two issues:

- What does the federal Constitution require states to provide with respect to state-paid counsel, and how does Oregon law differ from federal constitutional mandates?

- What does the federal court system provide for with respect to government-paid counsel, and how does Oregon law differ from that governing representation in federal court?

Within the confines particularly of legislative hearings on Oregon's indigent defense system and expenditures, it is not uncommon to hear that Oregon law provides a much broader entitlement to state-paid counsel than federal or even other states' laws. This

report is intended to address the concern that Oregon may be expending monies for indigent defense representation in matters that:

(1) the state is not required to provide, under federal law; or

(2) the state, where not mandated by federal law, ought not to provide such services--whether mandated by Oregon's Constitution or statutes.

There are at least two manners in which a report addressing Representative Mannix's and others' concerns could be presented: First, a legal treatise on the right to government-paid counsel could be prepared. Second, a discussion paper that focuses on the nature of the federal and Oregon right-to-counsel provisions and the differences between the two, without resort to detailed legal citations, could be prepared.

In 1988 the Judicial Department submitted a research paper to the Emergency Board entitled "Legal Research Paper on the Constitutional and Statutory Rights to Effective Assistance of Counsel at State Expense." The Executive Summary and the first ten pages of that paper are provided as Enclosure #1 to this report. This paper provides the constitutional, statutory, and appellate case law citations that underlie any discussion of the right to counsel. Enclosure #2 to this report is a summary of the federal and Oregon laws that prescribe the appointment of counsel at state expense in Oregon.

The focus of the remainder of this report is discussion-based; i.e., how does Oregon's indigent defense system compare to what is mandated only under the federal Constitution, and how does Oregon compare to the indigent defense system in federal court? This report focuses on right-to-counsel provisions at the trial level versus the appellate level, because Oregon's Indigent Defense Account and the Judicial Department's authority and responsibility with respect to indigent defense services are primarily trial-level-based; e.g., less than 1 percent of the subject caseload is for appellate representation.

Before addressing the issue of how Oregon's indigent defense laws compare to federal laws, it should be noted that efforts to systematically compare Oregon's indigent defense caseload/expenditures and legal provisions to those in other states are hindered by two facts: First, no review of state provisions for the appointment of counsel has been published that compares the breadth of the right to counsel provided in each state. Second, reports that compare caseloads or expenditures for indigent defense services by state frequently do not account for services provided at the local level. For example, the state of Kansas and many other states provide for (fund and administer) indigent defense services only in felony criminal matters. Provision of government-paid counsel in misdemeanor and juvenile proceedings, for example, is administered and funded at the city and county level.

III. The Right to Counsel at Government Expense in Oregon and the "Federal" Right to Counsel

As mentioned above, the "federal right to counsel" is subject to two interpretations in the context of Representative Mannix's request for a report that compares Oregon law with respect to indigent defense representation to federal law; i.e., federal constitutional law

governing Oregon and the federal court indigent defense system. Comparisons of both are provided below. In keeping with the nature of law in general, some areas of right-to-counsel law are either undecided or subject to different interpretations. The narrative discussion below is intended to focus on that which is clearly decided.

Enclosure #3 to this report represents an attempt to display the basis of authority and differences between Oregon's right-to-counsel laws and federal constitutional and federal court system right-to-counsel laws in a chart form. This chart also lists the number or an estimated number of indigent defense cases in Oregon today that result from the different federal and state provisions.

A. How Oregon and Federal Constitutional Provisions on the Right to Counsel at Government Expense Compare

1. Criminal Cases

The United States Supreme Court has clearly decided that federal constitutional provisions require that states provide counsel to indigent persons who are the subject of criminal investigations at certain "critical stages" of the investigation; e.g., custodial interrogation of a criminal suspect. It is rare for counsel to be appointed in such instances in Oregon.

The federal Constitution requires that states provide court-appointed counsel to indigent criminal defendants who are charged with aggravated murder, intentional murder, and felony crimes. This mandate accounts for almost 30,000 indigent defense cases in Oregon per year.

With respect to crimes that are classified as misdemeanors or petty offenses, the United States Supreme Court has held that the federal Constitution only requires states to provide counsel for indigent defendants who are actually incarcerated as a result of their criminal conviction. Prior to 1977 it appears that court interpretations of Oregon's constitutional provision regarding right to counsel paralleled the federal constitutional provision. However, the Oregon Supreme Court's decision in Brown v. Multnomah County in 1977 has been interpreted to hold that Oregon's Constitution requires appointment of counsel for indigent persons in all "criminal" proceedings, regardless of whether the defendant is actually incarcerated as a result of a conviction. Explained another way, the Oregon Constitution requires the appointment of counsel in any court proceeding in which there is:

(1) a potential of incarceration (i.e., any offense that has a permissible sentence of one day or more in jail); or

(2) no potential for incarceration, but which has certain nonincarceration-related indicia of a criminal prosecution (e.g., pretrial detention in jail and substantial potential fines).

The Brown case specifically addressed the issue of the state constitutional right to counsel for the offense of Driving Under the Influence of Intoxicants (DUII), which at that time had been changed by the legislature from a misdemeanor crime for a first offense to an "infraction." There was no statutory provision for even a potential jail sentence for the infraction of DUII. However, and perhaps by oversight, Oregon law did allow for persons charged with the DUII infraction to be held in jail, pretrial, but did not allow for pretrial incarceration on any other infractions. The Oregon Supreme Court held that a number of factors (including the pretrial detention provision) that applied to the DUII infraction, but not to any other infractions in Oregon, supported the court's holding that the offense was "criminal" in the sense of Oregon's constitutional right to counsel in "criminal" proceedings.

The specific facts underlying the Brown decision with respect to the right to counsel on an infraction were anomalous. No statutory provisions since the DUII first offense infraction present a similar scenario. Since the Brown decision and the legislative reenactment of DUII as a misdemeanor, no state-paid counsel has been provided to represent persons charged with offenses (infractions or violations) that do not carry the potential of a jail sentence.

What is most important about the Oregon Supreme Court's decision in Brown and other cases--in terms of discussing the differences between Oregon's and the federal constitutional rights to counsel--is the court's apparent determination that a potential for incarceration, rather than the federal standard of actual incarceration, dictates when a person is entitled to government-paid counsel.

To summarize, both the Oregon and federal Constitutions require appointment of counsel in felony cases. The only difference between the federal and Oregon constitutional right- to-counsel provisions applies to defendants charged with misdemeanors.. The federal Constitution only requires that counsel be appointed to represent indigent misdemeanor defendants who actually will be sentenced to serve jail time. Oregon's Constitution provides for state-paid representation for all indigent misdemeanor defendants--because a misdemeanor conviction carries the potential for a jail sentence.

It bears noting at this point that state statutory laws, as well as state constitutional laws, provide for the appointment of counsel. For example, ORS 135.050(4)(a) requires that counsel be appointed to all indigent defendants who are "[c]harged with a crime." ORS 151.515(1) and (2) provide that "[a] crime is an offense for which a sentence of imprisonment is authorized[.]" and that "[a] crime is either a felony or a misdemeanor." Therefore, regardless of the "actual" versus "potential" jail standards of the federal and Oregon Constitutions, an indigent defendant in Oregon who is charged with a misdemeanor is statutorily entitled to state-paid counsel.

Currently representation in misdemeanor cases accounts for almost 30 percent of the indigent defense caseload in Oregon. Although data is not readily available to indicate the number of current misdemeanor indigent defense cases that would not require appointment of counsel under the federal constitutional standard, that number reasonably could be assumed to be one-third of the current misdemeanor caseload; i.e., a significant savings in indigent defense expenditures likely would result. It should be noted that Oregon and federal constitutional law appears to be clear that the prohibition against actual incarceration if counsel is not appointed extends past the original nonjail sentence. This means that the defendant could not be sanctioned by incarceration for failing to comply with terms of a probation or other court order resulting from the original conviction.

If:

> the Oregon Constitution were amended to provide that the state constitutional right to counsel is no broader than that under the federal Constitution; or
>
> the Oregon Supreme Court were to reconsider its "potential incarceration" interpretation of Oregon's constitutional provision for right to counsel; and
>
> the Legislative Assembly were to amend ORS 135.055(4)(a) to restrict the statutory right to counsel in misdemeanor cases to those cases in which there is a sentence of actual incarceration; then

indigent persons who were charged with misdemeanors and who were not sentenced to incarceration, upon conviction, would no longer be entitled to state-paid counsel. As a practical matter, a system would need to be established to identify at the beginning of a misdemeanor prosecution (the point at which the right to counsel, if any, must be determined) those defendants who would not--based on the relative seriousness of the offense and criminal history--be subject to actual incarceration, if convicted.

2. Civil Cases--Postconviction Relief, Probation Violation, Juvenile Dependency and Termination of Parental Rights, Civil Commitment, Extradition, and Habeas Corpus

Dissimilar to decisions regarding criminal prosecutions, the United States Supreme Court generally has adopted no fixed, bright-line rule in interpreting the federal Constitution with respect to the right to counsel at government expense in civil cases. The one exception is the U.S. Supreme Court's determination that the federal Constitution does not require the appointment of counsel for indigents filing petitions in state court for postconviction relief. Oregon's authority for appointing counsel in such matters is statutory only.

With respect to other civil proceedings, the U.S. Supreme Court has indicated that the decision whether to appoint counsel should be made on a case-by-case due-process basis; i.e., that counsel is constitutionally required only where such assistance would be especially useful, given the nature of the issues and the ability of the party to express himself adequately. For example, in Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Supreme Court rejected the argument that appointment of counsel always is required in probation violation proceedings.

This area of federal constitutional law requires the consideration, weighing, and balancing of numerous factors, such as the nature of the right or privilege that will be affected by the court proceeding and the likelihood of error if counsel is not appointed. Therefore, the general federal constitutional rule in juvenile dependency and termination of parental rights cases, for example, is that there is no "per se" automatic right to counsel for indigent parents or children subject to such proceedings. However, in a particular case, based upon its specific facts, the federal Constitution might require appointment of counsel at state expense.

Oregon provides by statute for the appointment of counsel for indigent persons in all of the civil cases listed in this topic heading. (See Enclosure #2 for a complete list of civil proceedings in which there is a statutory right to counsel and the specific statutory provisions that authorize such appointment.)

B. How Oregon's Constitutional and Statutory Rights to Counsel at State Expense Compare to Indigent Persons' Right to Counsel in the Federal Court System

As discussed in Section II. of this report, a comparison of Oregon's right-to-counsel provisions to federal provisions should include a comparison to those rights afforded criminal defendants and others in the federal court system.

1. Criminal Cases

As discussed above, the federal Constitution requires the appointment of counsel for indigent persons charged with all felonies and those misdemeanors in which actual incarceration occurs after conviction in the federal court system. However, the federal Criminal Justice Act (CJA) mandates the appointment of counsel for indigent persons charged with a Class A misdemeanor in federal court, regardless of whether or not incarceration results from conviction. Further, the CJA provides that federally-paid counsel may be appointed to represent a financially eligible person who is "charged with a Class B or C misdemeanor, or an infraction for which a sentence to confinement is authorized" (versus imposed) if a federal magistrate or court determines that "the interests of justice so require."

Therefore, the only practical difference between the right to counsel for criminal defendants in Oregon's state court system and those in the federal court system is that appointment of counsel for Class B and C misdemeanors is discretionary in federal court but mandatory in Oregon's courts.

2. **Civil Cases--Probation Violation, Juvenile, Civil Commitment, Extradition, Habeas Corpus**

The federal Criminal Justice Act (CJA) requires that representation be provided at government expense for an indigent person who:

(a) is charged with a violation of probation;

(b) is a juvenile alleged to have committed an act of juvenile delinquency;

(c) is subject to a mental condition hearing (similar to state civil commitment); and

(d) is entitled to the appointment of counsel under federal statute relating to transfer of offenders to and from foreign countries (similar to extradition).

The CJA also provides discretionary authority to federal courts to appoint federally-paid counsel for an indigent person who is seeking habeas corpus relief, upon a determination that "the interests of justice so require." Finally, by administrative rule, federal public defenders may provide representation in matters that are "ancillary" to their client's criminal matter; e.g., civil forfeiture proceedings.

In comparing Oregon's right-to-counsel provisions to those in federal court, it should be noted that federal courts do not have jurisdiction of any juvenile dependency or termination of parental rights cases or postconviction relief. Based upon the discussion in subsection III.A.2. above regarding the right to government-paid counsel in Oregon for noncriminal, civil matters, the two systems differ insignificantly.

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Enclosure #1

LEGAL RESEARCH PAPER ON THE CONSTITUTIONAL AND STATUTORY RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AT STATE EXPENSE

CONSTITUTIONAL AND STATUTORY RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AT STATE EXPENSE

Executive Summary

The Oregon and federal constitutions and Oregon statutes guarantee the right to counsel in criminal and many quasi-criminal proceedings. To make that right meaningful for indigents who cannot afford to retain counsel, the constitutions and statutes require state courts to appoint counsel for indigents at state expense unless the indigent voluntarily, knowingly, and intelligently waives the right to counsel. Further, the constitutional right to counsel is the right to effective assistance of counsel. Indigents are also entitled to reasonable expenses necessary to investigate, prepare, and present an adequate defense.

The following is a brief summary of the constitutional and statutory guarantees discussed more fully in the accompanying research paper.

I. RIGHT TO APPOINTED COUNSEL AT STATE EXPENSE

A. The United States Constitution

The federal constitution guarantees a fair trial through the Due Process Clauses of the Fifth and Fourteenth Amendments, and defines in the Sixth Amendment most basic elements of a fair trial, including the right to counsel in all criminal prosecutions.

In a long line of cases, the United States Supreme Court has held that:

1. the right to counsel is a fundamental component of our criminal justice system and is the most precious of an accused's rights because it affects the accused's ability to assert any other right;

2. because counsel's assistance is so fundamental and essential to a fair trial and due process, the federal constitutional right to counsel applies to the states;

3. a person accused of a federal or state crime has the right to have counsel appointed at public expense (state expense for state crimes) if the accused cannot afford counsel; and

4. the right to counsel and right to appointed counsel at state expense is the right to effective assistance of counsel.

B. The Oregon Constitution

The Oregon Constitution guarantees the right to counsel in Article I, section 11:

"In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel . . . ."

Although the Oregon and federal constitutional guarantees are worded differently, the Oregon Supreme Court has interpreted the state guarantee to provide essentially the same right to effective or "adequate" assistance of appointed counsel as provided by the federal constitution.

C. Oregon Statutes

The Oregon Legislative Assembly has provided indigent defendants a statutory right to appointed counsel in criminal cases from the time of arrest through trial, at sentencing, on appeal to the Oregon Court of Appeals and on review to the Oregon Supreme Court, and in extradition, postconviction, and probation violation proceedings. It has also provided indigents the right to appointed counsel in various other proceedings and appeals from those proceedings:

- habeas corpus proceedings (implied right where statute provides for payment from indigent defense funds if the court appoints counsel for indigent petitioner);
- contempt proceedings of all kinds;
- juvenile proceedings involving dependency, delinquency, or termination of parental rights (1987 legislation codified federal and Oregon caselaw that provided parents a constitutional right to counsel in many dependency and all termination of parental rights cases);
- civil commitments and recommitments of mentally ill and mentally retarded persons;
- proceedings to determine ability to consent to sterilization; and
- parole revocation proceedings and proceedings to review terms of confinement for indigent prisoners confined for a 30-year minimum without possibility of parole (now within the Parole Board's appropriation).

Where these proceedings occur in courts that are part of the state court system, those statutes authorize and require the state to pay the appointed counsel from state funds. They further authorize and require the state to pay other

necessary and reasonable costs and expenses incurred in investigating, preparing, and presenting the indigent person's case; that is, costs and expenses necessary to make meaningful the rights to counsel and to a fair trial. The funds available to pay for most of those costs and attorney fees come from the indigent defense component of the Judicial Department budget, which is now administered by the State Court Administrator.

Oregon, as do many states, authorizes payment from state funds as the fairest means to guarantee indigent defendants their rights to effective assistance of appointed counsel and to fair trial. Lack of those funds would interfere with appointed counsel's ability to render effective assistance, and thereby would deny indigent defendants their constitutional and statutory rights to counsel and to fair trial.

II. EFFECTIVE/ADEQUATE ASSISTANCE OF COUNSEL

In reviewing whether a person has been denied the right to effective (or "adequate") assistance of counsel, both the Oregon and federal Supreme Courts have applied an "objective" standard of the attorney's performance. The standard is one of "reasonably effective" assistance, and must be determined case by case because the form of acceptable advocacy varies case by case. Although neither Supreme Court has set more specific guidelines, in several cases the Courts have used terms such as:

- "a reasonably competent attorney";
- advice "within the range of competence demanded of attorneys in criminal cases";
- "reasonableness under the prevailing professional norms"; and
- "reasonable professional skill and judgment."

Instead of adopting specific guidelines, both Supreme Courts have examined the duties of and functions to be performed by defense counsel in criminal cases, including counsel's duties:

- to be loyal;
- to avoid conflicts of interest;
- to advocate the defendant's cause diligently and conscientiously and with professional skill and judgment;
- to keep the defendant informed of important developments in the course of the prosecution

- to consult with the defendant on important decisions and to ensure that the defendant makes those decisions intelligently, especially when waiving fundamental rights such as by a guilty plea or waiver of jury trial; and

- to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Various statutes and the prevailing norms of practice provide guidance, as do the ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed 1980, Supp 1986) ("The Defense Function"). The Code of Professional Responsibility, which governs lawyers' professional behavior through disciplinary rules and ethical considerations, provides some additional guidance. Disciplinary rules prohibit a lawyer from handling legal matters that the lawyer is not competent to handle or without preparation adequate in the circumstances. Ethical considerations, which are aspirational but not mandatory, provide that admission to the bar in itself does not guarantee adequate representation in any one field.

Most statutes that guarantee appointed counsel require appointed counsel to be "suitable" and set a standard by providing for appointment only if the person is financially unable to retain counsel "possessing skills and experience commensurate with the nature and complexity of the case" (or some variation of that wording). Because Oregon courts hold appointed counsel to the same standards as retained counsel, appointed counsel, to be suitable, must possess those same qualities.

Lack of adequate funding to allow payment of reasonable attorney fees and reasonable expenses for appointed counsel already seriously hinders the court's ability to find skilled and experienced attorneys willing to accept appointments. Where an attorney is willing to accept appointment, lack of adequate funding seriously hinders the attorney's ability to provide the level of services required by law and denies the poor people of Oregon the fundamental rights guaranteed by our statutes and the state and federal constitutions. Therefore, as the United States Supreme Court recently said, where the interest of the state that weighs against such fundamental rights is the state's economy and where both the state and the defendant share an interest in the fair and accurate adjudication of criminal cases, "the State's interest in its fisc must yield."

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I. RIGHT TO APPOINTED COUNSEL

A. The United States Constitution

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence [sic]."

The United States Supreme Court has held that this right is essential to defendants charged with crimes so that all other individual rights may be asserted and the criminal process proceed fairly.[1] In Gideon v. Wainwright, the Supreme Court ruled that this fundamental right to appointed counsel for indigent defendants applies to the States through the Fourteenth Amendment to the United States Constitution, which provides that "no state shall deprive any person of life, liberty or property, without due process of law ...."[2] In all federal and state prosecutions, a defendant accused of a crime has the right to have counsel appointed at state expense if the

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[1] 372 US 335, 83 SCt 792, 9 LEd2d 799 (1963); see Argersinger v. Hamlin, 407 US 25, 92 SCt 2006 32 LEd2d 530 (1972); Maine v. Moulton, 474 US 159, 106 SCt 477, 88 LEd2d 481 (1985).

[2] Gideon, supra note 1.

accused cannot afford to hire counsel.

This right has been applied in federal cases to preclude any term of imprisonment of a defendant who has not been afforded the opportunity to appointed counsel.[3] Further, an uncounseled conviction may not be used to enhance a subsequent charge.[4] However, an accused may forego appointment of counsel and choose to represent him or herself provided that there is a knowing and intelligent waiver of the right to counsel.[5] A defendant so choosing to proceed pro se, or without counsel, may not later complain of the lack of counsel or the ineffectiveness of counsel.[6]

The right to counsel necessarily includes the right to effective assistance of counsel in order that the right afforded defendants is meaningful.[7] The scope of effective and ineffective assistance of counsel will be discussed later.

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[3] Argersinger, supra note 1; Scott v. Illinois, 440 US 367, 99 SCt 1158, 59 LEd2d 383 (1978).

[4] Baldasar v. Illinois, 446 US 222, 100 SCt 1585, 54 LEd2d 169, reh den 447 US 930 (1980).

[5] Faretta v. California, 422 US 806, 95 SCt 2525, 45 LEd2d 562 (1975).

[6] McKaskle v. Wiggens, 465 US 168, 104 SCt 944, 79 LEd2d, 122, reh den 465 US 1112, 104 SCt 1620, 80 LEd2d 148 (1984).

[7] McMann v. Richardson, 397 US 759, 771 fn 14, 90 SCt 1441, 25 LEd2d 763 (1970); Strickland v Washington, 466 US 668, 104 SCt 2052, 80 LEd2d 674, reh den 467 US 1267, 104 SCt 356, 82 LEd2d 864 (1984).

B. The Oregon Constitution and Statutes

Article 1, section 11, of the Oregon Constitution provides:

> "In all criminal prosecutions, the accused shall have the right ... to be heard by himself and counsel ...."

A defendant appearing for arraignment without counsel must be asked whether the defendant desires the aid of counsel, and if the defendant is unable to afford to hire counsel, the court must appoint "suitable" counsel unless the person waives counsel and the court approves the waiver.[8] "Suitable" counsel focuses on the adequacy of the attorney's performance by requiring that counsel adequately provide "those functions of professional assistance which an accused person relies upon counsel to perform on his behalf."[9]

Under Oregon law, appointment of "suitable" counsel for indigent persons is authorized in the following types of cases:

- Defendants charged with a crime from the time of arrest through acquittal or the imposition of punishment.[10]

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[8] ORS 135.045 - 135.055.

[9] Krummacher v. Gierloff, 290 Or 867, 872, 627 P2d 458 (1981).

[10] ORS 135.050(4)(a), (5); 135.896 (diversion).

- Defendants facing an enhanced sentence that may result in the imposition of a felony sentence.[11]

- Persons facing termination of DUII diversion agreement.[12]

- Persons facing extradition proceedings.[13]

- Probationers facing any proceeding concerning an order of probation.[14]

- Defendants facing contempt of court proceedings.[15]

- Persons seeking habeas corpus relief.[16]

- Parolees facing proceedings to revoke parole.[17]

- Prisoners confined for a minimum of 30 years without possibility of parole in proceedings to review likelihood

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11 ORS 135.050(4)(b).

12 State v. Vest, 88 Or App 101, ___P2d___ (1987); see ORS 813.750.

13 ORS 133.787.

14 ORS 135.050(5)(d).

15 ORS 33.095.

16 ORS 34.355.

17 ORS 144.317, 144.343, 144.337 (appeal from Parole Board to Court of Appeals).

of rehabilitation.[18]

- Defendants appealing a conviction or final order.[19]

- Persons seeking postconviction relief.[20]

- Juveniles charged with crimes and facing dependency proceedings.[21]

- Parents facing proceedings to terminate parental rights and parents in some dependency proceedings.[22]

- Persons alleged to be mentally ill or retarded.[23]

- Persons facing petitions for determining ability to consent to sterilization.[24]

When any of the above proceedings occur in courts that are part of the state court system, payment of appointed counsel is made from state funds.[25] Other expenses for investigation

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18 ORS 163.105.

19 ORS 138.480 - 138.500.

20 ORS 138.590.

21 ORS 419.498; 419.476; 419.563 (appeal).

22 State v. Jamison, 251 Or 114, 444 P2d 15 (1968).

23 ORS 426.100; 426.135; 427.265; 427.295.

24 ORS 436.265, 436.315.

25 ORS 135.055; 151.430; 151.460; 151.465.

and preparation of an indigent case are also authorized to be paid from state funds.[26] Most of these fees and costs are paid through the State Court Indigent Defense Account, which is administered by the State Court Administrator.[27]

The United States Constitution and the Oregon Constitution differ on the scope of cases in which a defendant is entitled to appointed counsel. Under the federal authority, there is no constitutional violation of the right to counsel as long as a defendant is not committed to imprisonment as a result of a criminal conviction.[28] Article 1, section 11, of the Oregon Constitution has been interpreted to require the appointment of counsel in any criminal case or in any offense or violation that has the character of a criminal prosecution.[29] In Brown v. Multnomah County District Court,[30] the Oregon Supreme Court held that although the legislature had "decriminalized" the offense of driving under the influence of intoxicants, the offense still retained sufficient penal characteristics of a

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26 ORS 135.055(3).

27 ORS 151.465.

28 Agersinger, supra note 1; Scott, supra note 3.

29 Stevenson v. Holzman, 254 Or 94, 458 P2d 414 (1969). But see State v. Rhoades, 54 Or App 254, 634 P2d 806 (1981), where the Court of Appeals held that the defendant was not entitled to appointment of counsel in a habitual offender proceeding because the proceeding was essentially civil in character. Applying the Brown factors, the court noted that the habitual offender proceeding did not subject the defendant to arrest, detention, incarceration or imposition of a fine.

30 280 Or 92, 570 P2d 52 (1977).

criminal prosecution to require the appointment of counsel for indigent defendants under Article 1, section 11, of the Oregon Constitution. This right exists independently of any sentence of imprisonment that may be imposed.[31]

The Oregon Supreme Court has adopted the federal rule that an uncounseled prior conviction may not be used to enhance the sentence for conviction on a later criminal charge.[32]

Defense counsel do not have a checklist of procedures that, when followed, will guarantee that the assistance provided a defendant is effective or adequate. Every attorney must independently evaluate the facts of a case, investigate those facts, make appropriate motions to the court, and proceed with whatever legal actions are in the client's best interest. Because of the nature of criminal defense, there can be no minimum and enhanced levels of services; every defendant should be assisted to the best of the attorney's capabilities.

Every attorney in Oregon is subject to certain standards regardless of the nature of the case or type of representation. ORS 9.460 requires attorneys to support the

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[31] Id at 290 Or 92, 103; see also Gaffey v. State of Oregon, 55 Or App 186, 637 P2d 634 (1981); City of Pendleton v. Standerfer, 292 Or 725, 688 P2d 68, rev den 298 Or 81 (1984).

[32] State v. Grenvik, 291 Or 99, 628 P2d 1195 (1981); City of Pendleton, supra note 31. In both cases the court reached decision by applying the federal Sixth Amendment rather than Or Const Art 1, §11.

constitutions and laws of the United State and Oregon, maintain the respect due the judicial system, proceed legally only where the cause is legal and just, never seek to mislead the court or jury by a artifice or false statements, maintain client confidence, avoid offensive personalities and facts prejudicial to the reputation of a party or a witness, never pursue or continue legal action out of motives of personal interest, and never reject for any personal consideration the causes of the defenseless or the opposed. In addition, all attorneys are subject to the Code of Professional Responsibility as approved by the Oregon State Bar and adopted by the Oregon Supreme Court.[33]

The Code of Professional Responsibility contains Disciplinary Rules, the violation of which by an attorney can lead to sanctions imposed by the Supreme Court.[34] Among other things, every attorney is required to preserve the confidences and secrets of clients,[35] to exercise independent professional judgment on behalf of a client,[36] to represent a client completely[37] and zealously within the bounds of the law.[38]

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[33] ORS 9.490.

[34] ORS 9.460 - 9.527.

[35] Canon 4.

[36] Canon 5.

[37] Canon 6.

[38] Canon 7.

Canon 6, Disciplinary Rule 6-101 prohibits a lawyer from handling a matter that he or she should know he or she is not competent to handle, from handling a legal matter without adequate preparation, and from neglecting a legal matter entrusted to him or her.[39]

In addition to the Disciplinary Rules, every attorney should be aware of the Ethical Considerations of the Model Code of Professional Responsibility. While the former are mandatory, the Ethical Considerations are aspirational and designed as principles for guidance of professional conduct.[40]

Specific norms of professional skill and practice in criminal defense cases are set forth in the ABA Standards for Criminal Justice, The Defense Function.[41] The Standards establish norms for lawyer-client relations, investigation and preparation,

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[39] Under DR 6-101 the following situations have led to disciplinary action: In re Howlett, Disciplinary Board Opinion; OSB 82-140 (failure to discover felony indictments filed against a defendant following dismissal of similar misdemeanor charges resulted in attorney discipline by Bar); In re Paauwe, 298 Or 215, 691 P2d 97 (1984) (failure to act on defendant's case resulted in suspension and probation); and State ex rel Supreme Court v. Anderson, 239 Or 362, 397 P2d 838 (1964) (failure to file a defendant's notice of appeal within the required time period resulted in reprimand by the Supreme Court).

[40] Preamble and Preliminary Statement of Ethical Considerations of the Model Code of Professional Responsibility of the American Bar Association as amended 1980.

[41] Chapter 4 (2d Ed 1980). In 1975, now Circuit Judge William Snouffer wrote Criminal Justice Standards in Oregon, in which he compared of the draft of the ABA Standards for Criminal Justice with Oregon law. The ABA Standards were adopted in 1980 with few revisions.

plea negotiations, trial and posttrial proceedings.[42] Again, these are guidelines of competent practice and not mandatory rules or guarantees of effective assistance.

II. EFFECTIVE ASSISTANCE OF COUNSEL

The right to assistance of counsel in a criminal prosecution would be meaningless without standards of review to insure that the counsel, appointed or retained, acted effectively or adequately in providing the assistance a defendant would expect to rely upon. Review most frequently occurs when the defendant petitions for postconviction relief.[43] Earlier standards focused on the nature of the proceeding to determine whether the attorney's conduct was so incompetent as to make the proceeding itself a 'sham,' 'mockery' or 'farce'.[44] More recent decisions have revised the standard to evaluate the effectiveness or adequacy of the conduct and performance of the attorney in meeting professional standards of representation and competency.[45]

The United States Supreme Court has held that the Sixth Amendment right to counsel means the right to effective assistance of

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[42] Id.

[43] ORS 138.510 - 138.610.

[44] Rook v. Cupp, 18 Or App 608, 526 P2d 605 (1974).

[45] Strickland v. Washington, supra note 7; Krummacher, supra note 9.

Enclosure #2

SUMMARY

CONSTITUTIONAL AND STATUTORY AUTHORITY FOR THE APPOINTMENT OF COUNSEL AT STATE EXPENSE IN OREGON

Source of Authority	Description
Constitutional	**Right to appointed counsel, if indigent:**
U.S.: Amendments V and XIV OR: Article 1, Section 12 Miranda v. Arizona 384 US 436 (1966)	To protect privilege against self-incrimination during custodial interrogation.
U.S.: Amendments VI and XIV OR: Article 1, Section 11 Gideon v. Wainwright 372 US 335 (1963) Argersinger v. Hamlin 407 US 25 (1972) Scott v. Illinois 440 US 367 (1979) Brown v. Multnomah County 280 OR 92 (1977)	In criminal prosecution resulting in incarceration (federal) or with potential for incarceration (Oregon).
In re Gault 387 US 1 (1967)	Same constitutional right to counsel applies to juveniles in delinquency proceedings, as for adult defendants.
Gagnon v. Scarpelli 411 US 778 (1973) Perry v. Williard 247 OR 145 (1967)	In some probation violation hearings (federal) and all probation violation hearings with potential for incarceration (Oregon).
Ross v. Moffitt 417 US 600 (1974)	In direct appeal from criminal conviction.

Source of Authority	Description
Constitutional	**Right to appointed counsel, if indigent:**
U.S.: Amendment XIV	For some parents facing termination of parental rights, contested adoptions, dependency and permanent guardianship proceedings.
Lassiter v. Dept. of Social Services 452 US 18 (1981)	
State v. Jamison 251 OR 114 (1968)	
Zockert v. Fanning 310 OR 514 (1990	
In re Alongi 123 Or App 74 (1993)	
State v. Silence 105 OrApp 149 (1991)	For some children in termination of parental rights proceedings.
Federal Statute	
Indian Child Welfare Act 25 USC 1912	For parent of Indian child in any removal, placement, or termination of parental rights proceeding; discretionary right to counsel for child.
Oregon Statutes	
ORS 33.035, 33.055, 33.065	In contempt proceedings, with potential for incarceration.
ORS 34.355	In habeas corpus proceedings.
ORS 135.055	In criminal, extradition, and probation violation proceedings.
ORS 136.617	For material witness subject to possible self-incrimination.
ORS 138.500	In criminal and probation violation appeals not handled by the public defender and postconviction relief appeals.
ORS 138.590	For petitioner in postconviction relief proceedings.
ORS 144.317 and 144.343	For some parole violation proceedings (counsel paid by Parole Board).

Source of Authority	Description
Oregon Statutes	**Right to appointed counsel, if indigent:**
ORS 161.346	In Psychiatric Security Review Board hearings.
ORS 161.385	In Psychiatric Security Review Board appeals.
ORS 419C.200	For juvenile in delinquency proceedings.
ORS 419B.195, 419B.205	Right to counsel, if requested, for child in dependency proceeding; right to counsel, if indigent, for some parents in dependency proceedings.
ORS 419B.518	For parent in termination of parental rights proceedings.
ORS 419B.310, 419B.449	Right to counsel, if requested, for child in review hearing; right to counsel, if indigent, for some parents in review hearings.
ORS 419B.195	For child in emancipation proceeding.
ORS 419C.200	In delinquency appeal.
ORS 419B.200	For parent or child in appeal from dependency or termination of parental rights proceeding.
ORS 426.100 and 426.307	In civil commitment and recommitment proceedings.
ORS 426.135	In appeal from civil commitment or recommitment proceedings.
ORS 427.265	In proceedings alleging mental retardation.
ORS 427.295	In appeal from mental retardation proceedings.
ORS 436.265	For involuntary sterilization proceedings.
ORS 436.315	In appeal from involuntary sterilization proceedings.

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RIGHT TO COUNSEL AT GOVERNMENT EXPENSE
TYPES OF CASES AND BASIS OF AUTHORITY
TRIAL LEVEL

LEGEND:
Y = Yes; Direct Authority; Absolute Right, If Indigent
N = No; Direct Authority; No Right
S = Some; Direct Authority; Discretionary or Due Process Right, If Indigent

? = Unknown

Y? = Likely; No Direct Authority
N? = Unlikely; No Direct Authority
S? = Likely for Some; No Direct Authority

* = Estimate of Caseload
** = Limited to Indian Child Welfare Act Cases

	OREGON COURTS BASIS OF AUTHORITY					FEDERAL COURTS BASIS OF AUTHORITY	
CASE TYPE	Oregon Constitution	Oregon Statute	Federal Constitution	Federal Statute	Annual Number of I.D. Cases	Federal Constitution	Federal Statute
CRIMINAL/OFFENSE							
Pre-Criminal Charges							
Interrogation	Y	N	Y	N	0	Y	Y
Line-up	Y	N	Y	N	0	Y	Y
Other Critical Stage	Y	N	Y	N	0	Y	Y
Death Penalty & Murder	Y	Y	Y	N	133	Y	Y
Felonies	Y	Y	Y	N	27,709	Y	Y
Misdemeanor							
Actual Jail	Y	Y	Y	N	10,961*	Y	Y
Potential Jail	Y	Y	N	N	19,907*	N	S
Violation/Infraction							
NO Jail Potential	Y?	N	N	N	0	N	N
Small Fine Only	N	N	N	N	0	N	N
Contempt	Y	Y	Y	N	1,776	Y	?
Diversion							
W/Guilty Plea	Y?	Y?	Y?	N	2,000*	Y?	Y?
W/O Guilty Plea	N	N	N	N	0	N?	N
Show Cause/Term.	Y	N	S?	N	725*	?	Y
CIVIL							
Extradition	?	Y	?	N	1,042	?	Y
Material Witness	S?	Y	S?	N	5*	S?	Y
Probation Violation							
Felony	Y	Y	S	N	10,924	S	Y
Misdemeanor	Y	Y	S	N	7,848	S	Y
Parole Violation	S	S	S	N	0	S	Y
Invol. Commitment	Y	Y	Y	N	1,819	Y	Y
PSRB Hearing	Y?	Y	Y?	N	370	Y?	Y?
Invol. Sterilization	Y?	Y	Y?	N	0	N/A	N/A
Mental Retardation	Y?	Y	Y?	N	0	N/A	N/A
Postconviction Relief	N?	Y	N	N	628	N	N
Habeas Corpus	N	Y	N	N	337	N	S
Forfeiture	?	N	Y?	N	0	Y?	S

CASE TYPE	OREGON COURTS BASIS OF AUTHORITY					FEDERAL COURTS BASIS OF AUTHORITY	
	Oregon Constitution	Oregon Statute	Federal Constitution	Federal Statute	Annual Number of I.D. Cases	Federal Constitution	Federal Statute
JUVENILE							
Delinquency	Y	Y	Y	N	6,311	Y	Y
Dependency							
Parent	Y	S	S?	Y**	2,738	N/A	N/A
Child	?	Y	S?	S**	2,346	N/A	N/A
Review Hearing							
Parent	?	Y	?	Y**	3,650	N/A	N/A
Child	?	Y	?	S**	4,302	N/A	N/A
Probation Violation	Y	N	S	N	2,097	N/A	N/A
Emancipation	N?	Y	N?	N	0	N/A	N/A
Term. Parent. Rights							
Parent	S	Y	S	Y**	277	N/A	N/A
Child	S	Y	?	S**	30	N/A	N/A
Contested Adoption							
Parent	S	N	S?	Y?**	11	N/A	N/A
Child	S?	N	?	S?**	0	N/A	N/A
Perm. Guardianship							
Parent	S	N	S?	Y?**	0*	N/A	N/A
Child	S?	N	?	S?**	0*	N/A	N/A

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REPORT TO THE NOVEMBER 1994 EMERGENCY BOARD

ON

THE OPERATIONAL AND FINANCIAL DESIRABILITY

OF

ESTABLISHING A STATE AGENCY PUBLIC DEFENDER SYSTEM IN OREGON

(TRIAL AND APPELLATE LEVELS)

Submitted By: Indigent Defense Services Division
Office of the State Court Administrator

November 7, 1994

I. Background for This Report

By budget note to its 1993-95 appropriation, the Judicial Department was directed to report to the November 1994 Emergency Board on the operational and financial desirability of establishing a state agency public defender system to provide indigent defense services at both the trial and appellate court levels.

Effective January 1, 1983, the state assumed the responsibility from counties for the funding and administration of indigent defense services in state courts at the trial level and for appeals not handled by the then-existing appellate public defender agency. The Judicial Department--specifically, the State Court Administrator (SCA)--was legislatively designated to bear the responsibility for administering the newly assumed state indigent defense program. Note: references to the "state indigent defense program" (ORS 151.430, et. seq.) exclude the Public Defender Committee and the Public Defender (ORS 151.210, et. seq.) which is referred to hereafter as the State Public Defender (SPD).

Effective with the 1985-87 biennium, responsibility for administering the state indigent defense program was transferred legislatively from the SCA to a newly established State Indigent Defense Board (SIDB) within the Judicial Department. In the fall of 1987 the SIDB was "decommissioned" and the responsibility for administering the state indigent defense program was reassigned to the SCA. In every legislative session since 1989, at least one bill has been introduced that would, inter alia, transfer the SCA's responsibility for indigent defense services to a commission (within the executive or the judicial branch).

The SPD is staffed by state employees who provide indigent persons with representation in primarily criminal appeals. The state indigent defense program has never been staffed by state employees. None of the "commission" bills introduced in the past three legislative sessions specifically addressed whether an indigent defense commission would provide services, even partially, by state employees.

Sections III. and IV. of this report address the issues of the operational and financial desirability of establishing a state agency to provide those services currently provided by the SPD and the state indigent defense program. The assumption is made that the term "state agency" denotes that at least partial service delivery would be effected by state employees of the agency.

II. Overview of the Current State Indigent Defense Program in Oregon

As noted above, while the SPD agency is state employee-based, all other indigent defense services in Oregon are provided by nonstate employees, either by independent contractors with the SCA or on an hourly fee basis. There is no single, uniform delivery system for non-SPD indigent defense attorney services. Generally, legal services are provided pursuant to contracts entered into between the SCA and nonprofit public defender organizations (who perform indigent defense work exclusively), law firms, consortia of attorneys/law firms, individual attorneys, or a combination thereof. Compensation under indigent defense contracts is based upon per case rates for certain caseloads. Generally, cases not handled by an indigent defense contractor (for

example, cases in which there is a conflict of interest for the contractor(s)) are assigned to qualified attorneys in private practice, who are paid on the basis of an hourly rate.

The SCA currently has 84 contracts for the provision of indigent defense legal services--at least one contract in each county, except Tillamook, Yamhill, Gilliam, and Wheeler Counties. These independent, personal services contractors provide legal representation in almost 90 percent of the trial-level, nondeath penalty indigent defense cases. Eight of these contracts are limited to legal representation in death penalty, murder, or other complex criminal cases. The remaining 76 contracts differ with respect to types of cases covered, number of cases covered, and type of provider. The SCA also has a limited number of contracts for the provision of nonattorney indigent defense services; e.g., death penalty investigation, forensic services, and foreign language translation services.

The state indigent defense program is administered by the SCA, with the assistance of judges, court staff, some staff in the Budget and Finance Division and the Indigent Defense Services Division (IDSD) (both divisions of the SCA's office). Judges and court staff primarily are responsible for the appointment of indigent defense counsel, authorization of nonattorney extraordinary expenses (for example, investigators and interpreters), and the payment of private bar (noncontract) attorney fees and extraordinary expenses. The Chief Justice of Oregon's Supreme Court, the SCA, and IDSD are responsible for the promulgation of policies and procedures relating to determination of indigence, qualification standards for indigent defense providers, and payment for indigent defense services. The SCA and IDSD are responsible for negotiating and monitoring all of the indigent defense contracts, most of which are for two-year terms. IDSD is comprised of a director and 5.9 FTE support staff.

Note: Because the current SPD already is state employee-based, discussions of the operational and financial desirability of establishing a state agency public defender system focuses primarily on the current "state indigent defense program" administered by the SCA.

III. Operational Desirability of State Agency Public Defender System

The following discussion is based upon two primary assumptions with respect to how a state agency public defender system would differ from the existing state indigent defense program:

(a) primarily state employee attorneys and support staff would provide indigent defense services; and

(b) existing functions, responsibilities, and services provided by state court judges, court staff, and divisions within the SCA's office would be assumed by the state agency.

The desirability of a state agency public defender system from the standpoint of "operations" must be viewed in terms of administration of the system and in terms of service delivery.

A. Desirability in Terms of Administration

Prior to 1992 indigent defense contracts generally were negotiated every two years, with all contract caseloads up for submission of bids at one time. Primarily due to the number of contracts, the number of bids submitted, and IDSD resources, contract negotiations now occur on an every-six-month basis. Approximately one-third of the contracts are negotiated every six months, with only a few negotiated during legislative session. This "staggering" of contract negotiations has allowed closer scrutiny and analysis of contract caseloads, budgets, and other terms. At the same time, it has resulted in a significant increase in the amount of time IDSD devotes solely to contract negotiations, leaving less time and resources for other administrative duties.

Beginning in the fall of 1993 IDSD experienced a significant increase in the number of contract proposals submitted for expiring indigent defense contracts. In the fall 1993 and spring 1994 negotiation periods, roughly twice as many bids were received for the number of contracts due to expire. For the current, fall 1994 negotiation period, almost three times as many bids were received as contracts due to expire. The increase in bid submissions is good in terms of competition--both financial and quality of services. However, the increase has significantly impacted the work load associated with negotiating contracts.

To the extent a state public defender agency would be primarily or significantly state employee-based, the administrative time currently consumed by contract negotiations would be significantly diminished. Contracts would only need to be negotiated for cases in which the state public defender attorneys had a conflict of interest or those conflict cases could be handled on an hourly rate, noncontract basis. Because ensuring coverage of court caseloads is of primary importance in the administration of indigent defense, contract negotiations currently detract from the performance of other administrative responsibilities.

Primarily as a result of history, in some instances dating back to the 1983 state takeover of indigent defense, contractor salary and benefit levels have differed between contractors. Significant efforts in the past six years have resulted in more uniformity in contractor salary and benefit levels, as well as in services and supplies levels. However, differences remain between contractors, regardless of differences in the seriousness of cases handled or other factually-based reasons. Establishing greater uniformity generally has been accomplished by making adjustments between contractors; i.e., limiting those who historically have had "more" and using some of the monies "saved" to enhance those who have had "less." In the context of dealing with contractors who must remain "independent" contractors for legal purposes, this has resulted in more contentious, lengthy contract negotiations--adding to the administrative burden both to the contractors and IDSD.

Establishment of a state agency public defender system, with statewide, uniform salary, benefit, and services and supplies schedules for employee staff, at least in the eyes of those who must administer indigent defense, would be administratively desirable.

IDSD, contractors, and the courts currently are responsible for reporting and monitoring contractor, private bar, and extraordinary expense caseloads and expenditures. Establishment of a state agency public defender system with much of the representation provided by state employees should negate the current need for, in many instances, duplicate record keeping by courts, contractors, and IDSD and duplicate data entry. The agency would be solely responsible for recording and monitoring caseloads and expenditures, as well as analyzing trends in both areas.

As noted above, currently trial-level judges are responsible for reviewing and authorizing requests for appointment of counsel and for extraordinary nonattorney indigent defense costs. Judges are assisted in their determinations whether to appoint counsel by verification specialist court employees and indigency guidelines promulgated by the Chief Justice. Judges are assisted in their determinations of whether to authorize nonattorney extraordinary expenses by IDSD staff, on request, and policies and guidelines established by the SCA. Despite assistance, guidelines, and diligence by the judges in making these determinations, the fact remains that determinations that impact the Indigent Defense Account and providers currently are being made by as many as 155 judges. Centralization of these responsibilities should result in efficiencies and greater uniformity.

Establishing a state agency public defender system which is responsible for determining whether to appoint counsel and whether to authorize extraordinary expenses would be desirable for a number of other reasons. Currently some judges are reluctant to authorize appointment of counsel or expenditure of indigent defense funds because of the nexus between the state court operations budget and the Indigent Defense Account budget. At the same time, some judges are inclined to grant requests for appointment of counsel or extraordinary expenses because to do so may cause a case to move more expeditiously through the court system.

A state agency public defender system presumably would provide for systems for reviewing appointment and expenditure requests that are more insulated from the judiciary. Such systems likely would provide for review of extraordinary expense requests by defense attorneys and personnel who are well-versed in what services are reasonable and necessary, what service providers are available and qualified, and what alternatives are available. Such a system would presumably provide for the opportunity for judicial review of requests that are denied by the state agency. Under such a system, the judge reviewing the matter would be in a more neutral position than under the current system, with the responsibility to determine matters of law and fact.

A final administrative change that would likely be effected by a state agency public defender system is that processing and payment of indigent defense expenses would be centralized, providing for greater efficiencies and less likelihood of error or delay. Currently all payments for noncontract indigent defense costs (private bar attorney and extraordinary expenses) are reviewed by judges and court staff, entered for payment by court staff, transmitted for payment to Salem, reviewed by SCA division staff, and transmitted to the

Executive Department for issuance of warrants, which are returned to SCA division staff for review and mailing.

B. Desirability in Terms of Service Delivery

The question of whether the replacement of the current indigent defense system with a state agency public defender agency would be desirable in terms of service delivery is likely the most controversial and unquantifiable issue to be considered.

The Oregon State Bar, in 1992, established an Indigent Defense Task Force to, among other matters, review the advisability of a state public defender system. That Task Force issued its final report in the fall of this year. The most controversial topic of that report and of the Task Force's efforts is and was whether or not Oregon's indigent defense system should:

(1) remain as it exists, with recommendations for improvement;

(2) remain as it exists with respect to service delivery (primarily contract-based) and trial-level judge involvement, but with the authority for administering the program transferred from the SCA to an "independent commission," housed within the judicial or executive branch; or

(3) be primarily state employee-based with respect to service delivery, with judges replaced with state employees with respect to responsibility for reviewing and approving requests for appointment of counsel and extraordinary expenses, with the authority for administering the program transferred from the SCA to an independent commission within the judicial branch.

The Oregon State Bar Task Force decided on the third option, after heated debates during its two-year existence, which continue to date.

The debate appears to center on two primary issues: First, many current indigent defense service providers believe that the fact that there are 84 indigent defense contractors, more attorneys who are interested in indigent defense contracts, and private bar hourly rate attorney providers results in healthy competition with respect to quality of services and cost. The apparent fear of these individuals is that a state agency public defender system might result in complacent defense attorneys mired in a state agency bureaucracy. The second issue of concern is similar to the first. Many attorneys in private practice provide indigent defense representation, as a supplement to their retained caseloads. Many of these attorneys believe that supplanting their contribution to the indigent defense system, in large measure, with state employee-based services will result in decreased participation in the system and likely increased costs to the system. The latter concern is premised upon the fact that some current contractors who

also have retained practices are able to subsidize their costs of providing indigent defense services with their retained work.

With the right people administering the agency and conflict case coverage, the right people providing the services, and sufficient resources for both, it appears reasonable to conclude that service delivery could be enhanced under an agency model. In the area of training alone, significant room for improvement exists. To date training of attorneys and staff who provide indigent defense services has occurred on an ad hoc basis. Only a few of the current public defender indigent defense contractors have an in-house program for training. Other than Continuing Legal Education requirements mandated by the Oregon State Bar and contract terms that require adequate training, attorneys who provide indigent defense services generally have relied upon the Oregon Criminal Defense Lawyers' Association to provide training opportunities.

Coordination of service delivery, which is currently the responsibility of the trial courts and would be transferred to the state agency, should be enhanced by the establishment of a state agency public defender system--particularly in those counties that currently have multiple indigent defense contractors (for example, there are 18 contractors for Multnomah County).

One other major issue in discussing service delivery is that of ensuring quality of services. Currently the only ways in which quality is monitored and controlled are:

(1) minimum qualification standards for attorneys wishing to perform indigent defense services, promulgated by the SCA;

(2) contract language addressing training, supervision, and quality of representation; and

(3) feedback from judges, other indigent defense providers, prosecutors, and indigent defense clients on quality of service issues.

Control over quality of services should be enhanced by creating an employer/employee relationship between those who provide the services and those who administer the program.

Finally, a state agency public defender system should foster better networking, both in the technical sense and in the communication sense, between attorneys, staff, and program administrators, which should directly result in enhanced and more efficient service delivery.

IV. Financial Desirability of State Agency Public Defender System

Historically, it appears that one of the primary reasons that establishment of a state agency public defender system has not been seriously considered in Oregon is the presumably adverse impact to the state General Fund of adding state employees; e.g., the PERS impact.

IDSD determined that the best manner in which to even begin discussions of whether or not changing the existing indigent defense system to an agency public defender system was to "create" such a new state employee-based system on paper.

The following represents what IDSD believes is a conservative estimate of the cost of shifting from a primarily independent contractor-based service delivery system to that primarily staffed by state employees. This "agency on paper" was designed to be able to cover existing indigent defense and SPD caseloads. Efficiencies that may result from having a more uniform system are not factored in. Similarly, savings in court staff, judge, and administration time are not factored in. Significant start-up costs are listed separately from ongoing estimated personnel and operations costs. Finally, the agency was created with the assumption that administration would be best provided on a regional basis, reporting to a central office.

The following set of assumptions underlie the "agency on paper." Of special note is the first assumption that caseloads, extraordinary expenses, salary/benefit levels for the new state employees, and services and supplies costs would remain static in the second year of the agency's first biennium of existence. This is not an assumption that IDSD intends as portraying reality. Additional cost estimates of salary step increases and benefit levels, as well as increases in services and supplies, will be available at the Emergency Board meeting.

Enclosure #1 to this report provides charts that display the detail underlying the "agency on paper" model. Page 1 of that enclosure provides a summary of the estimated costs for conflict case coverage, extraordinary expenses, and state employee-based services. The total estimated cost of establishing a state agency public defender system, based upon all of the assumptions listed below and within this report, is $104,746,976 for the agency's first biennium for ongoing operational costs. Start-up or onetime expenditures for the agency are estimated at $4,559,384. The total estimate for the agency's first biennium of existence, including start-up/onetime costs, is $109,306,360. This compares to approximately $101,850,000 estimated for 1995-97 for IDSD, indigent defense verification, the Indigent Defense Account, and the SPD.

Assumptions:

1. Salary, benefit, services and supplies, caseload, and extraordinary expense levels assume NO change in the second year of the biennium; i.e., the biennial estimate is based on the first year of state agency operation (not including start-up costs) with no changes in the levels identified above. Therefore, the biennial estimate is conservative over the two-year period.

2. Total trial-level caseload of 108,105 for a 12-month period (actual caseload for July 1, 1993, through June 30, 1994) plus 40 trial-level death penalty original and postconviction relief cases for a 12-month period.

3. The current SPD appellate caseload would be absorbed by the new state agency, as would the appellate cases currently handled by non-SPD indigent defense counsel.

   a. Appellate caseload for a 12-month period of 2,134, including agency conflict cases.

   b. Death penalty caseload of six death penalty appeals per year.

4. A conflict rate applied to the above caseloads of:

   a. Criminal cases: 20 percent for counties other than Multnomah.

   b. Criminal cases: 40 percent for Multnomah County.

   c. Juvenile cases: 40 percent.

   d. Civil commitment cases: 10 percent.

   e. Death penalty cases: 40 percent.

   f. Appellate cases: 10 percent.

   g. Death penalty appellate cases: 10 percent.

   The total conflict caseload is estimated to be: 21,841 trial-level criminal cases; 8,752 trial-level juvenile cases; 182 trial-level civil commitment cases; 16 trial-level death penalty cases; 370 PSRB hearings; 212 criminal, juvenile and civil commitment appeals; 2 death penalty appeals; and 15 PSRB appeals.

5. For the trial-level caseloads, the state agency would establish 11 regional offices, with satellite offices in 21 additional locations (total of 32 regional/satellite offices--no office in Morrow, Sherman, Gilliam, or Wheeler Counties). Attorney caseloads for a 12-month period and staffing ratios as follow:

   a. Regional directors: 125 cases.

   b. Attorneys: 300 criminal cases, 350 juvenile cases, 350 civil commitment cases, or a combined mix of cases. Six "floating" attorneys and two "floating" secretaries are included in the regional office staff. These positions would be available to travel and to respond to temporary work load fluctuations.

   c. Ratio of secretaries to attorneys: 1 to 3. At least one half-time secretary at each location.

   d. Ratio of trial assistants to attorneys: 1 to 4.

e. Ratios of investigators to attorneys: 1 to 4.

f. Generally, one office manager per regional office.

g. Generally, one administrative analyst per regional office.

h. Two field appellate attorneys located in two regional offices.

i. Eight Spanish language interpreters in various locations.

j. A verification specialist in 29 of 32 locations.

6. The state agency would establish one appellate office with attorney caseloads for a 12-month period and staffing levels as follow:

a. Felony appellate attorney: 51 cases.

b. Misdemeanor and other appellate attorney: 72 cases.

c. Death penalty appellate attorney: 1.5 cases.

d. Ratio of secretaries to attorneys: 1 to 3.

7. The state agency would establish a central administration office with a state public defender, a trial-level director, and an appellate director. The central office would include support staff, administrative analysts, a verification trainer/resource specialist, legal analyst (attorney), death penalty resource analyst (attorney), computer support persons, personnel specialists, and budget and accounting staff.

8. Salaries and "other personnel expenses": Salary levels are based upon current salaries for similar positions in the SCA's office, selected current contracts with nonprofit public defender offices, and the current State Public Defender's office.

Other personnel expenses include social security, retirement, workers' compensation assessment, medical and dental insurance, life insurance, etc., and is calculated by applying a factor of 38 percent to salary costs.

9. Operating costs: Central office operating costs based upon current Indigent Defense Services Division operating costs expanded for the additional personnel and anticipated travel for floating staff. Appellate, regional, and satellite location operating costs are based upon budgeted expenditures per category from selected contract budgets provided by public defender offices. Rent is calculated based upon a standard formula that outlines the square footage needed per type of position and square footage needed for common areas times an average market rate for office rental.

10. General government assessment: $410 per FTE is charged by the Department of Administrative Services to state agencies for provision of state services such as risk management, SAIF, unemployment, audit services, etc.

11. Capital: A personal computer for each FTE (assumes that 20 percent would not be new purchases but absorption of existing indigent defense public defender contractors' equipment); an extra personal computer per regional and satellite office location, appellate office, and central office; a network computer system to link all offices statewide that would store and manage case information; local area networks; office furniture (assumes that 40 percent would not be new purchases but absorption of existing indigent defense public defender contractors' furniture); fax; copy machines; computer software; etc.

12. Start-up costs: A factor of 8 percent of the onetime costs is used for: physical transitions such as moving, computer cabling, contracting for computer network setups, staff recruitment costs, etc.

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State Agency Public Defender System **Enclosure 1**
Conflict Caseload and Extraordinary Expense Summary **Page 1**
'ect State Agency Cost Summary
/TAL ESTIMATED COSTS

Case Type	Total Caseload For 12 Months	Agency Caseload For 12 Months	Conflict Caseload For 12 Months	Conflict Cost Per Case	Conflict Costs
Trial Level					
Criminal*	84,037	62,196	21,841	$400	$8,736,400
Juvenile	21,879	13,127	8,752	$300	$2,625,600
Civil Comm.	1,819	1,637	182	$250	$45,500
Death Penalty	40	24	16	$38,000	$608,000
PSRB Hearings	370	0	370	$250	$92,500
Appellate Level					
Non-DP	2,119	1,907	212	$800	$169,600
DP Appeals	6	4	2	$15,000	$30,000
PSRB Appeals	15	0	15	$500	$7,500
Total	110,285	78,895	31,390		$12,108,000

* Criminal includes probation violations, extraditions, habeas corpus, postconviction cases.

Estimated biennial cost for conflict cases: **$24,216,000**

'ncluding a reduction in expenses due to the state agency ving interpreters and investigators on staff, extraordinary expenses for non-death penalty cases are estimated for the biennium at: **$6,600,000**

Extraordinary expenses for death penalty cases (agency and conflict) is estimated for the biennium at $20,000 per case. **$1,600,000**

Total costs, in addition to direct agency costs, anticipated to be paid: **$32,416,000**

Direct State Agency Costs (without conflict cases and extraordinary expenses)

Item	Ongoing Costs	One Time Costs	Total
State Network/Info Mgmt Sys., LANs		$1,561,200	$1,561,200
Regional/Satellite Office Costs	$31,279,625	$2,358,412	$33,638,037
Appellate Office Costs	$3,065,083	$163,462	$3,228,545
Central Office Costs	$1,820,780	$138,578	$1,959,358
Contingency, start-up costs (8%)		$337,732	$337,732
Totals for one year	$36,165,488	$4,559,384	$40,724,872
Biennial Cost	**$72,330,976**	**$4,559,384**	**$76,890,360**

Total ongoing costs, including conflict caseload, and extraordinary expense costs: **$104,746,976**

Total of ongoing costs and one-time start up costs: **$109,306,360**

Regional/Satellite Offices		Comment	
Salaries	$19,201,396		$19,201,396
OPE (38%)	$7,296,530		$7,296,530
Operating Costs	$2,766,688		$2,766,688
General Government Assessment*	$252,560		$252,560
Rent/Maintenance	$1,762,451		$1,762,451
Subtotal for Ongoing Costs	$31,279,625		$31,279,625
Computers	$1,924,190	Less 20% at right	$1,539,352
Furniture/Other Equip.	$1,365,100	Less 40% at right	$819,060
Subtotal for One Time Expenditures	$3,289,290		$2,358,412
Total for Regional/Satellite Offices**	$34,568,915		$33,638,037

Appellate Office		Comment	
Salaries	$1,927,452		$1,927,452
OPE (38%)	$732,432		$732,432
Operating Costs	$246,632		$246,632
General Government Assessment*	$19,270		$19,270
Rent/Maintenance	$139,297		$139,297
Subtotal for Ongoing Costs	$3,065,083		$3,065,083
Computers	$131,750	Less 20% at right	$105,400
Furniture/Other Equip.	$96,770	Less 40% at right	$58,062
Subtotal for One Time Expenditures	$228,520		$163,462
Total for Appellate Office	$3,293,603		$3,228,545

Central Office		Comment	
Salaries	$1,126,612		$1,126,612
OPE (38%)	$428,113		$428,113
Operating Costs	$179,724		$179,724
General Government Assessment*	$13,120		$13,120
Rent/Maintenance	$73,211		$73,211
Subtotal for Ongoing Costs	$1,820,780		$1,820,780
Computers	$113,320	Less 20% at right	$90,656
Furniture/Other Equip.	$79,870	Less 40% at right	$47,922
Subtotal for One Time Expenditures	$193,190		$138,578
Total for Central Office	$2,013,970		$1,959,358

Statewide Agency Costs***

Item	Ongoing Costs	One Time Costs	Total
State Netwk/Info Mgmt. Sys., LANs		$1,561,200	$1,561,200
Regional/Satellite Office Costs	$31,279,625	$2,358,412	$33,638,037
Appellate Office Costs	$3,065,083	$163,462	$3,228,545
Central Office Costs	$1,820,780	$138,578	$1,959,358
Contingency, Start-Up Costs (8%)		$337,732	$337,732
Totals For One Year	$36,165,488	$4,559,384	$40,724,872
Biennial Cost	**$72,330,976**	**$4,559,384**	**$76,890,360**

* General Government Assessment - $410 per FTE per year.
** Does not include cost of networks.
*** Includes reduction in costs for absorption of existing computers and furniture.

Regional/Satellite Offices
80% of FY 1994* Criminal Cases, 20% Conflict Rate for Counties Other than Multnomah
60% of FY 1994* Criminal Cases, 40% Conflict Rate for Multnomah County
[illegible] of FY 1994* Juvenile Cases, 40% Conflict Rate
90% of FY 1994* Civil Commitment Cases, 10% Conflict Rate
60% of FY 1994* Death Penalty Trial Level Cases, 40% Conflict Rate

Positions	Number	Salary similar to	Salary	Salary/Total
Regional PD Directors	11	MPD regional	$56,000	$616,000
Office Managers	13	SWOPD	$28,000	$364,000
Administrative Analysts	18	AA I, step 2	$28,692	$516,456
Network and PC Support	8	Info Sys. Sup. Analyst	$38,436	$307,488
Data Entry Clerks	16	COS II, step 2	$20,400	$326,400
Interpreters	8	Estimate	$30,000	$240,000
Attorneys**, total: 253.5				
Level 3	85	SWOPD, MPD	$45,000	$3,825,000
Level 2	83.5	SWOPD, MPD	$35,000	$2,922,500
Level 1	85	MPD	$27,000	$2,295,000
Death Penalty Lead Attys	12	Estimate/AG salaries	$62,000	$744,000
DP Co-Attys Diff. total atty: 12		DP salary minus Level	$17,000	$204,000
Secretaries**	101	COS II, step 4	$22,476	$2,270,076
Trial Assistants	70	COS II, step 2	$20,400	$1,428,000
Investigators	77	RAO, step 4	$31,644	$2,436,588
Verifiers ***	28.5	VS, step 6	$24,768	$705,888
Total	616			$19,201,396

Appellate Office
90% of Appellate Cases, 10% Conflict Rate
90% of DP Appeals, 10% Conflict Rate

Positions	Salary Similar To	Number	Salary	Salary/Total
Appellate Director	IDSD Dir	1	$62,616	$62,616
[illegible]istrative Analyst	AA III, step 2	1	$36,600	$36,600
L[illegible]ppellate Attorneys	Estimate	3	$62,000	$186,000
Appellate Attorneys (located in Salem)	State PD Office	29	$45,000	$1,305,000
Field Appellate Attorney	State PD Office	2	$45,000	$90,000
Secretaries	COS II, step 4	11	$22,476	$247,236
Total		47.0		$1,927,452

Central Office

Positions	Salary Similar To	Number	Salary	Salary/Total
State Public Defender	Estimate	1	$70,000	$70,000
Trial Level Director ***	IDSD Dir	1	$62,616	$62,616
Legal/Legislative Analyst	Asst LC, step 2	1	$46,704	$46,704
Death Penalty Resource Specialist	Appl. Staff Atty., step 2	1	$51,516	$51,516
Administrative Analysts				
Senior Analysts ***	AA III, step 5	2	$42,372	$84,744
Analysts	AA III, step 2	3	$36,600	$109,800
Verification Trainer/Resource Specialist	Sr. RAO, step 2	2	$28,692	$57,384
Info Systems Support/Trainers	Info Sys. Sup. Analyst	6	$38,436	$230,616
Personnel Analysts	Pay. & Ben., step 4	2	$27,312	$54,624
Support Staff				
Secretaries/Admin. Asst. ***	COS II, step 6	1	$24,768	$24,768
Secretaries/Admin. Asst.***	COS III, step 2	1	$22,476	$22,476
Lead Worker ***	COS III, step 6	1	$27,312	$27,312
Data Entry	COS II, step 2	2	$20,400	$40,800
Budget Analyst ***	AA III, step 5	1	$42,372	$42,372
Expense Analysts	AA II, step 2	4	$31,644	$126,576
Accounting Clerks ***	COS II, step 6	3	$24,768	$74,304
Total		32		$1,126,612

[illegible]ly 1, 1993, through June 30, 1994
** Includes 6 "floating" attorneys, and 2 "floating" secretaries.
*** Similar to existing OJD positions.

Operating Costs

Item	Cost	Per	Reg/Sat Office Staff	Total Regnl/Satel Cost	Appellate Division Staff	Total Appellate Cost	Central Office Staff	Partial Central Cost
NLADA	$1,200	indiv. atty	285	$342,000	33	$39,600	4	$4,800
OSB - regular	$326	indiv. atty	285	$92,910	33	$10,758	4	$1,304
OCDLA - regular	$100	indiv. atty	285	$28,500	33	$3,300	4	$400
OCDLA - DP	$150	indiv. atty	285	$42,750	3	$450	1	$150
CLE	$525	indiv. atty	285	$149,625	33	$17,325	4	$2,100
CLE - DP	$150	indiv. atty	24	$3,600	3	$450	1	$150
Professional Liability Ins.	$1,100	indiv. atty.	285	$313,500	33	$36,300		
Auto travel - attys	$50	atty FTE	278.5	$13,925	33	$1,650		
Travel - inves.	$1,400	inves FTE	77	$107,800		$0		
Phone	$403	indiv.	644	$259,532	45	$18,135		
Modem phone line	$600	location	32	$19,200	1	$600		
Network Connect Cost	$450	connection	47	$21,150	2	$900	2	$900
Long Distance	$1,130	atty FTE	278.5	$314,705	33	$37,290		
Printing/off. supp.	$745	FTE	618	$460,410	45	$33,525		
Postage	$853	atty FTE	278.5	$237,561	33	$28,149		
Utilities	$280	indiv.	644	$180,320	45	$12,600		
Library	$5,000	location	32	$160,000	1	$5,000		
Subscriptions	$600	location	32	$19,200	1	$600		
Total				$2,766,688		$246,632		$9,804

Total operating costs above: $3,023,124

Appellate and Regional/Satellite Offices - Personal Computer Costs

Item	Cost	Per	Regnl/Satel Office Staff	Total Regnl/Satel Cost	Appellate Division Staff	Total Appellate Cost
Computers	$2,000	individual	644	$1,288,000	45	$90,000
Modem	$200	location	32	$6,400	1	$200
Printers	$3,000	every 5 FTE	124	$372,000	9	$27,000
Extra computer	$2,000	location	32	$64,000	1	$2,000
Paradox	$550	of. mgr., analyst	31	$17,050	1	$550
WordPerfect	$260	individual	644	$167,440	45	$11,700
Quattro	$300	office mgr, analyst	31	$9,300	1	$300
Total				$1,924,190		$131,750

Total computer costs above: $2,055,940

Appellate and Regional/Satellite Offices - Furniture/Equipment Costs

Item	Cost	Per	Regnl/Satel Office Staff	Total Regnl/Satel Cost	Appellate Division Staff	Total Appellate Cost
Typewriters	$450	location	32	$14,400	1	$450
Desks	$600	individual	644	$386,400	45	$27,000
Desk Chairs	$300	individual	644	$193,200	45	$13,500
Side Chairs	$120	two per indiv. atty	570	$68,400	66	$7,920
File cabinets	$300	individual	644	$193,200	45	$13,500
Bookcases	$300	indiv. atty	285	$85,500	33	$9,900
Reception area	$2,000	location	32	$64,000	1	$2,000
Library	$5,000	location	32	$160,000	1	$5,000
Fax	$1,500	location	32	$48,000	1	$1,500
Copier	$4,000	location	32	$128,000	1	$4,000
Large Copier	$12,000	Mult., Lane	2	$24,000	1	$12,000
Total				$1,365,100		$96,770

Total cost of furniture and equipment above: $1,461,870

Central Office Computers

Item	Cost	Per	Number	Total
Computers	$2,000	individual	32	$64,000
Mo[illegible]s	$200	estimate	3	$600
Qu[illegible]	$300	analyst, lead wkr., verif., acctg, data	24	$7,200
Paradox	$550	analyst, lead wkr., verif., acctg, data	24	$13,200
WordPerfect	$260	individual	32	$8,320
Printers	$3,000	every 5 FTE, rounded	6	$18,000
Extra computer	$2,000	location	1	$2,000
Total				$113,320

Central Office Furniture/Equipment

Item	Cost	Per	Number	Total
Typewriters	$450	location	1	$450
Desks	$600	individual	32	$19,200
Desk Chairs	$300	individual	32	$9,600
Side Chairs	$120	various	26	$3,120
File cabinets	$300	individual	32	$9,600
Bookcases	$200	individual	32	$6,400
Reception area	$2,000	location	1	$2,000
Library	$5,000	location	1	$5,000
Fax	$1,500	estimate	3	$4,500
Copier	$4,000	location	2	$8,000
Large Copier	$12,000	location	1	$12,000
Total				$79,870

Central Office Operations

Item	Cost	Per	Number	Total
Admin. Costs (non-IV)	$2,100	non-IV/ non Info. sup.	24	$50,400
Admin. Cost (IV&Info.)	$1,300	IV and Info Sys. Support	8	$10,400
U[illegible]	$310	individual	32	$9,920
Ad[illegible]. Travel (non-IV staff)	$300	non-IV/ non Info. sup.	24	$7,200
Admin. Travel (DP)	$1,800	DP resource spec.	1	$1,800
Admin. Travel (St. PD)	$1,800	State PD	1	$1,800
Admin. Travel (Div. Dir.)	$1,800	Trial & Appl. Directors	2	$3,600
Travel, floating staff	$7,000	floating attorneys and sec.	8	$56,000
Admin. Travel (IV&Info.)	$3,600	IV and Info Sys. Support	8	$28,800
Total				$169,920
Total from Previous Page				$9,804
Total, Central Operations				$179,724

Computer Network Costs/Capital

Item	Est. Cost	Per	Number	Total
State Info mgmt sys., network	$60,000	quad regions	4	$240,000
State network, cost per office	$1,500	connection	51	$76,500
Misc. cap server hook up	$60,000	statewide	1	$60,000
Local networks	$20,000	location	34	$680,000
LAN User Hard/Software	$700	individual	721	$504,700
Total				$1,561,200

Individual/Item	Area - SFs	Number	Total SF
Reception Area	280	1	280
Appellate Dir.	210	1	210
Attorneys	180	32	5,760
Analyst	100	1	100
Secretaries	80	11	880
Total		46	7,230

1. Total from Above:	7,230	Workstation Total
2. Total x 30%:	2,169	Support Total
3. 1 + 2 above	9,399	Subtotal
4. 3 above x 30%	2,820	Circulation Total
5. 1 + 2 + 4 above	12,219	Total General
6. Special Program Space	0	
7. Total General plus 6 above	12,219	Usable Space

Current rent varies from $.70 to $.95 per square foot per month.
Utilities are not included in this price.

Yearly Rent Cost: $139,297 (Using $.95 per sq. foot)

(Usable space x market rent x 12 months = yearly rent cost)

From Department of General Services Policy Manual, February 1, 1993, with some modifications.

Individual/Item	Number	Area - SF	Total SF
Reception Areas	32	280	8,960
Regional Directors	11	210	2,310
Attorneys	274	180	49,320
Info System Support	8	100	800
Off. Mgr., Analysts	31	100	3,100
VSs, investigators	110	100	11,000
Secretaries, TAs	183	80	14,640
Interp., Data Entry	27	50	1,350
	676		91,480

1. Total from Above:	91,480	Workstation Total
2. Total x 30%:	27,444	Support Total
3. 1 + 2 above	118,924	Subtotal
4. 3 above x 30%	35,677	Circulation Total
5. 1 + 2 + 4 above	154,601	Total General
6. Special Program Space	0	
7. Total General plus 6 above	154,601	Usable Space

Current rent varies from $.70 to $.95 per square foot per month.
Utilities are not included in this price.

Yearly Rent Cost: $1,762,451 (Using $.95 per sq. foot)

(Usable space x market rent x 12 months = yearly rent cost)

From Department of General Services Policy Manual, February 1, 1993, with some modifications.

Individual/Item	Number	Area - SF	Position SF
Reception Area	1	280	280
State Public Defender	1	280	280
Trial Director	1	280	280
DP Res., Leg. Analyst	2	180	360
Analysts, Lead Wkr.	13	100	1,300
IV, Info. Systems	8	100	800
Sec., Acct. Clerks	5	80	400
Data Entry	2	50	100
Total	33		3,800

1. Total from Above:	3,800	Workstation Total
2. Total x 30%:	1,140	Support Total
3. 1 + 2 above	4,940	Subtotal
4. 3 above x 30%	1,482	Circulation Total
5. 1 + 2 + 4 above	6,422	Total General
6. Special Program Space	0	
7. Total General plus 6 above	6,422	Usable Space

Current rent varies from $.70 to $.95 per square foot per month.
Utilities are not included in this price.

Yearly Rent Cost: $73,211 (Using $.95 per sq. foot)

(Usable space x market rent x 12 months = yearly rent cost)

From Department of General Services Policy Manual, February 1, 1993, with some modifications.

Percent	Cases	Lead Attorneys	Secretarial	Trial Asst	Investigator	Total
At 100%	40	20	20	10	20	70
At 60%	24	12	12	6	12	42

FTEs equals number of positions.

Included in staff in addition to the below is: Appellate Director

Cases		Felony Attys @ 51	Felony Attys @ 51 rounded	Misd & Othr Attys @ 72	Misd & Othr Attys @ 72 rounded, less field attys	Field Attys	Sec 1:3 Atty	Total Staff
Felony	711	13.94	14				5	
Misd & Othr	1,408			19.56	18	2	6	
Total	2,119	13.94	14	19.56	18	2	11	45
At 90%	1,907	12.55	13	17.60	16	2	10	41

Cases		Attys @ 1.5	Attys @ 1.5 rounded				Sec 1:3 Atty	Total Staff
DP	6	4	4				1	5
At 90%	4	3	3				1	4

Caseload estimates (do not include PSRB appeals):

Appeal Type	Biennium	Annual
Felony - Full*	1,422	711
Subtotal	**1,422**	**711**
Felony - GP, NC, PV*	1,206	603
Misdemeanor - Full*	344	172
Misd. - GP, NC, PV*	222	111
Juvenile**	90	45
Civil Commitment**	48	24
Habeas Corpus**	202	101
Post Conviction**	548	274
Parole*	156	78
Subtotal	**2,816**	**1,408**
Total	**4,238**	**2,119**

* From State Public Defender 95-97 budget projection and OJD projection of conflict cases.
** from FY 1994 actual caseload statistics.

State Agency Public Defender System
Regional/Satellite Offices
Criminal Cases Only

Regional/Satellite Office	Cases	Dir 125 @	Office Mgr	Admin. Analyst	Data Entry	Atty FTE 300 @ *	Atty FTE 300 @, rounded	Appellate Attorney	Interprt.	Sec 1:3 Atty	TA 1:4 Atty	Inves 1:4 Atty	IV	Tot with atty caseld at 300
Mult	25,168	1	1	2	2	83.48	83.0	1	2.0	28.0	21.0	21.0	5.0	167.0
At 60%	15,101	1	1	2	2	50.09	50.0	1	2.0	17.0	13.0	13.0	5.0	107.0
Wash	5,821	1	1	1	1	18.99	19.0		1.0	6.0	5.0	5.0	2.0	42.0
Col	486					1.62	2.0			0.5	0.5	1.0	0.5	4.5
Subtotal	6,307	1	1	1	1	20.61	21.0	0	1.0	6.5	5.5	6.0	2.5	46.5
Linc	1,891	1	1	1	1	5.89	6.0			2.0	2.0	1.0	1.0	16.0
Clat	859			1		2.86	3.0			1.0	1.0	1.0	1.0	8.0
Til	467					1.56	2.0			0.5	0.5	0.5		3.5
Subtotal	3,217	1	1	2	1	10.31	11.0	0	0.0	3.5	3.5	2.5	2.0	27.5
Clack	4,216	1	1	1	1	13.64	14.0			5.0	3.0	4.0	2.0	32.0
Hood R	643					2.14	2.0			1.0	0.5	1.0		4.5
Wasco	856		1			2.85	3.0			1.0	1.0	1.0	1.0	8.0
Subtotal	5,715	1	2	1	1	18.63	19.0	0	0.0	7.0	4.5	6.0	3.0	44.5
Umatilla	2,121	1	1	1	1	6.65	7.0	1		3.0	2.0	2.0	1.0	20.0
Morr						0.00	0.0			0.0	0.0	0.0		0.0
Sher	62					0.21	0.5			0.5	0.0	0.5		1.5
Gill						0.00	0.0			0.0	0.0	0.0		0.0
Wheel						0.00	0.0			0.0	0.0	0.0		0.0
Union	453					1.51	1.5			1.0	0.5	0.5	0.5	4.0
Wall						0.00	0.0			0.0	0.0	0.0		0.0
Subtotal	2,636	1	1	1	1	8.37	9.0	1	0.0	4.5	2.5	3.0	1.5	25.5
Mar	5,463	1	1	1	1	18.00	18.0		1.0	6.0	5.0	5.0	2.0	41.0
Polk	1,441					4.80	5.0			2.0	1.0	2.0	1.0	11.0
Yam	1,524			1	1	5.08	5.0		0.5	2.0	1.0	2.0	0.5	13.0
Subtotal	8,428	1	1	2	2	27.88	28.0	0	1.5	10.0	7.0	9.0	3.5	65.0
Coos	2,470	1	1	1	1	7.82	8.0			3.0	2.0	2.0	1.0	20.0
Cur	568					1.89	2.0			1.0	0.5	0.5		4.0
Doug	2,524		1	1	1	8.41	8.0		1.0	3.0	2.0	2.0	1.0	20.0
Subtotal	5,562	1	2	2	2	18.12	18.0	0	1.0	7.0	4.5	4.5	2.0	44.0

Regional/Satellite Office	Cases	Dir 125 @	Office Mgr	Admin. Analyst	Data Entry	Atty FTE 300 @	Atty FTE 300 @, rounded	Appellate Attorney	Interprt.	Sec 1:3 Atty	TA 1:4 Atty	Inves 1:4 Atty	IV	Tot with atty caseld at 300
Jac	3,086	1	1	1	1	9.87	10.0		1.0	3.0	3.0	3.0	1.5	25.5
Jos	3,042			1	0.5	10.14	10.0			3.0	3.0	3.0	1.0	21.5
Klam	3,103			1	0.5	10.34	9.0		0.5	3.0	2.0	2.0	1.0	19.0
Lake						0.00	1.0			0.5	0.0	0.5		2.0
Subtotal	9,231	1	1	3	2	30.35	30.0	0	1.5	9.5	8.0	8.5	3.5	68.0
Mal	1,556	1	1	1	1	4.77	5.0			2.0	1.0	1.0	1.0	14.0
Har	74					0.25	0.5			0.5	0.0	0.0		1.0
Bak	239					0.80	1.0			0.5	0.0	0.5	0.5	2.5
Grant	172					0.57	0.5			0.5	0.0	0.0		1.0
Subtotal	2,041	1	1	1	1	6.39	7.0	0	0.0	3.5	1.0	1.5	1.5	18.5
Lane	7,414	1	1	1	1	24.30	24.0		1.0	8.0	6.0	6.0	2.0	51.0
Bent	1,105					3.68	4.0			1.0	1.0	1.0		7.0
Linn	2,418			1	1	8.06	8.0			2.5	2.0	2.0	1.0	17.5
Subtotal	10,937	1	1	2	2	36.04	36.0	0	1.0	11.5	9.0	9.0	3.0	75.5
Desch	3,271	1	1	1	1	10.49	10.0		0.5	3.0	3.0	3.0	1.0	24.5
Crk	667					2.22	2.0			1.0	1.0	1.0		5.0
Jef	857					2.86	3.0		0.5	1.0	1.0	1.0		6.5
Subtotal	4,795	1	1	1	1	15.57	15.0	0	1.0	5.0	5.0	5.0	1.0	36.0
TOTAL (w/o Mult.)	58,869	10	12	16	14	192.27	194.0	1.0	7.0	68.0	50.5	55.0	23.5	451.0
At 70%**	41,208	10	12	16	14	134.59	135.8	1	4.9	48.0	35.0	39.0	23.5	339.2
At 75%**	44,152	10	12	16	14	144.20	145.5	1	5.3	51.0	38.0	41.0	23.5	357.3
At 80%**	47,095	10	12	16	14	153.82	155.0	1	6.0	54.0	40.0	44.0	23.5	375.5
Mult at 60%**	15,101	1	1	2	2	50.09	50.0	1	2.0	17.0	13.0	13.0	5.0	107.0
Total at 80% w/Mult.	62,196	11.0	13.0	18.0	16.0	203.9	205.0	2	8.0	71.0	53.0	57.0	28.5	482.5

* Caseload minus 125 cases assigned to the Regional Director, divided by 300.

** No decrease in administrative staff.

Note: Above caseload does not include PSRB hearings.

Number of locations: 32

Estimated number of individuals (not FTE, but persons) for 60% Mult. and 80% rest of the state:

Attorney:	207
Appl. Attorney:	2
Interpreter:	11
Secretarial:	75
Trial assistant:	55
Investigator:	59
Verifier:	31
Admin. Staff:	58
Network support:	3
PC support:	5
"Floating" attorney positions:	6
"Floating" secretarial positions:	2
Total:	514

Regl./Sat. Office	Cases	Atty FTE 350 @	Atty FTE 350 @, rounded	Sec 1:3 Atty	TA 1:4 Atty	Inves 1:4 Atty	Tot with atty caseld at 350
Mult	537	1.53	2.0	1.0	1.0	1.0	5.0
Wash	99	0.28	0.5	0.0	0.0	0.0	
Col	17	0.05	0.0	0.0	0.0	0.0	
Subtotal	116	0.33	0.5	0.0	0.0	0.0	0.5
Linc	13	0.04	0.0	0.0	0.0	0.0	
Clat	37	0.11	0.0	0.0	0.0	0.0	
Til	29	0.08		0.0	0.0	0.0	
Subtotal	79	0.23	0.0	0.0	0.0	0.0	0.0
Clack	202	0.58	0.5	0.0	0.0	0.0	
Hood R	9	0.03		0.0	0.0	0.0	
Wasco	20	0.06	0.0	0.0	0.0	0.0	
Subtotal	231	0.66	0.5	0.0	0.0	0.0	0.5
Umatil	44	0.13	0.0	0.0	0.0	0.0	
Morr		0.00		0.0	0.0	0.0	
Sher	2	0.01		0.0	0.0	0.0	
Gill		0.00		0.0	0.0	0.0	
Wheel		0.00		0.0	0.0	0.0	
Union	13	0.04	0.0	0.0	0.0	0.0	
Wall		0.00		0.0	0.0	0.0	
Subtotal	59	0.17	0.0	0.0	0.0	0.0	0.0
Mar	383	1.09	1.0	1.0	0.0	0.0	
Polk	15	0.04	0.0	0.0	0.0	0.0	
Yam	10	0.03		0.0	0.0	0.0	
Subtotal	408	1.17	1.0	1.0	0.0	0.0	2.0
Coos	27	0.08	0.0	0.0	0.0	0.0	
Cur	8	0.02	0.0	0.0	0.0	0.0	
Doug	52	0.15	0.5	0.5	0.0	0.0	
Subtotal	87	0.25	0.5	0.5	0.0	0.0	1.0
Jac	100	0.29	0.5	0.5	0.0	0.0	
Jos	42	0.12	0.0	0.0	0.0	0.0	
Klam	25	0.07	0.0	0.0	0.0	0.0	
Lake		0.00		0.0	0.0	0.0	
Subtotal	167	0.48	0.5	0.5	0.0	0.0	1.0
Mal	5	0.01	0.0	0.0	0.0	0.0	
Har	1	0.00		0.0	0.0	0.0	
Bak	0	0.00	0.0	0.0	0.0	0.0	
Grant	4	0.01		0.0	0.0	0.0	
Subtotal	10	0.03	0.0	0.0	0.0	0.0	0.0
Lane	43	0.12	0.5	0.0	0.0	0.0	
Bent	28	0.08	0.0	0.0	0.0	0.0	
Linn	40	0.11	0.0	0.0	0.0	0.0	
Subtotal	111	0.32	0.5	0.0	0.0	0.0	0.5
Desch	14	0.04	0.0	0.0	0.0	0.0	
Crk	0	0.00		0.0	0.0	0.0	
Jef	0	0.00		0.0	0.0	0.0	
Subtotal	14	0.04	0.0	0.0	0.0	0.0	0.0
TOTAL	1,819	5.20	5.5	3.0	1.0	1.0	10.5
At 70%	1,273	3.64	4.0	2.0	1.0	1.0	8.0
At 80%	1,455	4.16	4.0	2.0	1.0	1.0	8.0
At 90%	1,637	4.68	5.0	2.0	1.0	1.0	9.0

Estimated number of individuals (not FTE) at 90%:

Attorney:	7
Secretary:	4
Trial Assistant:	1
Investigator:	1
Total:	13

Note: Above caseload does not include PSRB hearings.

State Agency Public Defender System
Regional/Satellite Offices - Juvenile Cases

Regl./Sat. Office	Cases	Atty FTE 350 @	Atty FTE 350 @, rounded	Sec 1:3 Atty	TA 1:4 Atty	Inves 1:4 Atty	Tot with atty caseld at 350
Mult	10,121	28.92	29.0	10.0	10.0	6.0	55.0
Wash	1,560	4.46	4.0	1.0	1.0	1.0	
Col	113	0.32	0.5	0.5	0.0	0.0	
Subtotal	1,673	4.78	4.5	1.5	1.0	1.0	8.0
Linc	142	0.41	0.5	0.0	0.0	0.0	
Clat	81	0.23	0.0	0.0	0.0	0.0	
Til	18	0.05	0.0	0.0	0.0	0.0	
Subtotal	241	0.69	0.5	0.0	0.0	0.0	0.5
Clack	1,280	3.66	4.0	1.0	1.0	1.0	
Hood R	51	0.15	0.0	0.0	0.0	0.0	
Wasco	239	0.68	1.0	0.5	0.0	0.0	
Subtotal	1,570	4.49	5.0	1.5	1.0	1.0	8.5
Umatil	263	0.75	1.0	0.5	0.0	0.0	
Morr		0.00	0.0	0.0	0.0	0.0	
Sher	3	0.01	0.0	0.0	0.0	0.0	
Gill		0.00	0.0	0.0	0.0	0.0	
Whel		0.00	0.0	0.0	0.0	0.0	
Union	95	0.27	0.0	0.0	0.0	0.0	
Wall		0.00	0.0	0.0	0.0	0.0	
Subtotal	361	1.03	1.0	0.5	0.0	0.0	1.5
Mar	1,040	2.97	3.0	1.0	1.0	1.0	
Polk	121	0.35	0.5	0.5	0.0	0.0	
Yam	32	0.09	0.0	0.0	0.0	0.0	
Subtotal	1,193	3.41	3.5	1.5	1.0	1.0	7.0
Coos	403	1.15	1.0	0.5	0.0	0.0	
Cur	60	0.17	0.0	0.0	0.0	0.0	
Doug	178	0.51	1.0	0.5	0.0	0.0	
Subtotal	641	1.83	2.0	1.0	0.0	0.0	3.0
Jac	199	0.57	0.5	0.5	0.0	0.0	
Jos	203	0.58	0.5	0.5	0.0	0.0	
Klam	367	1.05	0.5	0.5	0.0	0.0	
Lake		0.00	0.5	0.0	0.0	0.0	
Subtotal	769	2.20	2.0	1.5	0.0	0.0	3.5
Mal	133	0.38	0.5	0.5	0.0	0.0	
Har	0	0.00	0.0	0.0	0.0	0.0	
Bak	200	0.57	0.5	0.5	0.0	0.0	
Grant	32	0.09	0.0	0.0	0.0	0.0	
Subtotal	365	1.04	1.0	1.0	0.0	0.0	2.0
Lane	3,397	9.71	10.0	3.0	3.0	2.0	
Bent	314	0.90	1.0	0.5	0.0	0.0	
Linn	405	1.16	1.0	0.5	0.0	0.0	
Subtotal	4,116	11.76	12.0	4.0	3.0	2.0	21.0
Desch	759	2.17	2.0	1.0	1.0	0.0	
Crk	69	0.20	0.0	0.0	0.0	0.0	
Jef	1	0.00	0.0	0.0	0.0	0.0	
Subtotal	829	2.37	2.0	1.0	1.0	0.0	4.0
TOTAL	21,879	62.51	62.5	23.5	17.0	11.0	114.0
At 70%	15,315	43.76	43.8	16.0	12.0	8.0	79.8
At 60%	13,127	37.51	37.5	14.0	10.0	7.0	68.5

Estimated number of individuals (not FTE) at 60%:

Attorney:	40
Secretary:	18
Trial Assistant:	10
Investigator:	7
Total:	75

FINAL

Report

of the

Oregon State Bar Indigent Defense Task Force

July, 1994

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I. MEMBERSHIP OF THE OREGON STATE BAR INDIGENT DEFENSE TASK FORCE

Co-Chairs:

Jane Aiken
Salem

James Minturn
Prineville

Members:

David Brewer
Eugene

James Brown
Salem

Ann Christian
Salem

Honorable W. Michael Gillette
Salem

David Hittle
Salem

Daniel O'Leary
Portland

David Orf
Medford

John Potter
Eugene

Kristine Olson Rogers
Portland

Michael Schrunk
Portland

Susan Svetkey/Julie McFarlane
Portland

Thomas Tongue
Portland

OSB Board of Bar Governors' Liaison & Staff:

Janet Hoffman, Board of Bar Governors

Susan Cournoyer

Bob Oleson

II. PREAMBLE -- THE TASK FORCE AND THE TASK

Societies have achieved internal order and the control of serious anti-social behavior in many ways. Civilized societies of the present day do so, in substantial part, by means of criminal, juvenile and involuntary commitment laws -- codified societal rules, procedures for inquisition or accusation concerning violations of those rules, fact-finding procedures to determine responsibility for violations, and graded punishment or other dispositions that are generally proportional to the offense, violation or other conduct that is of concern (for example, mental illness or child neglect).

In the United States and, more particularly, in Oregon, the criminal, juvenile and civil commitment laws are enforced through procedures known collectively and colloquially as the "due process of law." A principal component of "due process" is the right of anyone accused of a crime or whose liberty or other substantive interest is threatened by the government to be represented by counsel -- and, if indigent, the right to be represented by counsel at state expense. This right is guaranteed by Oregon's Constitution, the federal constitution, and/or statute.

A major challenge to any society that values the right to counsel lies in providing a mechanism by which all persons, regardless of wealth or social position, will have adequate counsel. Oregon faces that challenge. Constitutional rules require that counsel be available equally to all -- but, even without constitutional imperative, simple fairness would dictate a similar rule. Because many accused of crime, mental illness or being within the jurisdiction of juvenile courts are indigent, it has become necessary to construct a governmental system under which counsel is provided for those indigent persons. That system is expensive, and becomes more so every year.

Paying for the cost of indigent defense is an obligation of the state that charges persons with crimes, seeks to affect parental rights, or seeks to involuntarily commit individuals. That obligation has never been a popular one. Because it is not popular, the effort to create a permanent and reliable system for providing indigent defense services has never been made in any truly systematic way. Instead, funding of indigent defense has been grudgingly doled out and loudly condemned. Today, rising costs of providing indigent defense services, coupled with new and extreme limitations on the availability of funds to the legislature, will no longer permit a piecemeal, insular, and ad hoc approach to the problem.

Recognizing that a crisis in the indigent defense system was likely, the Oregon State Bar (OSB) established the Indigent Defense Task Force. The OSB charged the Task Force to investigate the nature and extent of the indigent defense function, to examine critically the ways in which the function is performed and funded, and to make concrete recommendations for reform of the system. (The "charge" of the Task Force is set out, in full, in Appendix #1.) The Task Force's Findings and Recommendations are limited to the trial level indigent defense system.

The Task Force has met 15 times, interviewed a number of witnesses, reviewed a large volume of statistical and textual material, and has drawn upon the collective experience and expertise of its membership to present the following report, findings, and series of recommendations. This report is written with primary emphasis on the findings and recommendations resulting from the Task Force's work over the past one and one-half years. If the information the Task Force reviewed were included, in detail, within this report, particularly in the areas of right to counsel at state expense and indigent defense financial and caseload data, the reader likely would be overwhelmed with the amount of information available. Appendix #2 is a summary compilation of the persons who testified before the Task Force and the materials/reports reviewed by the Task Force. The Task Force understands that the Judicial Department will be submitting detailed reports to the November 1994 legislative Emergency Board addressing the right to counsel at state expense and administrative structures for indigent defense services. In addition, the detailed fiscal and caseload information available on indigent defense services will no doubt be submitted and reviewed thoroughly during budget hearings next legislative session.

III. HISTORY OF INDIGENT DEFENSE SERVICES IN OREGON STATE COURTS

"The court shall assign counsel
to defend the prisoner,
in case he cannot procure counsel himself"

Bluebook (circa. 1849, pre-Oregon statehood)

The notion of government being responsible for the provision of counsel to assist indigent persons whom the government seeks to prosecute criminally predates Oregon's statehood. Court decisions holding that such provision and the attending costs thereof are mandated as a matter of federal and state constitutional law are much more recent. Mandates regarding the provision of counsel at state expense for non-criminal matters, such as juvenile dependency, termination of parental rights, and involuntary commitment proceedings, are the result of decisions made by courts and legislators in recent history, as well.

Since 1935, Oregon law has required that courts provide for defense counsel to anyone charged with a felony and financially unable to retain an attorney. Since the mid-1960s, the types of court and other proceedings in which an indigent party is entitled to counsel at government's expense have been recognized by courts and by legislative bodies to be broader than criminal felony prosecutions. (For example, right to counsel for persons facing involuntary commitment was recognized in Oregon in 1972.) Provision for payment of counsel came much later. Efforts to provide for a system of uniform, competent indigent defense representation and compensation continues today.

Prior to January 1, 1983, counties and cities in Oregon were responsible for funding the cost of almost all indigent defense services. State general fund monies were expended only to fund the State Public Defender ("SPD") (which handled criminal and post-conviction relief appeals), established in 1967. Attorneys generally provided legal assistance to indigents on a pro bono basis. As the number of people and types of proceedings for which indigent defense representation was necessary increased, pro bono services proved insufficient and local governments began to encounter the funding issues that continue today with respect to indigent defense services. In 1969, a legislative bill to establish a state public defender for trial level representation failed, reportedly because of an inability to establish the potential cost thereof. That was the same year that the Oregon Supreme Court held that there was a constitutional right to counsel at government expense for municipal minor misdemeanor charges, where incarceration was imposed.

In the early 1970s, the first public defender organization in the nation was established in Portland. Established pursuant to a grant obtained by a local prosecutor, Metropolitan Public Defender Services, Inc., subsequently provided indigent defense services pursuant to contracts with Multnomah County. Through the 1970s, indigent defense services generally were provided on a case-by-case basis by attorneys compensated on an hourly basis.

In 1977 and 1979, legislative efforts were undertaken to shift the responsibility for indigent defense from the counties to the state. These efforts were unsuccessful. Testimony from hearings held on the issue is illustrative of the counties' and the state's primary concern -- the escalating cost of providing indigent defense services. For example, there was testimony that the cost of indigent defense statewide was increasing 24.9% per year. Examples of severe increases in some counties (where murder cases in particular could severely impact county budgets) were cited in support of the state undertaking responsibility; e.g., Malheur County experienced a 137 percent increase in

indigent defense costs from 1972 to 1976. The Association of Oregon Counties' number one priority for state assumption of the court system was the assumption of indigent defense costs from the counties.

In 1981, the legislative effort to shift the administrative and fiscal responsibility to the state was successful. The legislation was effective January 1, 1983. In 1980, State Court Finance Action Committee reportedly compiled county expenditures for indigent defense as follows: 1978-79 $6.5 million; 1979-80 $8.9 million (37% increase). Responsibility for indigent defense administration was placed with the Chief Justice and State Court Administrator (SCA).

$31,817,426 was expended for indigent defense services for the first full biennium of state responsibility (1983-85). The death penalty was reinstated by voters in November of 1984, effective December 6, 1984. The 1985 Legislative Assembly passed legislation shifting the responsibility for administering indigent defense from the Chief Justice and SCA to an independent State Indigent Defense Board (SIDB). The SIDB was comprised of voluntary board members and was served by a full-time, paid administrator and a half-time staff person.

Indigent defense expenditures for the 1985-87 biennium totaled $46,452,692, of which $1.8 million represented the beginning costs of representation in death penalty cases. As early as six months into the 1985-87 biennium, the SIDB projected that biennial expenditures would likely exceed the original appropriation ($31.5 million) by $4-8 million. A month later, the projected deficit increased to $6-10 million. By April of 1986, the projected shortfall was over $11 million, despite an Emergency Board appropriation of $1.3 million for death penalty cases. By September 1986, as a result of a deficit reduction management program (including extensive pro bono services), almost $3.5 million had been "saved". Despite the containment, a projected deficit of $8-10 million remained. Ultimately, the Emergency Board provided additional funding for the remainder of the biennium.

The 1987 Legislative Assembly passed legislation reversing its previous decision to shift responsibility for indigent defense to the SIDB. The Chief Justice and the SCA resumed and continue to have responsibility for the "State Indigent Defense Program". In addition to resuming responsibility, the SCA was directed by statute and budget note to establish numerous data reporting systems, assume additional responsibilities, explore numerous alternative methods of providing indigent defense, and report regularly to the Emergency Board. By budget notes, the 1987 Legislative Assembly "strongly suggested" that all District Attorneys review one county's model of reducing some Driving While Suspended crimes to violations and implement the existing statutory diversion alternative to prosecution. The latter "suggestion" was chosen over the option of reconsidering a bill that would have transferred diversion authority from the prosecution to the courts.

Indigent defense expenditures for the 1987-89 biennium totaled $54,521,870, of which almost $3.4 million was for death penalty representation. In addition to preparing reports to the Emergency Board and otherwise complying with the legislative directives noted above, the SCA undertook a pilot project to determine whether providing court employees to assist judges in determining whether a person was indigent would be cost effective.

Indigent defense expenditures for the 1989-91 biennium totaled $66,425,313, of which $5 million was for death penalty representation. The 1989 Legislative Assembly authorized expansion of the successful indigence verification pilot project to a statewide basis. The Emergency Board authorized a staggered and incremental increase in the hourly rate paid non-contract, indigent defense lawyers and assigned additional funds to offset the unanticipated costs of Penry death sentence resentencings and State Public Defender appellate overload.

Indigent defense expenditures for the 1991-93 biennium totaled almost $81 million, of which almost $6 million was for death penalty representation. The total amount also included approximately $5 million which allowed the hourly rate paid to non-contract attorneys to be $40 for non-death penalty representation and $55 for death penalty representation.

Since the late 1970s, Oregon's indigent defense system appears to be one of the most studied indigent defense systems in the nation. Also, Oregon's indigent defense system appears to be the most studied component of Oregon's criminal, juvenile and civil commitment justice systems. The following is only a summary listing of the studies, committees, and task forces that have addressed or continue to review Oregon's indigent defense system.

Pre-1983 -- Prior to State Takeover from Counties

OSB Committee on the Defense of the Indigent Accused. (Existed until 1992, when OSB Indigent Defense Task Force was created.)

Various county level reviews, conducted with funding and assistance by the Law Enforcement Assistance Administration and National Legal Aid and Defenders Association, primarily addressing cost and quality of service issues.

1977-81: various interim committees specifically addressing state takeover of indigent defense; for example, Joint Judiciary Interim Judicial Administration Committee (1977-78 interim).

Post-1983 -- After State Takeover from Counties

1983-85: Interim House and Senate Judiciary, Representatives Mason and Springer.

1985-87: Representative Hooley Group (time period of State Indigent Defense Board (SIDB), indigent defense fiscal crisis in the spring of 1985, and legislative transfer of responsibility from SIDB back to SCA and Chief Justice.

1987-89: Representatives Burton and Bauman Group

Spangenberg (national expert on indigent defense) Report -- "Oregon's Adult Criminal Indigent Defense System" -- commissioned by SCA and legislature.

EMT Report (Bureau of Justice Assistance Technical Assistance Report): "The Potential Impact of Prosecutorial and Court Practices and Procedures on Indigent Defense Costs in Oregon: A Preliminary Assessment."

Portland City Club Report on Indigent Defense.

1989-91: SJI Spangenberg Legislative Task Forces on Indigent Defense in Oregon and Washington.

Chief Justice's Indigent Defense Committee.

1991-93: Interim Senate Judiciary Subcommittees on Indigent Defense. Three subcommittees: Juvenile/Family Law; Technology; Caseload Management.

Ongoing Committees/Task Forces/Reviews

Chief Justice's Indigent Defense Committee.

Interim House Judiciary -- primarily, administrative placement of indigent defense.

OSB Indigent Defense Task Force.

Oregon Criminal Justice Council -- recommendations regarding administration and provision of indigent defense services, required by budget note.

Secretary of State, Audits Division -- performance audit.

Criminal Justice Advisory Committees (CJACs) -- mandated by statute last legislative session. Each judicial district must establish a CJAC, with representatives of the various criminal justice system components serving as members. CJACs are advisory and educational only. Members must provide budget and caseload information, for informational purposes of other system components.

Most of the committee/review work performed prior to the recent committees focused primarily on decriminalization methods of reducing or containing indigent defense costs. They focused on indigent defense primarily, district attorneys to a certain degree and generally, did not consider any other players or factors (for example, increase in dysfunctional families) in the criminal, juvenile, and involuntary commitment systems.

The current committee/review work primarily is focusing upon the follow issues:

1. the placement and structure of Oregon's indigent defense system;

2. quality and efficiency issues associated with the current indigent defense system; and

3. the interrelatedness of all components of the criminal, juvenile and involuntary commitment justice systems in which indigent defense is provided; i.e., expansion of the focus from prior concentration only on indigent defense, or only on district attorneys, recognizing that neither component necessarily or intentionally works toward increasing caseloads, the seriousness of caseloads, or costs.

IV. THE RIGHT TO COUNSEL AT STATE EXPENSE IN OREGON

> "[W]here both the State and the defendant share an interest in fair and accurate adjudication of criminal cases, 'the State's interest in its fisc must yield.'" Gideon.

Attorneys provide legal services at state expense in over 100,000 cases per year in Oregon. The majority of indigent defense cases at both the trial and appellate levels are criminal in nature. However, non-criminal indigent defense cases (juvenile, civil commitment, probation violation, post-conviction relief and habeas corpus) accounted for approximately forty-two percent of the trial level indigent defense caseload in 1993.

The types of cases, instances, or court proceedings where indigent persons are entitled to state-paid counsel are as follows:

1. Death penalty and other criminal (felony and misdemeanor) prosecutions.
2. "Critical stages" of a criminal investigation.
3. Material witness proceedings where compulsion to testify raises issue of self-incrimination.
4. Probation violation proceedings.
5. DUII diversion show cause proceedings.
6. Some parole violation proceedings.
7. Extradition and contested detainer proceedings.
8. Most contempt proceedings.
9. Post-conviction relief proceedings.
10. Habeas Corpus proceedings.
11. Involuntary commitment and recommitment proceedings for the mentally ill and mentally retarded.
12. Proceedings to determine a person's ability to consent to sterilization.
13. Psychiatric Security Review Board proceedings.
14. Juvenile court proceedings:
    a. Delinquency.
    b. Probation violation proceedings.
    c. Dependency.
    d. Review hearings.
    e. Termination of Parental Rights.
15. Contested adoption proceedings.
16. Contested permanent guardianship proceedings.
17. Appeals from all of the above.

Unlike most other state expenditures, appropriations for the defense of the indigent accused and others entitled to state-paid counsel are not discretionary. Legal representation of criminal defendants facing incarceration is mandated by the Sixth Amendment to the U.S. Constitution. Scott v. Illinois, 440 U.S. 367 (1979). Because of the recognition that attorney representation renders trials more fundamentally fair (and efficient), some state constitutions and statutes (as well

as federal statutes) provide for the appointment of counsel at any time that there is the possibility of incarceration.

Oregon requires appointment of counsel in all "criminal" matters by statute (ORS 135.050(4)(a) and by constitution (Article I, Section 11); i.e., no requirement of "actual incarceration" is required. There has been some consideration in Oregon of amending these provisions to mirror the federal constitutional standard, in order to reduce indigent defense costs. In the late 1980's, New Hampshire considered setting up a system to identify at the beginning of the prosecution (the point at which counsel is appointed) criminal defendants who would not (based on the seriousness of the charge and criminal history) be subject to actual incarceration, even though the offense they were charged with provided for the possibility of incarceration. New Hampshire determined the likely additional costs associated with implementing such an early identification program would more than offset the potential savings in indigent defense costs. The Task Force has not attempted to recompute the variables in such an equation for Oregon.

The standards of the American Bar Association further allow pre-arraignment assignment of defense services, because such an arrangement expedites proceedings. While cost-conscious legislators and administrators have been very concerned with the costs associated with implementation of right to counsel, there is not much room to maneuver around the constitutional mandate. Gideon's Trumpet, which details the travesties when people could be imprisoned or executed without lawyers to plead their cases, should be required reading in all secondary schools in an effort to build an empathetic and enlightened public that understands the need for indigent defense appropriations.

V. THE INDIGENT DEFENSE PROGRAM IN OREGON TODAY

A. Overview.

1. The "State Indigent Defense Program" (ORS 151.430, et. seq.).

The State Court Administrator (SCA), the Chief Justice of the Oregon Supreme Court and the Indigent Defense Account ("State Indigent Defense Program", ORS 151.430 et. seq.) are responsible for the provision and payment of counsel and defense services to all indigent persons for whom there is a statutory or constitutional right to such services. The only exception is those appeals for which the State Public Defender (SPD) is responsible. (See subsection "B", below.)

The "State Indigent Defense Program" is administered by the SCA, with the assistance of the Indigent Defense Services Division (IDSD), judges and court staff. IDSD is comprised of a director and six support staff positions. The Chief Justice, SCA and IDSD are responsible for the promulgation of policies and procedures (guidelines) relating to the determination of indigence by judges, qualification standards for indigent defense providers, payment of indigent defense services, and the negotiation of contracts for the provision of indigent defense services. There are eighty-four contracts in place for delivery of indigent defense services.

The 1993-95 appropriation to the Indigent Defense Account (IDA) is $80,965,342, plus a $6.0 million reserve to the legislative emergency board. The original reserve was $6.9 million; however, the September 1993 Emergency Board transferred $.9 million to cover additional 1991-93 IDA costs. The total amount expended for 1991-93 was $80,871,311. Absent the $6.0 million reserve, the 1993-95 appropriation to the Indigent Defense Account is essentially the same as that expended for 1991-93.

The SCA and IDSD also administer a statewide indigence verification program. Twenty-six verification specialists screen and verify the financial status of persons applying to the court for appointment of counsel at state expense. For the last biennium, the indigence verification program was directly responsible for avoiding over $3 million in indigent defense costs.

2. State Public Defender.

ORS 151.210 et. seq. establishes a Public Defender Committee and Public Defender (referred hereafter as the State Public Defender (SPD)). The SPD is legislatively assigned within the judicial branch of government, but is independent of the Chief Justice and the SCA with respect to administration and budget. The only direct tie between the SPD and OJD is that the Supreme Court is responsible for appointing members of the Public Defender Committee. Other than that responsibility, the OJD has no budgetary or administrative control over the SPD.

The SPD is completely independent of the "State Indigent Defense Program", for which the SCA is responsible and for which funding is through the Indigent Defense Account. However, because the SPD represents only persons who are indigent and who are entitled to appointed counsel at state expense, the SPD is, in fact, a part of Oregon's "indigent defense system". In addition, to the extent the SPD is unable to provide services as listed below, those services become the responsibility of the SCA and the Indigent Defense Account. Finally, the cost of transcripts for SPD appeals are paid from the Indigent Defense Account. The SPD generally provides representation to persons who are determined indigent in criminal appeals, probation violation appeals, and parole violation appeals. The SPD consists of the Public Defender, 18 staff attorneys and 11 support staff, all of whom are state employees. The 1993-95 projected caseload for the SPD is six death sentence appeals and approximately 3,500 criminal, probation violation, or parole violation appeals. The 1993-95 SPD appropriation is $3,632,860.

B. Determination of Indigence.

Trial level judges ultimately are responsible for determining whether or not a person, subject to one of the case types for which there is a right to state-paid counsel, is "indigent", i.e., eligible for SPD representation or representation payable from the Indigent Defense Account. The only exception to this is that the Oregon Supreme Court determines indigency for purposes of death sentence appeals.

The Oregon statutory standard for determining indigence mirrors that established by the U.S. Supreme Court in Ake v. Oklahoma, 470 S. Ct. 68 (1985). Specifically, " ... a person is indigent if the person is determined to be financially unable to retain adequate counsel without substantial hardship in providing basic economic necessities to the person or the person's dependent family." ORS 135.055(1)(d) and 151.485(1).

The statutory standard is applied to individual requests for appointed counsel as follows. The applicant is required to provide a sworn financial statement, listing specific information regarding income, assets, debts and dependents. Federal Food Stamp guidelines serve as the first determinant of eligibility. If the applicant qualifies for food stamps, the applicant is presumed to be indigent. If an applicant does not qualify for food stamps, that person qualifies for state-paid counsel only if his/her (and generally spouses') income and liquid assets are determined not sufficient to reasonably hire an attorney on the relevant type of case. The guidelines used for this latter determinant are "retainer" guidelines and are

established by the Chief Justice. For example, the current guideline amount for the cost of retaining an attorney on a DUII case is $500.

Verification specialists (court employees) located throughout the state are responsible for obtaining, screening, and verifying the financial background of persons applying to the court for appointed counsel, and for making recommendations to judges whether or not counsel should be appointed.

C. Delivery System for Attorney Indigent Defense Services (non-SPD).

While the SPD is state employee based, all other indigent defense services are provided by non-state employees, either pursuant to a contract with the SCA or on an hourly fee basis. There is no single, uniform delivery system for non-SPD indigent defense attorney services. Generally, legal services are provided pursuant to contracts entered into between the SCA and nonprofit public defender organizations (100% indigent defense work), law firms, consortia of attorneys, or individual attorneys or a combination thereof. Compensation under indigent defense contracts is based upon per case rates. Generally, cases not handled by an indigent defense contractor (generally, cases in which the contractor has a conflict of interest) are assigned to qualified attorneys in private practice, who are paid on the basis of an hourly rate.

The SCA currently has eighty-one contracts for the provision of attorney indigent defense services; at least one contract in each county, except Tillamook, Yamhill, Gilliam and Wheeler Counties. The SCA also has a limited number of contracts for the provision of non-attorney indigent defense services; e.g., death penalty investigation, forensic services, and translation services. Eight of these contracts are limited to legal representation in death penalty, murder, or other complex criminal cases. The remaining seventy-three contracts differ with respect to the types of cases covered, number of cases covered, and type of provider (non-profit public defender, law firm, consortium of attorneys).

Fourteen contracts are with non-profit public defender organizations, covering twelve counties. All of the contracts with non-profit public defenders include investigation services. Twenty-four contracts are with law firms, some of which provide legal representation on a retained basis, as well as indigent defense representation. Twenty-four contracts are with consortiums of attorneys (more than one firm or office). Eleven contracts are with sole practitioners.

For the Fiscal Year Ending (FYE) 1993, representation under contract with the SCA accounted for approximately eighty-three percent of the trial-level, non-death penalty indigent defense cases.

D. Delivery System for Non-Attorney Indigent Defense Services.

The federal and state constitutional guarantees of right to counsel and Oregon statutes also mandate the provision of non-attorney services that are reasonable and necessary for the preparation, investigation and presentation of the case. Generally, non-lawyer services afforded to indigent persons entitled to counsel at state expense include psychological, investigation, translation, and expert witness assistance. Provision of such services is subject to the appointed attorney securing pre-authorization from the court to employ such services and is governed by the indigent defense payment policy issued by the SCA. The average annual cost of providing non-attorney indigent defense services outside of contracts exceeds $3 million per year.

E. Funding of Indigent Defense Services.

State General Fund monies remain the sole source of funding in Oregon for the IDA and for the SPD. Local governments do not provide any financial support for indigent defense services. Money that is repaid to the state by persons who receive indigent defense services does not replenish the IDA. Rather, this revenue (approximately $3 million per year) goes directly into the state General Fund.

Increasingly, states are enacting legislation to supplement local and state general fund appropriations for indigent defense; e.g., court assessments and "sin taxes". It appears Oregon has not given serious consideration to such supplementation or to supplementation from monies received as a result of drug and other forfeitures.

The appropriation process for the IDA is similar to that on the federal level. In spite of ORS 151.465 (statutory "firewall" between the IDA and other Oregon Judicial Department (OJD) appropriations), the IDA is only one of many line items in the OJD's budget. This is dissimilar to the SPD's budget/appropriation process, under which the Public Defender Committee submits its budget request directly to the legislature without the Chief Justice's or SCA's review or imprimatur.

The national trends in indigent defense clearly are toward state (versus county or city) funding, governance by an independent commission, and delivery of services by state employees and contractors.

VI. TASK FORCE FINDINGS

A. Indigent Defense Representation in Oregon.

In the United States and, more particularly, in Oregon, the criminal law is enforced through procedures known collectively and colloquially as "due process of law". Due process is often defined in terms of "rights." The most critical of these rights is the right to be represented by counsel, since few people have the knowledge or skill to exercise their other rights without legal help. This right to counsel at state expense -- for indigent persons facing a potential deprivation of liberty or other significant right by the government -- is guaranteed by the state and federal constitutions or statutes.

The Task Force has examined four primary aspects of the current system used to provide indigent defense services in Oregon.

1. Who is served.
2. The demand for indigent defense services and funding of indigent defense services.
3. The quality of representation provided.
4. Responsibility for the administration and management of the indigent defense system and the method of service delivery.

The Task Force makes the following findings:

1. Persons Served by the Indigent Defense System

Generally, those indigent persons who receive counsel at state expense include persons (both adults and juveniles) accused of offenses (including probation violations) that carry a potential penalty of incarceration, persons appealing from convictions of such offenses, persons seeking

either habeas corpus or post-conviction relief from such convictions, juveniles and their parents who are involved in dependency and termination of parental rights proceedings in juvenile court, and persons facing involuntary mental commitment or other proceedings listed in Section IV, above.

2. The Demand for Indigent Defense Services And Funding of Indigent Defense Services

a. The Demand

The Task Force was persuaded by the testimony prepared by Professor Wayne Westling for the Interim Oregon Senate Judiciary Committee in March 1992 which summarizes the right to counsel in Oregon. In 1969, Professor Westling notes, the State tried to convince the Supreme Court that it would be prohibitive to guarantee counsel to all potential inmates, but the justices held firm in their opinion that due process demanded no less. The place to cut fiscal corners is NOT where you're pinning criminal labels on citizens.

With respect to fiscal planning, Professor Westling described the state's decision to assume responsibility for judicial salaries and indigent defense, while leaving the prosecution function "in the hands of the 36 counties." It has become clear in the ensuing decade that this fiscal schizophrenia has left the system dysfunctional. Westling likened criminal proceedings and the state's mandate to provide indigent defense services to "a faucet connected to a garden hose".

> "The spigot is in the hands of the county district attorneys. Providing defense services is like being the child at the other end of the hose filling buckets. The child keeps filling buckets as long as the stream of water keeps flowing. The only way to control the number of buckets is to turn down the spigot. So long as the spigot is in the hands of the county fiscal planners, all the state can do is provide pails ... the state has no choice. Since the state is constitutionally bound to provide defense services, the fiscal impact of this has passed from the control of the state to the agency which has control of the [tap]."

In the fall of 1992, the Oregon Interim Senate Judiciary Committee conducted and published the results of an "Indigent Defense Survey". Half of the district attorneys in the state responded. Judges and indigent defense providers also were surveyed. The respondents were asked to evaluate the prosecution's screening of cases -- while 70% said that the screening would reduce indigent defense costs, only 35% indicated that the district attorneys used such a system. When asked whether the county DA had "made any changes in charging practices since 1989 that have resulted in a reduction of indigent defense costs," almost half (48%) said "No".

In this same survey, respondents were asked to react to the Spangenberg Report, which noted that "the problems experienced in recent years in the explosion of indigent defense costs goes beyond the increase in caseload alone. They are the direct result of developments in virtually every other component of the criminal justice system. They cannot be controlled solely through changes directed at the indigent defense system. Thus, any attempt to improve cost efficiency must address the complex web of factors found in the inter-relationship between indigent defense and the other major components of the criminal justice system." A total of 89% of the respondents agreed with this assessment (62% agreed "strongly").

The overriding forces which determine demand for indigent defense services are constitutional and statutory provisions that establish individual "rights," define crimes, and set the threshold for determining who is "indigent." However, it is clear to the Task Force that, beyond the constitutional and legislative provisions, other components of the primarily criminal and juvenile justice systems have a major impact on the number of persons who require services. Increasing or decreasing resources for law enforcement, local or state corrections (including probation officers), prosecution, and child welfare and mental health agencies will impact indigent defense resources, just as changing indigent defense resources affects other system components.

All system components need to "network"; i.e., better ensure that all system components are apprised of changes in other components. Law enforcement agencies, prosecutorial policies and the courts can have a major impact on indigent defense demand. For example, changes in law enforcement agency policy on drug or vice investigations or community policing, or the use of citations instead of some custody arrests, influence demands on indigent defense. Prosecutorial emphasis on particular types of crime, or changes in policies regarding civil compromise, diversion, violation treatment, or plea negotiations influence demand for indigent defense services. Demands also are placed on indigent defense resources by the state court system, which must contend with the pressures associated with the processing of civil cases, docketing and other problems associated with the availability of courtrooms, staff, and judges. Further, the relative resources and possibly varying practices of Children's Services Division ("CSD"), state and local mental health agencies, and state and local corrections departments (including parole and probation) impact indigent defense resources. For example, four jail facilities in four different locations within one county necessitate additional indigent defense resources.

The various components of the criminal, juvenile and involuntary commitment systems should be encouraged, if not mandated, to consider the potential impact of their activities and resource changes on indigent defense costs and, when practical, to establish a minimal level of policy standardization to help efforts to better predict and even stabilize costs of indigent defense, as well as costs of other components.

It should be noted, however, that the Task Force recognizes and agrees that it is unreasonable and would be counterproductive for CSD, for example, to make decisions about removing children from unsafe homes based upon concerns about the impact on the Indigent Defense Account. However, again as an example only, to the extent CSD and the courts could reduce the time period between the removal of a child to either safe return to the home (after necessary services are made available to the parents) or termination of the parent's rights to the children, indigent defense resources would be impacted beneficially.

Innovative programs in the criminal and juvenile justice systems such as diversion, alternative dispute resolution, misdemeanor-to-violation treatment, and early disposition programs, are now in place in some counties. Such programs hold promise for containing indigent defense costs (and other system costs) in the short term and in the long-term, to the extent that recidivism declines as a result of such programs.

b. Funding Considerations

There is a growing appreciation and realization that criminal, juvenile and involuntary commitment justice systems are truly integrated and interdependent systems. Laws cannot be passed affecting one component ("players" consisting, for example, of the courts, law enforcement, prosecution, defense) of any of these systems without being cognizant of the potential impact on the other components of the same system or the impact on the other justice systems.

Currently, IDSD prepares formal, written Fiscal Impact Statements (FISs) on all proposed state legislation that may impact the Indigent Defense Account. FISs should be prepared not only on the state level, but also for city and county government actions. Further, at the state level, formal, written FISs should be required to be submitted that address the likely fiscal impact on state and local law enforcement, corrections, prosecution, and county juvenile departments.

The Task Force's examination of the difficulties indigent defense funding has experienced leads to the conclusion that there is no structured system for reviewing the impact of funding and other legislative decisions on different criminal, juvenile, and civil commitment justice systems. The difficulty with non-integrated, piecemeal funding decisions is that the system is never functioning as a whole, but rather one or more portions of it drive the other component parts.

Any proponent of any change in funding should be required to evaluate how that change will affect the other participants, thereby allowing the legislative body to assess the true cost of a proposal, including a determination of which other participants will need additional money in order to keep pace with the new financial allocation. Alternatively, if there is a cost savings to be realized, that cost savings similarly should be evaluated as to how it would affect the rest of the system; i.e., whether it would make resources available to deal with funding increases that may be taking place elsewhere in the system. This analysis also is necessary in the evaluation of auxiliary systems that directly impact the criminal, juvenile and civil commitment justice systems, such as funding for the Psychiatric Security Review Board, probation, parole, mental health resources, community service-type resources and the like.

District attorneys across the country have historically objected to standardization or central control of charging practices. However, the Task Force finds that there need to be some minimal standards or guidelines adopted, while still preserving the right of individual jurisdictions to be reflective of the citizens living within the community.

The Task Force recognizes that there needs to be latitude in the screening and charging practices of the locally elected and funded district attorneys to support and reflect local community concerns and priorities. An example would be Multnomah County's drug diversion and domestic violence diversion programs. What works in one county may not work in another county. The establishment of standards or guidelines for prosecutors and law enforcement need only be minimal, leaving enough room to reflect individual prosecutorial/community choices within each county.

Prosecution resources must be allocated on some rational ratio with indigent defense resources, corrections resources; and police resources. The ratio need not be one to one; however, it makes little sense for a prosecutor to obtain additional deputy district attorneys when there are no deputy public defenders to defend the cases charged. Any prosecution funding initiatives should require a statement as to whether or not there will be additional police resources, indigent defense resources, court or corrections resources used by the incremental increase in prosecution resources.

It should be incumbent upon the local district attorneys to assist the police, the sheriff, or other law enforcement agencies in their jurisdiction to develop a criminal justice fiscal impact statement that would accompany any request for additional funds. By way of example, if the local police agencies sought additional funding to hire new officers, the local district attorney would be expected to work with the police agency to analyze the

impact the additional officers would have on court filings, indigent defense, courts, and corrections.

Accepting that local political officials must be answerable to their electorate, community representatives, including elected officials, should be expected to go through the same process of fiscal impact as legislators and proponents of legislation on a statewide basis go through in enacting local ordinances and local prosecution policies or in instituting criminal law initiatives. Specifically, local ordinances or criminal law initiatives must be evaluated in terms of the fiscal impact upon the entire criminal, juvenile and involuntary commitment justice systems. Prior to the adoption of a local ordinance or a criminal prosecution policy, it is important for the proponents of that policy to consider whether there are alternative effective ways of addressing any qualities that the measure will present to the system as a whole and develop proposals that would be part of the entire package.

The key to establishing a stable funding base for indigent defense services lies in addressing the relationship between discretionary decisions made within other sectors of the criminal, juvenile and involuntary commitment justice systems, as well as factors such as crime rates and dysfunctional families over which no system component has direct control.

The fact that non-state funded system components have and exercise their discretion in differing manners is at issue, but not under attack. The Task Force's purpose is not simply to contend that fewer arrests, prosecutions and incarcerations will reduce indigent defense costs. The Task Force does not, for example, suggest that police agencies and prosecutors should turn the other cheek to crime. Rather, the Task Force finds that in the absence of more unified cost accountability for all components of the system, indigent defense will remain a lonely step-child whose budget is constantly revisited in crisis.

In view of the constitutional and statutory mandates for indigent defense services, the biennial frenzy to sell a budget to the Legislature, followed by interim trips to the Emergency Board for more money is simply unacceptable.

What should a fiscally "integrated" criminal justice system look like?

The first part of the answer lies in the development of "good data". Good caseload/workload statistics are the obvious cornerstone of stable funding. However, this is the relatively easy part. The greater challenge lies in developing sound data for the fiscal impact created by other components of the justice system on defense costs. The SCA's office has received a federal grant to develop a system that will better ensure predictability in indigent defense workload and funding projections. In the concept paper submitted in support of the grant application, the SCA identifies the critical issue to be the prediction and quantification of the effects of changes in other components' resources on indigent defense. Specific remedial proposals must hinge to a significant extent upon the outcome of the statistical studies. With good statistical data and development of formulae to forecast costs, further adjustments can be made in budget correlations between other state funded components of the system as well, such as juvenile, corrections and mental health programs.

While it is probably not practical to consider funding local law enforcement programs at a statewide level, good statistical data reflecting the differential costs of law enforcement and prosecution among various local jurisdictions could facilitate a safety net system reallocating excess indigent defense costs over and above a statistical mean average back to local jurisdictions which generate higher than average law enforcement and prosecution expenses.

3. Quality of Representation

While data available to the Task Force suggests that the general quality of indigent defense representation in Oregon still is meeting national standards, the Task Force has received substantial anecdotal information that raises significant questions as to this issue. Maintaining quality of representation is being strained by rising caseloads, the increased seriousness of crimes charged, and the rising costs associated with the practice of law.

The Task Force is especially alarmed by the adoption of the following contract negotiation policy by the SCA and IDSD: no inflationary increases (for example, for rent and other overhead) will be provided to an indigent defense contractor, absent the contractor agreeing to accept additional workload to offset the cost of such increases. Increasing individual attorney caseloads because of efficiencies realized as a result of technology, for example, should be encouraged. However, increasing caseloads solely on the basis of cost containment is a short term and dangerous approach that ought not be encouraged. It is clear that the failure of court-appointed counsel to provide appropriate levels of service will likely lead to protracted post-trial proceedings (appeals, post-conviction relief, habeas corpus proceedings) and negative impacts on the other system components.

Lack of a uniform performance monitoring system has made it difficult for the Task Force (and will make it difficult for future indigent defense administrators and legislatures) to assure continued competency of indigent defense counsel.

Presently, indigent defense legal services are delivered in two primary modes: under contract with the SCA or on a case-by-case appointment basis to individual attorneys. As discussed previously, the types of contractors vary. Services in one county may be delivered by a mixture of a full-time non-profit public defender corporation under contract with the SCA and private bar (case-by-case) appointments for cases in which the public defender has a conflict. Another county may provide services solely on a case-by-case appointment basis, while a consortium of attorneys who have a partial retained law practice may provide indigent defense services under contract with the SCA in an adjacent county. The disparate systems for providing services necessarily involve different standards and practices concerning, inter alia, lawyer selection, pay, caseloads, and clerical and other support personnel. The absence of a more uniform system of delivery of services makes comparison of the costs associated with each kind of delivery system difficult.

The Task Force found that there is no comprehensive performance monitoring system for either adult or juvenile indigent defense practitioners, nor are there detailed standards for measuring effective, yet efficient, representation. Measuring quality of service in the adult criminal arena can, in part, be judged by the number of successful post-conviction relief proceedings. However, assessing quality solely by this measure is not effective or efficient. Issues concerning quality of representation should be monitored and measured at the original court proceeding level by means of a uniform monitoring system. The Task Force was not able to determine how the quality of representation provided, for example, under public defender contracts compares to that provided under consortium contracts, private bar appointments, or retained counsel. Similarly, the Task Force was unable to determine the quality of representation provided by one public defender contractor compared to another public defender contractor.

Clearly, the existence of a cadre of experienced attorneys who have chosen indigent defense services as a full or partial career results in significant efficiencies and cost savings to the indigent defense system, and perhaps, more importantly, the entire adult and juvenile justice systems. Indigent defense has developed into a specialty of its own and the Task

Force found that lawyers practicing in this field require specialized, effective and non-taxing performance measures, support services, and continuing legal education. The costs of such services should be treated as integral parts of the indigent defense system.

4. Administration of the Indigent Defense System

Currently, Oregon's indigent defense services system, with the exception of the State Public Defender, is administered directly by the Oregon Judicial Department (OJD). The Legislative Assembly is responsible for placing and to a certain degree delineating constraints on that responsibility with OJD.

Specifically, the Chief Justice and State Court Administrator (SCA) are directly responsible for preparing the budget for and administering the appropriation to the Indigent Defense Account. The SCA is responsible for promulgating indigent defense policies, in conformance with statutes enacted by the legislature and constitutional provisions, and the SCA is responsible for deciding when and with whom contracts for indigent defense legal services will be entered into. Trial level judges within the OJD are responsible for determining whether an individual before the court is eligible (financially and by type of proceeding facing the individual) for indigent defense services (whether to appoint counsel at state expense). Trial level judges are responsible for determining whether non-attorney indigent defense services (for example, investigation, psychiatric and translation services) will be authorized. And, trial level judges are responsible for appointing counsel who the court deems to be "suitable" for the type of representation involved in individual cases.

The placement of administrative responsibility for the indigent defense system with the OJD has had undesirable consequences, the most conspicuous of which is its impact on morale within the department. There is a perception among some judges, who are responsible for determining in the first instance whether a person qualifies for indigent defense services, that they are being blamed by the legislature for the resulting costs. In those judges' view, placing budgetary responsibility for the system within their own branch of government reinforces this misunderstanding, and results in the offsetting of other OJD needs against the rising costs of indigent defense services. The Task Force recognizes that such concerns are honestly held, but believes they are a misperception. The Task Force also believes that indigent defense funding, which is a constitutionally generated obligation, should remain -- both for traditional and symbolic reasons -- closely associated with that branch of government that is primarily responsible for protecting individual rights.

The Task Force finds that:

a. at a minimum, philosophical questions are generated by placing a major administrative task and its accompanying budget within the branch of government that is dedicated to and ultimately responsible for dispute resolution between opposing parties;

b. the threat posed by increasing limitations on available resources will exacerbate pressures to provide for indigent defense services primarily on the basis of lowest contract bid amounts, with a proportional lessening in the attention paid to quality of services provided under the contract;

c. despite recent efforts by the SCA and IDSD to establish parity between indigent defense contractors, disparity continues; and

d. the resources currently available to administer indigent defense are severely strained by the necessity of frequently negotiating and renegotiating indigent defense contracts.

VIII. TASK FORCE RECOMMENDATIONS

Based upon the Task Force's findings, testimony from local state and federal indigent defense providers and court administrators, national standards, and experiences in other states and the federal indigent defense system, the Task Force makes the following recommendations. The Task Force recognizes that the Bar will pursue implementation of the Task Force's recommendation regarding administration and provision of indigent defense services through two biennia, with creation of the independent commission as the first priority. The Task Force anticipates that the model that will be incorporated in the Bar's legislative implementation of that recommendation will be a state employee-based public defender system overseen by a commission that will be responsible, inter alia, for identifying those circumstances in which application of the model would be fiscally appropriate.

A. "Oregon Justice Plan" Study

The Task Force recommends that the Oregon legislature undertake a study of the criminal justice, juvenile, and civil commitment delivery systems as an integrated whole (as it did the Oregon health care delivery system) for possible adoption of a resource allocation system similar to that created by the Oregon Health Plan.

B. Standards for Providing Indigent Defense Services

The Oregon State Bar (OSB) should promulgate and adopt "Standards for Providing Indigent Defense Services" that are similar to, but not limited to, those promulgated by the American Bar Association (ABA). The standards should address system and quality/efficacy assurance issues identified by the Task Force. Any of the standards that address criminal, juvenile or civil commitment defense practice generally (not specific to indigent versus retained defense) shall apply to all lawyers practicing in those fields.

The OSB and administrative authority for Indigent Defense Services should work closely with the legislature to ensure that statutes and resource levels complement the adopted standards. Pending adoption of Oregon's Standards for Providing Indigent Defense Services, the Task Force recommends that the ABA Standards be used as a guide.

C. Permanent OSB Indigent Defense Committee or Task Force

The OSB should establish a permanent committee or task force to:

1. periodically review and revise the "Standards for Indigent Defense Services";
2. work with the appropriate groups to draft such legislation as necessary to implement the standards and revisions to those standards;
3. develop recommended guidelines and standards, regarding, but not limited to, prosecutor and law enforcement practices, practices of other criminal, juvenile, and civil commitment justice system components that impact other components, functional parity between system components, and other "linkage" issues identified in this report;

4. study and recommend diversion and alternative dispute resolution programs that might better serve indigent defense client and societal needs, and reduce court, law enforcement, prosecution and indigent defense costs.

D. Encourage Law Enforcement/Prosecution Guidelines

The OSB should encourage the Attorney General and Oregon District Attorneys Association (ODAA) to establish statewide standards or guidelines that address arrest and charging criteria, and the disposition of criminal and delinquency cases; e.g., diversion and alternative dispute resolution programs. To this end, the OSB should appoint members of the Attorney General's office and the ODAA to act as liaisons to the permanent OSB committee or task force established pursuant to recommendations "C.3.", above.

E. Mandatory Fiscal (System) Impact Statements, "Networking", and Development of Integrated Budgetary and Work Load Data Network

No local or state funding or law revisions impacting the criminal, juvenile, or civil commitment justice systems should be enacted without the submission and careful review of detailed Fiscal (System) Impact Statements addressing the potential impact on all other system components.

Representatives of all system components should actively participate in the recently mandated Criminal Justice Advisory Committees, including willing provision of component budget and work load information to other components as mandated by the new law.

The OSB should endorse and support with all reasonable means available, the development of an integrated budget data network for all components of the criminal, civil commitment and juvenile justice systems. The development of such a data base will promote better cost control and predictability for all system components. It will also enhance the ability of the legislature to promote tax equity by targeting for surcharge funding sources which disproportionately add to the cost of indigent defense or other system components.

F. Placement, Administrative Structure, and Service Delivery System for Indigent Defense Services

1. Placement -- Retain within the Judicial Department.

2. Administrative Structure -- Independent Commission. The Chief Justice appoints commission members and the commission appoints the administrator. The Chief Justice is encouraged to continue providing budgetary leadership.

3. Service Delivery System -- Primarily state employee based. Contracts and private bar representation for conflict cases and cases in locations where full-time state employee system is not fiscally sound. Current placement of responsibility for authorization of private bar and extraordinary expense payments with trial judges replaced with administrative process established by the commission, subject to judicial review.

Chart #1 displays the Task Force's recommendations in an organizational diagram. Chart #2 displays the current indigent defense organizational diagram, for comparison purposes. (These two charts are included immediately after this "Recommendations" section.)

G. Regardless of the structural changes recommended above, the task force strongly recommends the following occur:

1. Establishment and Funding of a Death Penalty Resource Center

The administrative authority for indigent defense services should fund the full cost of a trial level Death Penalty Resource Center for the defense. The death penalty resource center

would serve many of the same functions provided to prosecutors by the Attorney General's "DA Assistance Unit."

The resource center should include, at least, an experienced death penalty trial attorney, a mitigation specialist, and an administrative assistance. The resource center should be associated with a law school to provide both independence and enhanced research capabilities.

The administrative authority for indigent defense services should mandate the use of the resource center by attorneys at the time of appointment. The resource center would not provide direct representation to defendants, but would:

(a) provide technical assistance to attorneys appointed to death penalty cases in the development of pretrial motions, the need for experts, and trial strategies;

(b) be available as an additional resource to talk with the client;

(c) be a resource to discuss plea options;

(d) provide updates on death penalty law;

(e) provide general case evaluation;

(f) maintain and distribute a library of briefs, memoranda, demurrers, and other written death penalty-related documents;

(g) be a liaison with national death penalty resources;

(h) be available for judicially requested emergency intervention;

(i) assist in improving the presentation of mitigation evidence;

(j) assist in the training of lawyers, investigators, and mitigation specialists; and

(k) provide general on-call technical legal assistance.

2. Development and implementation of performance measures and peer review programs to assist in monitoring and maintaining quality attorney and non-attorney indigent defense services.

3. Development and implementation of, at least, pilot program systems for the appointment of counsel and the authorization of indigent defense services administratively versus judicially.

4. Development of a specific long-range "business plan" for the provision of indigent defense services, with primary emphasis on the establishment of a more uniform, integrated indigent defense system.

5. Development and conducting of an initial and periodic "Needs and Resources Assessment Survey" of indigent defense providers to assist in the development of the "business plan" identified above.

6. Identification and implementation of methods to ensure parity among indigent defense providers.

H. The Task Force recommends that the legislative counsel's office draft legislation necessary to implement the changes recommended herein that require legislative action and that the Chief Justice of the Oregon Supreme Court implement all recommended changes that can be achieved in the interim.

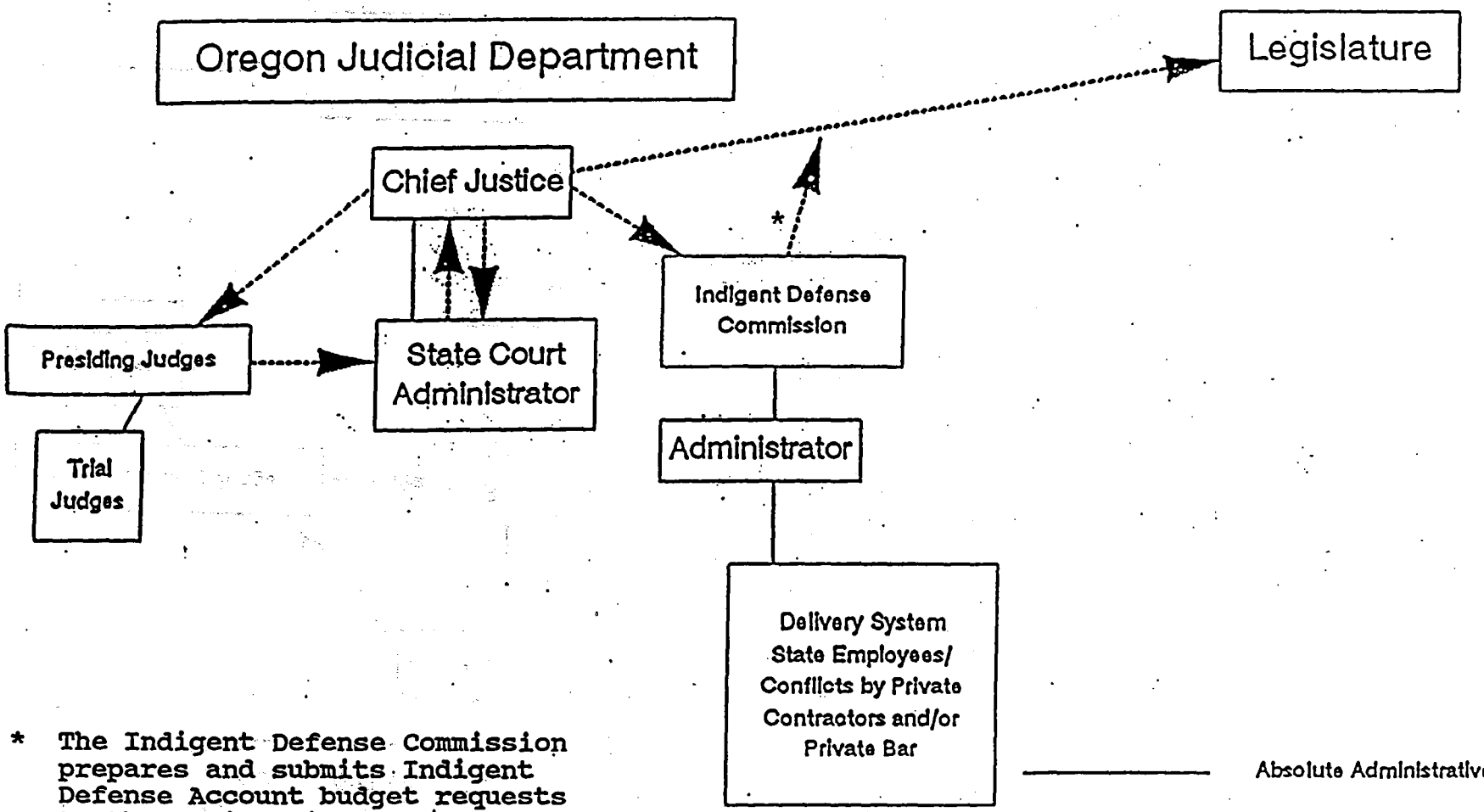
I. The Task Force recommends that the legislature provide adequate funding for indigent defense services.

OSB Recommended Organizational Structure

or

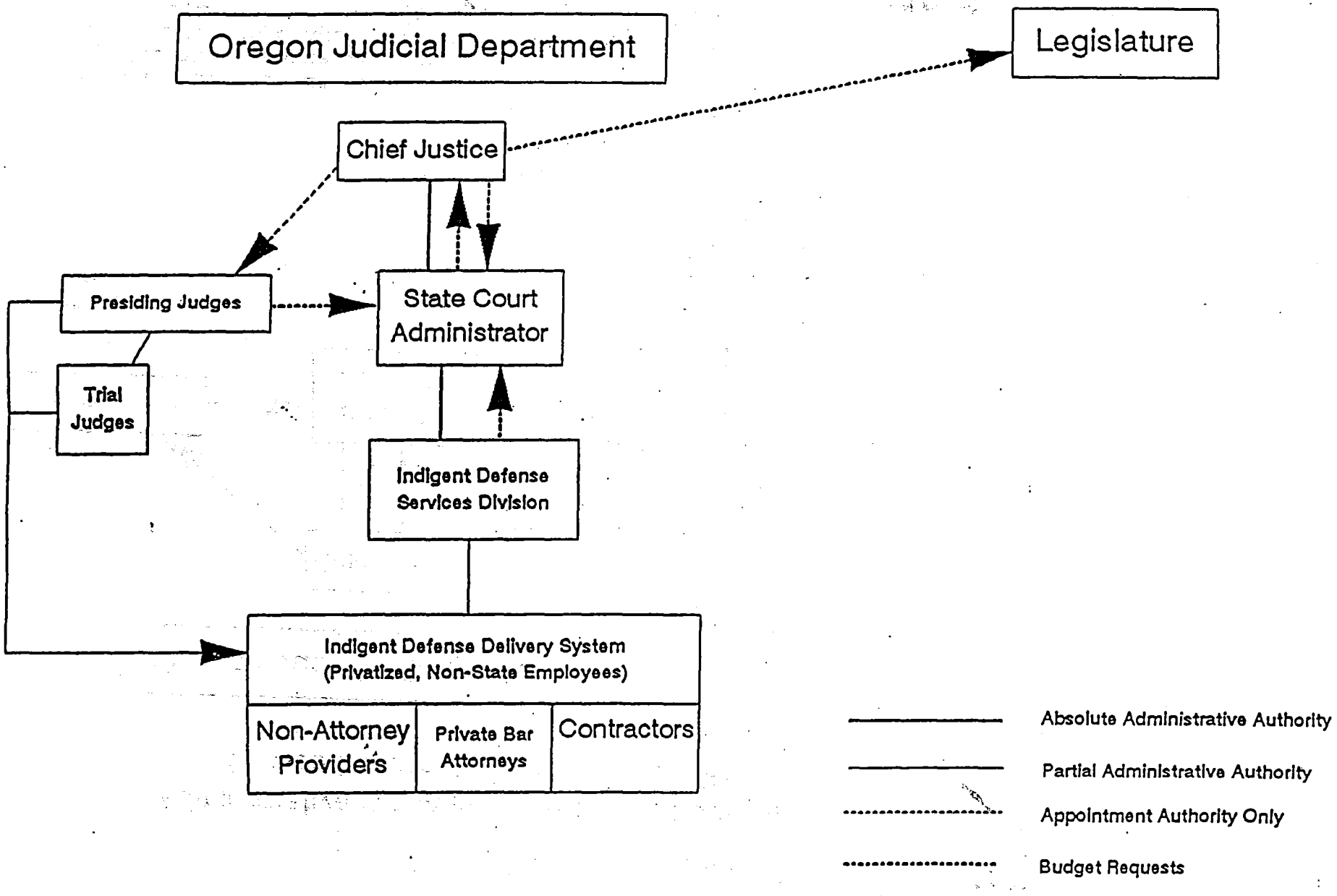
Indigent Defense Services

Administrative Structure: Independent Commission Appointed by Chief Justice
Service Delivery System: Primarily State Employee Public Defenders



* The Indigent Defense Commission prepares and submits Indigent Defense Account budget requests to the Legislative Assembly. The Chief Justice provides budgetary leadership.

Existing Organizational Structure for Indigent Defense Services



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APPENDIX #1

THE CHARGE OF THE OSB INDIGENT DEFENSE TASK FORCE

Julie Frantz, 1993 President of the OSB, appointed a project-oriented Indigent Defense Task Force to replace the former OSB Committee on the Indigent Accused. The following is the "charge" to the newly created task force.

The Bar recognizes and supports a mix of private appointed practitioners and lawyer organizations with whom the state has contracted in providing indigent defense. The need for adequately funding indigent defense services and for ensuring the maintenance of high quality representation in this area are viewed as critical concerns requiring immediate attention. This Task Force is appointed to develop a long-range plan that addresses state-wide concerns on both issues, and to provide recommendations to the Board on relevant 1993 legislative issues.
Specifically, the charge to this Task Force is as follows:

1. Funding.

    a. Develop procedures for ensuring continuing long-term financial support and tying level of indigent defense funding to such other aspects of the criminal justice system as prosecution, police and courts.

    b. Review the source of funding. Currently, funding for indigent defense is part of the general funding of the judicial department.

    c. Review, evaluate and monitor effectiveness of current situation, wherein there is a "wall" between indigent defense funds and the general funding of the judicial department.

    d. As part of the evaluation of the present system, review prior efforts to institutionalize this arrangement through a state public defender agency (e.g., the previously proposed legislation known as the "Burton Bill," a copy of which will be provided).

    e. Review and evaluate funding implications of a comprehensive state public defender agency if one is ultimately included in the state bar's long-range plan or blueprint for providing these services.

    f. As no decisions having fiscal impact are made in a vacuum, but rather in the context of current political realities, it is requested that the task force work with the BOG's public affairs staff in investigating and responding to the major policy issues before the 1993 legislature.

2. Quality of Representation.

Develop proposed standards of practice for lawyers representing the indigent accused to be adhered to by the entity charged with the responsibility for making the appointments (whether it be to private practitioners or to contracted organizations, or a combination thereof). These standards should address the following issues:

a. Ensuring the standards comport with constitutional criteria and provide for adequate monitoring of the appointment/contract process.

b. Evaluation of the need for standards of practice to be incorporated into either statements of professionalism or ethical rules that providers can rely upon when resisting adverse conditions imposed upon them by courts or financial providers.

c. Funding and conformance pressures, which tend to force indigent defense providers to choose between advocacy for their own pecuniary interests versus the interests of the client.

3. Recommendations Re: Input/Response to 1993 Legislative Issues.

In light of anticipated substantial fiscal reductions throughout the state budget brought on in large part by the impact of Measure 5, it is anticipated that the upcoming legislative session will closely scrutinize the level of state indigent defense funding. Accordingly, the task force should develop strategies in response to anticipated funding and related policy issues. In this regard, it should be noted the bar membership at the 1993 annual meeting passed a resolution stating the importance of maintaining adequate judicial branch funding, in part to target the importance of responding to any political pressure "to reduce the compensation of already underpaid court-appointed counsel."

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APPENDIX #2

PERSONS WHO TESTIFIED BEFORE THE TASK FORCE
AND
MATERIALS REVIEWED BY THE TASK FORCE

Speaker	Date
Wallace D. Terry Umatilla/Morrow Public Defender Services, Inc.	February 5, 1993
James H. Murchison Jerry Frost Marion County Court Administrator's Office	February 5, 1993
Steven T. Wax Federal Public Defender (Portland)	May 8, 1993
Sally Avera State Public Defender's Office	May 8, 1993
Mark Austin Cross Portland	May 8, 1993
David Orf Jackson County Public Defenders	

I. REPORTS AND ARTICLES

Report of the Committee to Review the Criminal Justice Act (with synopsis) as published in BNA Criminal Law Reporter (March 10, 1993)

Gideon v. Wainwright, Revisited: What Does the Right to Counsel Guarantee Today? 10 Pace Law Review 327 (1990).

A Comparison and Prosecution and Defense Resources for Capital Litigation, ABA Bar Information Program and Post-Conviction Death Penalty Representation Project (September 1991)

ABA Standards for Criminal Justice: Providing Defense Services (Third Edition 1992)

ABA Standing Committee on Legal Aid and Indigent Defendants Plan (July 1993)

Indigent Defense Management Options

United States District Court for the District of Oregon Policy Statement Regarding Criminal Justice Act Panel

Defense Services for the Poor, ABA Criminal Justice Section Newsletter (Spring 1993)

Office of the State Court Administrator Request for Proposals for Indigent Defense Legal Services Contracts:

I. General Information

II. Proposal Application Form and Instructions

III. Model Contracts for Fixed Caseload, Outputs Caseload, Death Penalty Caseload and General Contract Terms Document

Indigent Defense Caseloads and Commonsense: An Update, National Legal Aid and Defender Association (1992)

Materials Provided by Indigent Defense Services Division to the Oregon State Bar Indigent Defense Task Force

II. LEGISLATION AND TESTIMONY

(67th Oregon Legislative Assembly, 1993 Regular Session)

Senate Bill 224 (Creation of Public Defender Services Commission)

A. Testimony of Sally L. Avera, State Public Defender, in opposition

B. Letter to Senator Dick Springer from Dale W. Penn, Oregon District Attorneys Association, in opposition

C. Testimony of Jim Arneson, Oregon Criminal Defense Lawyers Association

D. Testimony of R. William Linden, Jr., State Court Administrator, in support

Senate Bill 415 ("Anti-Shanghai Bill" prohibits court from appointing attorneys to represent indigent persons unless attorney volunteers)

House Bill 3434 (Reducing Indigent Defense Costs and the Judicial Branch Budget -- SB 5523 -- with amendments)

A. Written comments by Dale Penn, Marion County District Attorney, in opposition

B. Comments of Ross M. Shepard, Oregon Criminal Defense Lawyers Association, in support (qualified)

House Bill 3425 (Requires State Court Administrator to allocate and distribute to counties money appropriated for representation of indigent in juvenile courts; requires counties to pay for such representation)

House Bill 3664 (Creates independent public defender board within executive branch)

A. Testimony of R. William Linden, Jr., State Court Administrator, in support

III. LETTERS RECEIVED AND REVIEWED BY TASK FORCE

A. Ronald L. Gray, Gladstone attorney, indigent defense contract administrator, June 29, 1994.

B. William A. Furtick, Eugene attorney, indigent defense contract administrator, June 30, 1994.

C. Linda Friedman Ramirez, Portland and Salem attorney, indigent defense contractor, July 5, 1994.

D. Charles Steak, Curry County Deputy District Attorney, July 6, 1994.

E. Judie Hammerstad, Clackamas County Commissioner, Chair of AOC Human Services & Public Safety Committee, July 7, 1994.

T H E S P A N G E N B E R G G R O U P

/L. Spangenberg
esident

Marbo F. Hansen
Financial Officer

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A COMPREHENSIVE APPROACH TO CONTAINING THE COST AND CASELOAD OF INDIGENT DEFENSE SERVICES IN THE CRIMINAL JUSTICE SYSTEM

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EXECUTIVE SUMMARY

In December of 1989, The Spangenberg Group of Newton, Massachusetts undertook a project sponsored by the State Justice Institute (SJI) entitled "A Comprehensive Approach to Containing the Cost and Caseload of Indigent Defense Services in the Criminal Justice System." The funding of this project was the culmination of a process that began nearly a year before with the submission of a concept paper for initial review by SJI.

The concept paper was developed as a result of the extensive experience of The Spangenberg Group in working for state and county government in the area of indigent defense delivery. This experience showed that the single most important issue was (and continues to be) the ever-growing cost of these services. Further, the state courts around the country were then and are now faced with an ever-increasing backlog of civil and criminal cases, with many jurisdictions appointing counsel in 75% of all criminal cases; in some (especially large metropolitan) jurisdictions, the indigency rate is even as high as 90%.

The goal of the project was to address the reasons for the growth in indigent defense costs and caseloads in a system-wide context through the establishment of broadly based task forces in several pilot sites. The objective was to identify measures to control indigent defense costs and caseloads without endangering the role of law enforcement, the prosecution function or the constitutional rights of indigent defendants by involving key policymakers and practitioners from all branches of government, all aspects of the criminal justice system from law enforcement to corrections, and the private bar. It was hoped that factors affecting indigent defense caseloads and costs (but normally outside the control of indigent defense practitioners) could be addressed by recognizing that the indigent defense system does not operate in a vacuum, but rather is part of the complex and interdependent criminal justice system.

Demonstration task forces were created in two sites: the states of Washington and Oregon. These states were chosen for a variety of reasons, including: the contrast provided by the types of indigent defense systems in operation and their funding mechanisms, similar problems dealing with increasing caseloads and limitations on available resources, the different approaches to task force sponsorship offered in each state, and the existence of data regarding the system and its operations in each state to serve as a foundation for the task forces' efforts.

The Oregon Legislative Task Force on Indigent Defense Cost and Caseloads consisted of 35 members, including representatives from the Legislature, the Judicial Department, the Executive branch, law enforcement, district attorneys, criminal defense practitioners,

and private bar members. Members were appointed by the Speaker of the House, then Vera Katz, and the President of the Senate, Dr. John Kitzhaber. The Task Force was co-chaired by Representative Peter Courtney and Senator Richard Springer. Logistical assistance was provided by the Office of the Speaker, Legislative Services, and the Office of Legislative Counsel. Because of the large size of the Task Force, a smaller Working Committee of a dozen members was designated by the co-chairs. The Working Committee met six times between June and December 1990, while the full Task Force met three times over this period.

The Washington State Advisory Group consisted of 22 members appointed by Lieutenant Governor Joel Pritchard, who served as Chairman of the Task Force. Staff assistance was provided by the Office of the Administrator for the Courts. Members of the Advisory Group included Legislative leaders, members of the judiciary, representatives of the Executive branch, the major criminal justice agencies, the private bar, and county and city government. The Advisory Group met 11 times over the course of 13 months between September 1990 and October 1991. For the most part, the Advisory Group met as a whole during the course of its deliberations. One subcommittee was established which met to review misdemeanors that might be treated as bail-forfeitable offenses or otherwise diverted from the system.

Following the completion of the efforts of both Task Forces, an evaluation of the pilot project was conducted by John Tull & Associates of Colorado, as required by the State Justice Institute. This evaluation involved the review of all relevant documents and materials, interviews with staff of The Spangenberg Group, and, most importantly, polling of participants' perceptions and opinions. The evaluation provided valuable insight into the successes and failures of the pilot task forces and useful recommendations for similar efforts to be undertaken elsewhere which are incorporated into this report.

The experiences of the Task Forces in the two demonstration sites were very different. On the whole, participants in the Washington Advisory Group viewed it as a successful effort, while participants in Oregon were less satisfied with the outcome.

The project demonstrated that a comprehensive task-force approach to containing indigent defense costs and caseloads can be beneficial, particularly in jurisdictions that are just beginning to develop an awareness of crisis and the need for a coordinated response. The principal benefit of the approach may be the opportunity for informed discussion among the usually adversarial components of the criminal justice system and to begin the incremental process of education.

Bringing about major change in the indigent defense system (and the criminal justice system generally) can only be

accomplished in the long term. The goals and expectations of the task force members should reflect this reality to avoid frustration with the pace of change and their contribution to it. A separate implementation effort of several years' duration may be required before any of the task force's recommendations bear fruit.

In order to be successful, the task force needs to have committed leadership and a strong chairperson who is of sufficient stature to command respect and who is objective and not directly involved in funding or administering the indigent defense system. Task force sponsor(s) must be able to provide or coordinate leadership, staffing and funding for the effort. Task force membership must be representative of all relevant criminal justice agencies and the three branches of government, as well as the private bar. No one group or political philosophy should appear to be over-represented. Members should be key individuals with power and authority in the groups or agencies they represent. The size of the task force should be limited to a number that allows for the full participation of all members.

The assistance of expert consultants can facilitate the efforts of the task force by assisting in data collection, providing information from other jurisdictions, and suggesting guest speakers with relevant experience. Perhaps most importantly, the consultants can provide direction at critical junctures in the deliberations in the form of working papers, summaries of accomplishments, and draft recommendations.

Also crucial to the success of the task-force effort is the availability of local staff to be responsible for tasks such as coordinating the project, setting up meetings, serving as a contact for members, preparing and disseminating minutes, and researching issues, to name a few. Local staff should work closely with both the chairperson and the expert consultants.

The task force should conduct its deliberations over the course of at least a year. This provides enough time to fully explore the issues and develop the personal trust necessary for such a diverse group to reach consensus on politically controversial issues. Meetings should be held on a regular basis, as often as monthly, to maintain momentum. The schedule should be set in advance and the length of meetings limited to two to three hours to increase participation. Where possible and appropriate, the schedule might correspond with the legislative agenda or budget cycle.

Finally, a number of problems can be anticipated and should be prepared for in advance. These difficulties include: getting the key parties to agree to participate; reaching a consensus; structuring recommendations to increase the likelihood of implementation; dealing with entrenched interests that work against progress; and collecting the data necessary to develop informed

conclusions and recommendations.

CHAPTER ONE

INTRODUCTION

In December of 1989, The Spangenberg Group of Newton, Massachusetts, undertook a project sponsored by the State Justice Institute (SJI) entitled "A Comprehensive Approach to Containing the Cost and Caseload of Indigent Defense Services in the Criminal Justice System." The funding of this project was the culmination of a process that began nearly a year before with the submission of a concept paper for initial review by SJI.

The concept paper was developed as a result of the extensive experience of The Spangenberg Group in working for state and county government in the area of indigent defense delivery. This experience showed that the single most important issue was (and continues to be) the ever growing cost of these services. In a study completed by the Group for the U. S. Department of Justice, Bureau of Justice Statistics (BJS), entitled, "Criminal Defense for the Poor, 1986," the data disclosed that the cost to state and county government for appointed counsel to indigent defendants had increased by 60% since similar data were first collected in 1982. During this same period, the total caseload nationally had increased by more than 40%, suggesting that much of the increase in cost was due to an increased number of indigent cases.

The state courts around the country were then and are now faced with an ever-increasing backlog of civil and criminal cases, with many jurisdictions appointing counsel in 75% of all criminal cases; in some (especially large metropolitan) jurisdictions, the indigency rate is as high as 90%. Public defenders have consistently been complaining about work overload and too many cases. Meanwhile, the private bar, as evidenced by a growing number of lawsuits, has been concerned about both work overload and inadequate fees for court-appointed services.

Project Goals

The goal of the project was to address the reasons for the growth in indigent defense costs and caseloads in a system-wide context through the establishment of broadly based task forces in several pilot sites. The objective was to identify measures to control indigent defense costs and caseloads without endangering the role of law enforcement, the prosecution function or the constitutional rights of indigent defendants by involving key policymakers and practitioners from all branches of government, all aspects of the criminal justice system from law enforcement to corrections, and the private bar. It was hoped that factors affecting indigent defense caseloads and costs, but normally outside the control of indigent defense practitioners, could be addressed by recognizing that the indigent defense system does not operate in a vacuum, but rather is part of the complex and interdependent criminal justice system.

The concept behind the pilot project involved four basic principles. First, the fewer cases that formally enter the criminal justice system, the lower the overall costs. Second, the earlier that a criminal case is disposed of within the criminal justice system, the lower the costs. Third, systems handling large volumes of minor misdemeanor cases should concentrate their efforts at the "front end." Such cases would be most likely not to result in a jail sentence (and thus have no federal constitutional requirement for the appointment of counsel) or might be most effectively handled outside the criminal justice system through some type of diversion. Fourth, if a large number of these cases could be diverted or disposed at the outset, there would be a positive effect on all components of the criminal justice system: law enforcement, prosecution, courts, indigent defense, and corrections. The resources saved could then be better directed to cases involving more serious crimes.

It was envisioned that the measures considered by the task forces in the pilot sites might address such factors as arrest rates and detention practices, prosecutorial charging practices, court procedures, and defense program practices. Legislative actions, such as the decriminalization of certain offenses, were also envisioned among the measures that might be considered. The intention was that a broadly structured, statewide task force could agree upon policy which would reduce the number of cases requiring appointment. In addition, it was anticipated that this would have a positive impact on the other equally overworked and underfunded components of the criminal justice system.

The goals of the project were consistent with SJI's own purposes and objectives. SJI is mandated to "direct a national program of financial assistance designed to assure that each citizen of the United States is provided ready access to a fair and effective system of justice." It is authorized to "support research, demonstrations, special projects, technical assistance, and training to improve the administration of justice in the state courts" and to "encourage, assist and serve in a consulting capacity to state and local justice system agencies in the development, maintenance, and coordination of criminal, civil and juvenile justice programs and services." The study was also responsive to several authorized program areas and special interest program categories, including those regarding studies of the causes of trial and appellate court delay in resolving cases and implementation and evaluation of innovative programs and procedures designed to reduce substantially the expense and delay in litigation.

Demonstration Sites

Demonstration task forces were created in two sites: the states of Washington and Oregon. These states were chosen for a variety of reasons, including: the contrast provided by the types

of indigent defense systems in operation and their funding mechanisms, similar problems dealing with increasing caseloads and limitations on available resources, the different approaches to task force sponsorship offered in each state, and the existence of data regarding the system and its operations in each state to serve as a foundation for the task forces' efforts.

The states of Washington and Oregon provided a contrast in funding mechanisms and system organizational structures. Washington has a county-funded, county-organized system for providing indigent defense services. Each county in Washington selects and funds its own type of indigent defense program. Oregon, in contrast, has a state-funded system under which the State Court Administrator negotiates defense services contracts in most counties through a competitive bid process.

Both states had experienced a higher rate of increased caseload and costs than the national average, as well as higher indigency rates. In Oregon, the cost of indigent defense services had risen dramatically, from $12.6 million in 1982 to $22.4 million in 1986, engendering a funding crisis that resulted in a restructuring of the system's administration at the state level by the Legislature in 1987. Caseloads had also increased by 56% during this period, with larger than expected increases in several categories of cases, particularly juvenile cases. Indigency rates, or the percentage of all criminal cases in which defense counsel is appointed, were averaging over 80% for felonies in Oregon.

In Washington, the overall costs to local government for indigent defense grew dramatically from $26.8 million in 1987 to approximately $40 million in 1990. Similarly, caseloads were increasing at an alarming rate, particularly for drug and dependency cases. The overall caseload more than doubled during the 1980s. By the early 1990s, the total number of indigent cases throughout the state exceeded virtually every other state in the country. Indigency rates in Washington had risen to a level averaging between 70% and 80% by 1990.

Key policymakers and practitioners faced with problems providing indigent defense services in both Washington and Oregon had already developed an appreciation for the complex interrelationship among components of the criminal justice system, and there was strong support for taking a comprehensive approach to improving the indigent defense system. Such appreciation and support was considered essential to the potential for success in the demonstration sites.

The task forces in each state were to be sponsored by different entities, providing the opportunity to assess more fully the mechanics of the task-force process itself by comparing the two approaches. The task force in Oregon was established under the aegis of the Legislature, while in Washington it operated under the auspices of the Lieutenant Governor with the assistance of the Office of the State Court Administrator.

Recent studies of the indigent defense systems in each state had been conducted by The Spangenberg Group. These studies provided substantial data about the respective systems' structures and operations to serve as a foundation for the Task Forces' efforts. Further, in each state there was a history of addressing problems in the indigent defense system, although not in the comprehensive manner proposed for the demonstration task forces.

The Oregon Legislative Task Force on Indigent Defense Cost and Caseloads consisted of 35 members, including representatives from the Legislature, the Judicial Department, the Executive branch, law enforcement, district attorneys, criminal defense practitioners, and private bar members.[1] Members were appointed by the Speaker of the House, then Vera Katz, and the President of the Senate, Dr. John Kitzhaber. The Task Force was co-chaired by Representative Peter Courtney and Senator Richard Springer. Logistical assistance was provided by the Office of the Speaker, Legislative Services, and the Office of Legislative Counsel. Because of the large size

[1]See Attachment A for a complete list of Task Force members in Oregon.

of the Task Force, a smaller Working Committee of a dozen members was designated by the co-chairs. The Working Committee met six times between June and December 1990, while the full Task Force met three times over this period.

The Washington State Advisory Group consisted of 22 members appointed by Lieutenant Governor Joel Pritchard, who served as Chairman of the Task Force. Staff assistance was provided by the Office of the Administrator for the Courts. Members of the Advisory Group included Legislative leaders, members of the judiciary, representatives of the Executive branch, the major criminal justice agencies, the private bar, and county and city government.[2] The Advisory Group met 11 times over the course of 13 months between September 1990 and October 1991. For the most part, the Advisory Group met as a whole during the course of its deliberations. One subcommittee was established which met to review misdemeanors that might be treated as bail-forfeitable offenses or otherwise diverted from the system.

Following the completion of the efforts of both Task Forces, an evaluation of the pilot project was conducted by John Tull & Associates of Colorado, as required by the State Justice Institute. Several methods were employed to conduct this evaluation:

- The evaluator reviewed the transcripts and minutes of each of the task force meetings to assess the extent to which Task Force participants were able to identify and analyze methods to contain costs in the indigent defense system. The evaluator also reviewed the memorandum to the Task Forces outlining possible areas for each Task Force to consider, the final report of the Washington Task Force, samples of the data provided and other pertinent documents from each of the Task Forces.
- Staff of The Spangenberg Group were interviewed about their

[2]See Attachment B for a complete list of the members of the Washington State Advisory Group.

participation in the process and their perception of it.

- o A survey was sent to each member of each Task Force seeking their assessments of the success of the Task Force, the staff's performance and various aspects of the Task Force process.
- o Selected members of the Task Forces were interviewed by the evaluator by telephone.

This evaluation provided valuable insight into the successes and failures of the pilot Task Forces and useful recommendations for similar efforts to be undertaken elsewhere which are incorporated into this report.

Purpose and Organization of the Monograph

Part of the overall intention of the demonstration project sponsored by SJI was to determine if the comprehensive task-force approach would be appropriate for replication in other jurisdictions faced with similar problems in providing indigent defense services. The purpose of this monograph is to review the experiences of the two pilot Task Forces, drawing from them lessons that would be useful to other jurisdictions undertaking similar efforts.

Chapter Two of this monograph provides how-to advice for other jurisdictions planning to establish a comprehensive task force to address indigent defense issues in their own states or localities. Information provided in this chapter includes: where and under what conditions such an approach is appropriate; what goals should be established; who should sponsor the task force; who should participate as members; what kind of expert assistance will be needed; what kind of schedule should be established; and what kind of problems should be anticipated. Chapter Three of this monograph provides in-depth detail about the operations of the Task Forces in Washington and Oregon and their successes and failures. Chapter

Three also summarizes the issues discussed and recommendations made by each of the Task Forces.

CHAPTER TWO

ORGANIZING A TASK FORCE IN YOUR JURISDICTION

The project demonstrating "A Comprehensive Approach to Containing the Cost and Caseload of Indigent Defense Services in the Criminal Justice System," described in detail in the following chapter, was sponsored by the State Justice Institute with the express intent of determining if the approach would be appropriate for replication in other jurisdictions faced with similar problems of increasing indigent defense costs and caseloads. The project has shown that, indeed, a comprehensive task force can be beneficial in addressing such problems under certain circumstances and conditions. The purpose of this chapter is to inform other interested jurisdictions about where and when the task force approach can be successfully employed, what it may reasonably be expected to accomplish, and how the process should be organized and run. The chapter is designed to provide nuts-and-bolts advice that results from: 1) The Spangenberg Group's own internal evaluation of the SJI-sponsored project; 2) the independent evaluation conducted by John Tull and Associates, which relied primarily on participants' opinions; and 3) The Spangenberg Group's additional experience in serving as consultants to numerous task forces and commissions, primarily under the auspices of the American Bar Association Bar Information Program (BIP).[1]

Specifically, the chapter addresses the following questions:

- Is the task-force approach appropriate in your jurisdiction?

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[1]The American Bar Association Bar Information Program (BIP) was established in 1983 to provide assistance to state and local jurisdictions' efforts to improve their respective indigent defense systems. The Spangenberg Group is the primary provider of technical assistance on behalf of BIP. In the past several years, the Group has served as consultant to statewide task forces or commissions in 24 states.

- What goals should be established?
- Who should sponsor the task force?
- Who should be on the task force?
- What kind of expert assistance will be needed?
- What kind of schedule should be established?

Finally, advice is offered on what kinds of problems can be anticipated if a task-force effort is undertaken.

The demonstration project and, therefore, the recommendations which follow specifically address indigent defense issues. However, it should be noted that the comprehensive task force approach could be more generally applied to address problems in any sector of the criminal justice system that have systemwide impact and require the forging of a broad consensus to effect positive change.

Is the Task Force Approach Appropriate In Your Jurisdiction?

Obviously the first question to be examined is whether or not a task force is appropriate in any particular jurisdiction. There are a number of factors that should be examined in order to answer this question. First, is there a belief, at least among some components of the criminal justice system and the three branches of government, that a problem exists in the jurisdiction?

Task forces work best if they begin with the understanding that there is a crisis in indigent defense delivery or various components of the criminal justice system. It is still necessary to gather the facts and the data, but if the task force can begin with the assumption that a crisis currently exists (assuming that one does in fact exist), then more energy can be devoted to attempting to solve the crisis, and it is more likely that participants will be willing to make difficult policy decisions. In the absence of this initial understanding, trying to determine whether or not there is a crisis and trying to convince task-force

members that there may be a crisis can take a large amount of time that will substantially cut down on the time available for debate, discussion and resolution of major ideas and objectives.

Second, is there a history of problem-solving in the particular jurisdiction and prior cooperation among the key organizations or individuals, including the courts, criminal justice agencies, the executive and legislative branches and the private bar? The two pilot jurisdictions were selected for this project in part because there had been several prior efforts to address the problems of indigent defense services, including statewide studies that The Spangenberg Group had conducted in both states, so there was a history of problem-solving and cooperation among the various agencies. However, our experience has led us to conclude that in some cases, there may be too much history for a task force to be beneficial. This we believe was the case in Oregon, where the problem of indigent defense has been a continuous and contentious one for almost a decade. There, numerous committees, often consisting of the same individuals, had dealt with many of the same problems, making it more difficult to achieve success with yet another task force. Many changes had already been implemented, and the problems that remained were the most intractable and politically sensitive ones.

According to the independent evaluator:

> The Task Force process may be more effective in states which are just coming to grips with their indigent defense crisis. The principle (sic) benefit of the process in such circumstance may be to begin informed discussion among the components of the criminal justice system and to begin the incremental process of education.

It is also important to determine whether there is available leadership in any particular jurisdiction to support and direct the efforts of a task force. Our experience has been, both in our work on the SJI grant and our prior work with BIP task forces around the country, that leadership is absolutely essential to any successful

task-force operation. Leadership must come from an individual who is highly respected across the three branches of government and all criminal justice agencies. As chairperson, this individual will not necessarily be required to spend a substantial amount of his or her time working for the task force, but s/he must be committed to accomplishing its goals.

This means then that there must be local staff support to assure that the task force has available information, that agendas and minutes are prepared, and that meeting logistics can be coordinated on site. There must also be, in our judgment, expert technical assistance to enhance local staff support by providing new ideas and information from around the country regarding what works and what does not. The Washington State task-force experience is a very positive one in that the State Court Administrator's office designated an individual who spent a substantial amount of her professional time working with the task force and the consultant, making sure that information was provided and that there was a local contact to help arrange meetings, putting together reports and informing members of meeting schedules. In addition to this professional assistance, administrative assistance was also provided at locating meeting sites, getting notices out, getting minutes out, answering questions, etc. The efforts of the outside consultant and the AOC were complementary; the outside consultant was able to discuss things that had worked in other states and the AOC was extremely helpful in gathering necessary data from Washington State. All of this was important to the ultimate success of the task force.

One of the most important, if not the most important, decision to be made in establishing a task force is the selection of the task-force chairperson. It is absolutely essential that the chairperson of the task force be someone who will be highly respected by all members of the group, but s/he need not be an expert on indigent defense delivery. Some of the best chairpersons we have dealt with have been highly successful civil lawyers. The

chairperson must be able to run a good meeting, make important telephone calls, and have access to key persons on the state level. The chairperson must also be a consensus builder and be willing to step in when controversial issues are being discussed. It is critical during the life of the task force, and particularly during the early stages, that all possible issues be put on the table regarding the criminal justice system. Without a strong chairperson, proponents of particular views or philosophies may attempt to limit discussion on important issues. A strong chairperson can make certain that all points of view are heard and that all issues remain on the table until there is a full discussion.

In this regard, the independent evaluator concluded:

> It is important that the leadership of the Task Force be committed to it and have confidence in the process. One person should serve as chair who should be a person of stature who is objective and not directly involved in funding or administering the indigent defense system.

Finally, there is the question of available funding. In order for a task force to have the resources necessary to conduct its business, it needs a grant or other funding support. These funds may underwrite the travel of task-force members to various meetings, fees and travel of the technical assistance providers, and the costs of drafting and publishing of a final report. Further, funds may be necessary to support data collection to inform the task force's decisionmaking process. This may be a particular problem in states where a sense of crisis is emerging and the education process is just beginning. There can be many different sources of funding for a particular task force. It can come directly from the legislature or the courts, or it can be a shared responsibility among the major criminal justice components. There are also federal funds available for the creation of task forces, including the federal anti-drug abuse grant funds.

What Goals Should Be Established?

The goals of the task forces in Oregon and Washington were to consider the causes of the growth in cost and caseload of the indigent defense system and identify measures to contain those costs without endangering the role of law enforcement, the prosecution function, or the constitutional rights of indigent defendants. The specific objective was to cut down the number of criminal cases entering the court system that require the appointment of counsel and contain the cost of others.[2]

According to the evaluator:

> While there are sound reasons for stating a broad goal for the project, the lack of a narrower focus is a problem. Many Task Force members expressed an underlying sense of frustration that the stated goal was impossible to achieve because the underlying politics make it unlikely that any recommendations would ever be adopted.
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> Even among Task Force members in both states who were frustrated by the process not fully accomplishing its loftier goal, there was acknowledgement that there was a very significant side benefit of the process. That benefit was the increased level of awareness of the nature of the crisis among the participants and a greater understanding of the perspective of others affected by it.

He concluded:

> The most successful aspect was the Task Force process involved the side benefits of bringing together disparate viewpoints, interests and concerns about the indigent defense system and talking together about the problems. There are two aspects of this: First is the education of participants about the problem and their general increase in awareness of the nature of the problem and how it is perceived by others. The second is the development of networks among people who get to

[2]See Chapter One for a more detailed discussion of project goals.

know each other and who will possibly work together on the issue in other settings.

This increased communication and understanding was considered an important benefit, not only among those directly responsible for system operations, but also among those responsible for funding and for administering the system. Because of the importance of this benefit, it was recommended that mutual education and increased understanding should be made an explicit goal of the task force.

Further, what the task force seeks to accomplish should be more narrowly defined to provide greater focus early in the process and avoid members' frustration with the difficulty of accomplishing major change in the short run. Bringing about change in the indigent defense system (and in the criminal justice system generally) is a long-term process that can only be accomplished in an incremental fashion, given political and practical exigencies.

It is important that this be recognized both in defining goals and evaluating the success of a comprehensive task-force effort. Because of the nature of the process and the work involved, the task-force process cannot be evaluated fully in terms of results for at least two years after the work has ended. This is in large measure because recommendations will invariably suggest legislative change or change in budgets of various agencies. It is unlikely that these kinds of changes can occur within a short period of time after the task-force process is completed. It also strongly suggests the need for an implementation committee which may be separate from the task force to follow through on the recommendations for a period of at least several years.

At the outset, the task force should develop a set of specific objectives. These objectives should ultimately be limited to a small number that are both workable and achievable. The process should begin with all relevant issues on the table, with an understanding that over time the priorities will be narrowed as more information is available and possible consensus determined.

The final recommendations should be few in number and address those priority areas that present the best chance for achieving the overall goals of the committee, both in the short and the long term.

Who Should Sponsor the Task Force?

As noted earlier, the Task Force in Oregon was sponsored by the Legislature through both the Speaker of the House and the President of the Senate. In Washington State, the Advisory Group was established by the Office of the Administrator for the Courts under the leadership of the Lieutenant Governor. Experiences with the Bar Information Program include task forces that have been created by a state bar association, the Chief Justice of the Supreme Court, the state legislature, and the Governor. In several cases, they have been jointly sponsored.

There are advantages and disadvantages to each of the various sponsorship scenarios. Of the two demonstration sites, the sponsorship option chosen in Washington proved to be the most successful. The Administrative Office of the Courts (AOC) was able to provide local staff for the Task Force and also to develop available information as needed. On the negative side, because of the press of the numerous responsibilities of the AOC, it took considerably longer for the initial planning period to be completed.

One advantage of legislative sponsorship, as was the case in Oregon, is that the legislature is in a unique position as the funding authority in many states to make the decisions that will improve the system. However, legislative sponsorship also contributed to the politicization of the task-force process. According to the evaluator, because the two co-chairs were legislators:

> There was a tendency...for ideas to be tested for their political viability in the Legislature early in the

process. As a result, discussions of some ideas were short-circuited and there was a strong tendency to veer away from potentially controversial stands.

Further, legislative sponsorship was primarily responsible for the large number of members on the Oregon Task Force, as it was considered necessary to provide for equal representation of both political parties in both the House and the Senate.

Sponsorship by the state supreme court may suffer from some of the same disadvantages as legislative sponsorship, if the court is involved in fundamental ways in administering and funding the indigent defense system. On the other hand, the chief justice is in a unique position to use his or her authority to bring the key players to the table and forge consensus among diverse views, if so inclined.

State bar association sponsorship can be extremely effective, as a task force can benefit from the involvement of influential members of the legal community who are not directly involved in the daily operations of the indigent defense system. Bar sponsorship can only be effective in the long run, however, if the board of governors and the president are willing to commit themselves to supporting the task force effort. Without this broad commitment, bar sponsorship in name only will accomplish little or nothing in implementing meaningful system change over the long term.

In determining whether or not an organization is suited to sponsor a task force, consideration should be given to whether it has the funding, staff support, and the leadership capacity required for a successful project. But while these three functions are critical to the operation of the task force, they do not necessarily need to be found in a single sponsor. It may be that they can be found among a combination of sponsors, each of whom has something to contribute to the task force's successful operation.

Who Should Be On The Task Force?

It is extremely important that the task force be representative of all relevant criminal justice agencies, the three branches of government, and the private bar. Care should also be taken that representation among the various groups is balanced in order to avoid any perception that the task force is "stacked" with proponents of a particular point of view or political philosophy. One of the reasons that the task force was so large in Oregon was because there was an effort to get as many groups and individuals involved as possible and because there was a political need to have a large number of legislative members on the task force. While there is no magic number for task-force membership, group dynamics and the goal of fostering improved education and awareness militate in favor of a smaller, though still representative, task force.

The evaluation concluded that:

> The Task Force in Oregon was too large for all of its members to participate, to bring about the necessary level of trust and to develop a familiarity with the issues. The Washington Task Force, on the other hand, was large enough to encompass the various interests that needed to be represented, but was small enough for all members to participate.

Several issues regarding membership are as important as the size and composition of the task force. First, it is important to be certain that the task force is comprised of key individuals with power and authority and not lower level staff persons. The representation of a group by an individual is not sufficient unless that individual is a major force in directing the policies of the agency or group. When the task force is formed, the importance of the members themselves attending the meetings should be emphasized. Even if they are unable to come to every meeting, it is important to have them at the table to determine what progress can be made in reaching compromises and developing consensus on issues that

will need their or their agency's support. It is also important to have these key people listed as active members of the task force, and that they be willing to sign a final report when the work is completed and the recommendations have been made.

If possible, members of the task force should be identified specifically. Simply asking for a representative of a particular organization or group may result in a member in tune with the task-force goals but with no power; or a member may be appointed who is so opposed to the concept of a task force and all the goals and ideas that are placed on the table that s/he can serve as an obstruction to progress.

While it is preferable to involve as many of the members as fully as possible throughout the life of the task force, it can be useful to designate subcommittees or working groups to develop more specific information on certain issues and present working papers for discussion and resolution by the full task force. To the extent possible, these smaller committees should also reflect all perspectives represented on the task force.

What Kind of Expert Assistance Will Be Needed?

Like every high-level advisory committee, commission or task force, if the task force is organized correctly, some of the busiest people in the state will be appointed who, for the most part, do not have the time or skills to conduct research and gather information on their own. It is absolutely essential that the assistance of expert consultants be available to the task force over the life of the project. Consultants can identify the types of data that will be needed by the task force in order to make decisions on recommendations; in some cases, where those data are not available, the experts can develop the instruments to collect the data.

It has proven extremely helpful for experts to provide specific information to the task force on how other states fund

indigent defense services, how the services are structured, and how oversight is provided. Information on new ideas or programs that have proven successful in containing the cost of indigent defense and/or assisting the components of the criminal justice system in conducting their work more expeditiously and more fairly is also helpful. Consultants should limit the information provided to the experiences of other states that the task force can relate to its own experience in terms of geography, politics and/or philosophy. Along these same lines, consultants can provide advice to the task force, particularly at the start, on the roles and purposes of other task forces, e.g., how they have gone about their tasks, developed an agenda, reached consensus and compromise, and put their final report together with findings and recommendations.

The role of the experts is a difficult balancing act. Experts should not attempt to control the task forces' operations or recommendations. However, they can provide direction at critical junctures in the deliberations to facilitate the work of the task force. At the outset, the consultants should provide a detailed review of potential issues for consideration to serve as a starting point for the discussion. As a sense of common priorities emerges, the consultants should summarize what has been accomplished and what remains to be done so that the task force can continue to build on its previous efforts. Finally, the consultants may draft proposed recommendations for the task force in order to focus the discussion and identify areas of difference and potential compromise.

Experts also can be useful in bringing into the jurisdiction criminal justice leaders from other states, either those who have been through the task-force experience themselves or who have developed a particularly innovative program that has worked.

What Kind of Schedule Should Be Established?

The task-force effort should continue over the course of at least one year. The amount of work to be accomplished is considerable and does not benefit from being hurried. Where appropriate, the schedule can be geared to a legislative agenda or budget cycle, particularly if the task force's recommendations are likely to require statutory change or budgetary action. However, the task force should never rush to judgment simply to meet a legislative deadline. The long-term prospects for success will be greater if the task force comes to a reasoned judgment and puts off legislative action for another session.

One of the major goals of the task force is to develop a broadly based coalition and new alliances. The support of traditional adversaries for certain recommendations can have an extremely positive impact on the likelihood of success. (For example, in one state we observed highly persuasive testimony in support of recommended changes in the indigent defense system provided by the attorney general and local prosecutors from the two major urban areas of the state.) If such positive support cannot be accomplished, then the consensus-building process should be used in an attempt to neutralize traditional sources of opposition. To accomplish this, task-force members must be willing to step back and listen with an open mind. It takes time to develop the necessary sense of trust among the task-force members. They need to have the opportunity to get to know each other on a personal basis and to be certain that their willingness to compromise will not be used against them outside the meeting room.

The task force should meet regularly, perhaps as often as once a month. This is important to build and maintain momentum and be able to deal with a large number of issues in a substantive way. Holding a few of the meetings in a more casual setting, away from members' usual "turf," can be useful in developing more personal interaction among members. Rates of participation can be increased

if a schedule of meetings is established in advance and meetings are generally limited to two to three hours.

Problems to Anticipate

There are a number of problems that we have encountered in working with task forces, both under the SJI grant and in prior BIP work, that can be anticipated and/or avoided in other jurisdictions undertaking similar efforts.

In some states, it is very difficult to get the key parties to participate. It may be necessary to have the chairperson contact some potential members directly and request personally that they participate. In some circumstances, key persons may simply fail to show up for meetings. A call then should be made by the chairperson, the chief justice, the state bar president or a key legislative member to successfully encourage more active participation.

It is almost always difficult to achieve consensus among diverse participants. Each individual comes to the table with a certain background and a certain set of goals. A strong chairperson is extremely important in convincing members to step outside their normal roles and develop a consensus. Every effort should be made to avoid any formal written dissent. This can be very harmful to achieving the objectives of the task force. There will be times, however, when this will not be possible and the final report may have to reflect diverse points of view. One way to address this may be to put language in the report suggesting that a difference of opinion exists, but without including a full dissent on one or more issues.

In examining problems and issues in the criminal justice system, implementation of some recommendations may require additional funding that is unlikely to be forthcoming. The executive or legislative branch may draw the line and state that this issue cannot be addressed because it is a funding problem.

Efforts should be made by the chairperson and other members to keep these issues on the table so that they can be discussed and talked about as time goes on. One way to achieve results is to order the list of recommendations in a way that divides them into categories; for example: recommendations that can be achieved without funding, legislation or court rule; recommendations that can be achieved through court rule; recommendations that can be achieved through regulations; recommendations that can be achieved only through legislation, but will not require additional funds; and, finally, recommendations that can only be achieved with additional funding. If the recommendations are grouped in these various categories, it may be easier to develop a consensus and better ensure that some can be implemented in the short term while continuing to work toward goals that may require additional funding.

In dealing with the legislative and executive branches, it is important to determine at the outset what compromises the task force is willing to make. Frequently the final decision on legislation occurs in the waning days of the legislature. There may be only a few hours to make final decisions. This is when political decisions will need to be made by those in key positions concerning what is best for the overall system and what kind of improvement can be made in light of political reality.

Support of an individual, agency or group for any goals and recommendations the task force might develop should not be taken for granted. For example, in some states, many judges are former legislators or have political ties to the legislature and can be influential when they take a strong position against a task force's recommendation. We have also observed situations where certain task force members have attempted to influence negatively the direction of the task force in private. Therefore, no one should assume at the outset that a particular group will be supportive of specific goals or recommendations. There have been instances where local public defenders have been the most negative members of the task force when it comes to issues like state funding or the

creation of a statewide system. In such a situation, they may work behind the scenes to kill such recommendations because they are satisfied with the status quo or they feel threatened by recommended changes.

Finally, the availability of reliable data within the criminal justice system can vary dramatically from jurisdiction to jurisdiction. Virtually all states publish some court data for the criminal justice system. However, it may not be collected or reported in a way that will be useful to the task force; thus, original data collection may be required. Available data should be reviewed early in the process, perhaps even before a task force is organized, in order to determine what additional information will have to be collected and what that will entail logistically. Any original data collection effort will require staffing, funding, and access to information.

Summary and Conclusions

A comprehensive task-force approach to containing indigent defense costs and caseloads can be beneficial, particularly in jurisdictions that are just beginning to develop an awareness of crisis and the need for a coordinated response. The principal benefit of the approach may be the opportunity for informed discussion among the usually adversarial components of the criminal justice system and the beginning of the incremental process of education.

Bringing about major change in the indigent defense system (and the criminal justice system generally) can only be accomplished in the long term. The goals and expectations of the task-force members should reflect this reality to avoid frustration with the pace of change and their contribution to it. A separate implementation effort of several years' duration may be required before any of the task force's recommendations bear fruit.

In order to be successful, the task force needs to have committed leadership and a strong chairperson who is of sufficient stature to command respect and who is objective and not directly involved in funding or administering the indigent defense system. Task-force sponsor(s) must be able to provide or coordinate leadership, staffing and funding for the effort. Task force membership must be representative of all relevant criminal justice agencies and the three branches of government, as well as the private bar. No one group or political philosophy should appear to be overrepresented, and the total number of members should not be too large to allow for full participation. Members should be key individuals with power and authority in the groups or agencies they represent.

The assistance of expert consultants can facilitate the efforts of the task force by assisting in data collection, providing information from other jurisdictions, and suggesting guest speakers with relevant experience. Perhaps most importantly, the consultants can provide direction at critical junctures in the deliberations in the form of working papers, summaries of accomplishments, and draft recommendations.

Also crucial to the success of the task-force effort is the availability of local staff for tasks such as coordinating the project, setting up meetings, serving as a contact point for members, preparing and disseminating minutes, and researching issues. Local staff should work closely with both the chairperson and the expert consultants.

The task force should conduct its deliberations over the course of at least a year. This provides enough time to fully explore the issues and develop the personal trust necessary for such a diverse group to reach consensus on politically controversial issues. Meetings should be held on a regular basis, as often as monthly, to maintain momentum. The schedule should be set in advance and the length of meetings limited to two to three hours to ensure participation. Where possible and appropriate,

the schedule might correspond with the legislative agenda or budget cycle.

Finally, a number of problems can be anticipated and should be prepared for in advance. These difficulties include: getting the key parties to agree to participate; reaching a consensus; structuring recommendations to increase the likelihood of implementation; dealing with entrenched interests that work against progress; and collecting the data necessary to develop informed conclusions and recommendations.

CHAPTER THREE

THE TASK FORCES IN OREGON AND WASHINGTON

The experiences of the Task Forces in the two demonstration sites were very different. On the whole, participants in the Washington Advisory Group viewed it as a successful effort, while participants in Oregon were less satisfied with the outcome. The following sections provide additional detail regarding the task-force process employed in each demonstration site, highlighting factors that contributed to success and problems that were encountered, and summarizing the respective conclusions and recommendations of the two groups.

The Oregon Legislative Task Force on Indigent Defense Cost and Caseloads

Task Force Membership and Process

The Oregon Legislative Task Force on Indigent Defense Cost and Caseloads consisted of 35 members, including representatives from the Legislature, the Judicial Department, the Executive branch, law enforcement, district attorneys, criminal defense practitioners, and private bar members.[4] Members were appointed by the Speaker of the House, then Vera Katz, and the President of the Senate, Dr. John Kitzhaber. The Task Force was co-chaired by Representative Peter Courtney and Senator Richard Springer. Bill Taylor, Counsel to the House Judiciary Committee, also participated *ex oficio* in the Task Force effort. Lloyd Athearn of the Speaker's Office provided logistical assistance, as did the Office of Legislative Services.

Because of the large size of the Task Force, a smaller Working

[4]See Attachment A for a complete list of Task Force members in Oregon.

Committee of a dozen members was designated by the co-chairs. The members of this Working Committee were extremely diligent in their participation and were responsible for accomplishing the majority of the work of the Task Force.

In the interest of political balance, the Task Force included 10 legislative members, five from each house, who were chosen to be representative of both parties. In addition, certain of the legislative members were chosen because of their involvement on the Judiciary and Ways and Means Committees, the interim Emergency Board, and in other leadership roles.

In practice, only a few of the legislative members participated in the ongoing deliberations of the Task Force. This may have been due, in part, to the fact that the Task-Force effort took place during an election year in which many key seats in the Legislature were being contested. (In fact, the election resulted in a major shift of power, particularly in the House and the Governor's Office, while the Task Force was still meeting.)

The Task Force's co-chairs were particularly sensitive to the political factors affecting the likely implementation of recommendations in the areas being discussed. While attention to political exigencies is necessary in any such policymaking effort, in this case the emphasis from the chairs may have foreclosed or foreshortened discussion in some areas. Likewise, other legislative members were not eager to revisit issues which had been the subject of fierce debate and controversy in recent legislative sessions, e.g., the question of decriminalizing offenses such as felony charges for driving while a license was suspended (DWS).

The defense bar, both public and private, was heavily represented on the Oregon Task Force, with eight criminal defense practitioners participating. In addition, there were six representatives of the private bar in general on the Task Force. Many of these individuals were very involved in the Task Force's (and Working Committee's) deliberations, which may have lead to a perception on the part of some that these groups were over-

represented.

There were two district attorneys on the Task Force, both of whom participated at a very high level on both the full Task Force and the Working Committee. Further, there were several judicial appointees who were very involved in the process, as well as two representatives of the State Court Administrator's Office who attended all the meetings and provided extensive data to the Task Force. In contrast, representatives of law enforcement were involved only marginally.

The full Task Force met three times between June and December of 1990, while the Working Committee met six times during this period. The final meeting of the Working Group was held immediately preceding the final meeting of the full Task Force, in order to make decisions regarding final recommendations for the Task Force's consideration and vote.

Working Committee meetings generally lasted half a day, although towards the end of their deliberations on proposed recommendations, some meetings were scheduled for an entire day. Full Task Force meetings lasted between two and three hours. One of the two Co-Chairs presided over the Task Force and Working Committee meetings. Patricia Smith, Vice President of The Spangenberg Group, acted as consultant and generally facilitated the meetings during the substantive discussions. All meetings of both the full Task Force and the Working Committee were recorded to provide a permanent record. These tapes were transcribed, and summary minutes of most of the meetings were prepared by the consultant.

Issues for Consideration

Prior to the first meeting of the full Task Force, The Spangenberg Group distributed a detailed memorandum outlining six areas for potential consideration by the Task Force. These included: the scope of the right to counsel in Oregon; charging

practices of law enforcement and prosecutors; decriminalization of minor offenses; judicial administrative practices; defense counsel practices; and other issues, such as bail practices, marginal indigency and indigency standards. The first meeting resulted in the production of an expanded list of 39 specific areas of potential concern.

The first task of the Working Committee was to narrow this list of issues down to a few areas that were deemed to have potential for successful change and would contribute meaningful savings. Between the Working Committee's first and second meetings, a telephone poll of members was conducted by the expert consultants that resulted in a list of 10 preliminary priorities. After extensive discussion of each of the preliminary issues in several meetings, the Working Group proposed a set of limited priorities, including:

1. Changes in the scope of the right to counsel;
2. Uniform charging practices, especially in regard to misdemeanors reduced to violations;
3. Early screening and disposition at arraignment;
4. Local court revenues;
5. Drug diversion programs; and
6. Death-penalty charging practices.

The focus of the Working Committee's efforts was to find the items that would have the greatest impact on costs and caseloads. The Spangenberg Group attempted to provide information from both Oregon and other jurisdictions around the country that would assist the Working Committee in identifying these issues. Further, the Office of the State Court Administrator provided extensive data for use by the Working Committee in the winnowing process. This process resulted in elimination from the list (after much discussion) of a number of issues which everyone on the Working Committee agreed were very important matters, but which either did not show promise for realizing meaningful cost savings or had already been addressed by recent legislative or administrative action (such as the issue of reducing misdemeanors to violations). The final list of

recommended priorities included some issues that continued to generate controversy, most notably the right-to-counsel issue. The items on the list were presented in no order of priority, with the exception that the last item--death-penalty charging practices--was identified as a lower priority.

The full Task Force reviewed and approved all of these proposed priorities. In addition, the members voted unanimously (at the strong suggestion of representatives of the State Bar) to add one major issue for continued consideration: the dual conflicts involved in the Judicial Department administering the indigent defense system and individual judges having authority to make administrative and fiscal decisions regarding defense representation. It was further suggested that the Working Committee look into the possibility of effecting savings by relying primarily on preliminary hearings as opposed to grand juries to issue indictments. Because there was no information available that suggested a cost savings resulting from the use of preliminary hearings, the Working Committee ultimately recommended that the issue be dropped from the list of priorities.

Final Conclusions and Recommendations

Following the narrowing of the priorities, the Working Committee was charged with developing proposed recommendations in its few remaining sessions. On December 17, 1990, the Working Committee had its final meeting to develop proposed recommendations for presentation to the full Task Force that same afternoon. The following summarizes the actions taken in these final sessions with respect to the Task Force's deliberations on each of the priority issues, as well as on the issue of federal drug grants that had only recently been made available to the states. The Task Force's conclusions are offered in the order in which the issues were discussed at the final meeting.

1. Federal Drug Grant Funds. During the period of the Task-Force effort, the federal Bureau of Justice Assistance (BJA) Drug Grant program was specifically opened up to indigent defense programs by action of Congress. This provided the first opportunity for the infusion of federal funds into the state's indigent defense programs since the demise of the Law Enforcement Assistance Administration (LEAA) in 1979-80. BJA funds are made available to criminal justice agencies through two mechanisms: (1) a block-grant program with certain amounts of money allocated to each state, based on a population formula; and (2) a discretionary-grant program available to all applicants. Block grant funds are distributed in each state through a designated planning agency at the state level, and allocation decisions are made in each state according to its own individual process. Discretionary funds are distributed directly by BJA.

In Oregon, the allocation decision for block-grant funds was made after a series of public meetings and with the input of local executive committees from around the state. At the time that the Task Force was considering making recommendations about the possible use of such federal funds, allocation decisions for block-grant funds resulting from this process were already in place for 1991, and largely excluded indigent defense. Programs slated for funding included law enforcement and treatment programs in prisons. The Working Committee offered a number of specific suggestions about the types of demonstration programs (such as a drug diversion program) that might qualify for BJA funds under a combined criminal justice program including indigent defense, prosecution, and the courts. However, it was determined to be impolitic and infeasible to alter the allocations so late in the process without alienating those law enforcement and corrections agencies from which funds would have to be diverted and compromising the potential for long-term cooperation among important constituencies. Further, a new governor was about to take office and would be reviewing the state process for allocating block grant funds. Thus, the Task Force

recommended that the Executive and Legislative branches consider making application for funds from BJA's discretionary grant program and that combined projects including indigent defense programs, prosecutors, and the courts should be an essential part of any such application.

2. Judicial Department Conflict. This issue was discussed during the course of the Task Force's deliberations in two dimensions: (1) the potential conflict inherent in the administration of the indigent-defense system by the Judicial Department and the Chief Justice; and (2) the potential conflict of individual judges having authority to make administrative and fiscal decisions regarding defense representation. In response to these perceived conflicts, for several years prior to the Task-Force effort, proposals had been made by various groups to create once again an independent commission to administer the operations of the indigent-defense system throughout the state. The various proposals were distinguished primarily by the branch of government in which it was recommended the independent commission should be placed, whether Judicial or Executive. While the Task Force was engaging in its deliberations on this subject, a draft bill was being prepared by the Judicial Department which suggested that the Commission should be part of the Executive Branch. The Task Force found it impossible to reach consensus on which proposed structure would be preferable, or even on the advisability of recommending the creation of an independent commission, because of the highly charged political nature of the issue.

Therefore, the Task Force recommended support for the principle that the direct conflict inherent in having trial judges making fiscal and administrative decisions about appointment of counsel and provision of other indigent defense services (e.g., investigations) should be eliminated in the interest of guaranteeing due process. Implicit in this recommendation was the assumption that some administrative structure (be it a commission

or some other entity) would continue to be in place to provide trial judges with lists of qualified attorneys for appointment and arrange for their compensation, and also to review and approve requests for funds for other defense services.

3. Early Screening and Disposition. Early screening programs instituted in Lane County, Oregon, and other jurisdictions around the country make experienced defense and prosecution counsel available at arraignment in order to dispose of as many cases as possible and appropriate at that early stage. Such programs to reduce the volume of criminal cases that continue through the criminal justice system only work in an environment of cooperation among judges, prosecutors, and public defenders. Because of the need for informed cooperation and the necessity of structuring individual programs for each local jurisdiction, the Task Force determined that attempting to legislate the expansion of this type of program through statute or court rule would be inappropriate.

The Task Force recommended that a training program be developed under the supervision of the Chief Justice and with the assistance of the Oregon Criminal Defense Attorneys Association (OCDLA), the Oregon District Attorneys Association, judges' associations, and other appropriate groups, for purposes of educating all the parties involved as to the benefits of early screening and disposition programs (or other equally effective alternative programs with similar goals) and the incentives that exist for their creation. To encourage this educational process, the Task Force further recommended that the Legislature's Ways and Means Committee should include a budget note in each affected group's appropriation requiring a coordinated review of approaches to early screening and disposition in the counties throughout the state, with regular progress reports.

4. Right to Counsel. Of all the issues considered by the Task Force in Oregon, none was more controversial than the question

of taking action to reduce the volume of criminal cases by altering the state guarantees of the right to counsel. The Task Force concluded that there were several reasons why the indigent defense caseload is high in Oregon. First, Oregon has substantially expanded the right to counsel beyond federal constitutional requirements. Second, in recent years there has been a large increase in drug cases and a doubling of juvenile cases. A final factor results from the State Supreme Court's decision in Brown v. Multnomah, 280 Or. 95, 570 P.2d 52 (1977). The Court's interpretation of Article I, section 11, of the Oregon Constitution in Brown set a standard which provides for counsel in all cases in which a criminal sanction can be applied, including cases in which the only sanction is a fine. Because of the constitutional underpinnings of the right-to-counsel guarantee, it was determined that any action taken to alter the nature of that right would require a constitutional amendment.

Many members of the Task Force did not want to address the question of the right to counsel at all, feeling that current guarantees were the result of past policy decisions that were appropriate and should not be revisited. Further, litigation was pending in the State Supreme Court that addressed directly the right-to-counsel question, even as the Task Force was debating the issue. Thus, it was suggested that the question should be tabled until the Supreme Court ruled. Some felt that, regardless of whether it came out in favor of altering or retaining current right-to-counsel provisions, the Task Force had to address the question of a constitutional amendment, as it would inevitably be raised in any legislative debate about the structure and cost of the state's indigent defense system. Others were of the opinion that even if a constitutional amendment to limit the right to counsel was deemed the most appropriate approach to reducing the state's indigent criminal caseload, it was not politically feasible and should not be pursued. Feeling that the final decision on such a controversial issue should be made by the full Task Force, the

Working Committee continued to address the issue and presented two alternative versions of a constitutional amendment for consideration by the Task Force in the event that it was decided to recommend that approach.

The Task Force voted to include the following alternative constitutional amendments in a report to the Legislature so that they would be available for consideration should the Legislature decide to address the issue of the right to counsel:

1. No provision of this Constitution grants an indigent defendant in a criminal prosecution a right to counsel at public expense which is more extensive than that guaranteed by the Constitution of the United States.

2. In all criminal prosecutions, the accused shall have the right to be heard by counsel; provided that a conviction can at no time result in an incarceration.

The Task Force explicitly did not take a position recommending whether or not a constitutional amendment limiting the right to counsel should be pursued; neither did it indicate any preference between the two proposed alternatives. Further, the Task Force did not suggest what, if any, fiscal implications might arise from such an amendment.

It should be noted that the vote about whether or not even to report on the proposed alternatives was extremely close (11 in favor and eight opposed). The sentiment against a constitutional amendment to alter the right to counsel was very strong among certain individuals and groups represented on the Task Force, including some legislators, public defender representatives, and private bar members.

5. Municipal and Justice Courts' Revenues. Within the last few years, a problem developed in certain counties in Oregon where Municipal and Justice Courts had been created for the specific purpose of generating revenues (from criminal fines, fees and forfeitures) for the localities, which resulted in decreased revenues and increased costs in the state courts. Use of the

additional revenue generated by the new Justice Courts varied. In at least one county, Lane, the revenue was used to fund a new traffic enforcement team. Thus, all revenue-generating cases were being prosecuted in the local Justice Court, resulting in a $300,000 drop in revenue to the State General Fund, while an additional 300-400 misdemeanor traffic offenses resulting from the traffic enforcement team (which produced little or no revenue) were being sent to the District Court for prosecution, including the appointment and compensation of counsel, all at state expense.

The Judicial Department was concerned that other counties would decide to adopt the same approach, with potentially disastrous results for the overall judicial budget, and it had worked with the Associations of Cities and Counties to develop legislation that would address the problem. At the time of the last Task Force meeting, two draft bills had been prepared: LC 463-1 to deal with the Municipal Courts, and LC 463 to deal with the Justice Courts. These bills were designed to remove the financial incentives for counties and municipalities to siphon off revenue-generating cases by requiring that they reimburse the State General Fund.

The Task Force recommended the support of the Judicial Department in its effort through draft bills LC 463 and LC 463-1 to alleviate the problems with local courts draining State General Funds by reserving revenue-generating cases for their jurisdiction and generating additional state costs by deferring additional misdemeanor traffic cases to the District Courts.

6. Death-Penalty Charging Practices. Because of the high cost of prosecuting capital cases and the pressure that may sometimes be felt to bring a charge of aggravated murder (only to end up settling the case as a non-death charge many months later), it was felt that providing a longer period for an informed decision by the prosecutor about which cases truly merit a charge of aggravated murder would result in savings to the entire criminal justice system.

The Task Force recommended that a 30-day period be established during which the district attorney could determine whether or not capital charges would be brought in a case. The Task Force felt that although it would be appropriate to appoint a "death-qualified" attorney at the outset of a case in which a capital charge was possible in order to provide for appropriate and continuous counsel, the attorney should be paid at the regular rate until and unless a charge of aggravated murder is brought, at which time the higher capital rate would become applicable. By tying the compensation rate to the prosecutor's decision within the 30-day timetable, savings could be achieved in individual cases, in addition to broader system savings to be realized by avoiding the costs of inappropriately prosecuting cases on capital charges.

The Washington State Advisory Group on Indigent Defense

Membership and Process

The Washington State Advisory Group on Indigent Defense was established by the Office of the Administrator for the Courts under the leadership of Lt. Governor Joel Pritchard as Chairman. Lt. Governor Pritchard served 16 years in the U.S. House of Representatives and is highly respected in the State of Washington.

The Advisory Group was composed of 22 members representing all three branches of government, the Bar, the major criminal justice agencies throughout the state, and county and city government.[5] Legislative members included the Chairs of the Senate Law and Justice, House Judiciary, Senate Ways and Means, and House Appropriations Committees. In order to provide continuity between the legislatively established Indigent Defense Task Force and the Advisory Group, five members of the former committee (including its Chair) were appointed to the Task Force. Jane Nelson of the Office

[5]See Attachment B for a complete list of the members of the Washington State Advisory Group.

of the Administrator of the Courts (AOC) served as Project Coordinator, and Kelly Reid of the AOC provided administrative support.

The Advisory Group met 11 times over the course of 13 months between September 1990 and October 1991. The Washington Advisory Group got started much later and met more frequently than the Oregon Task Force. For the most part, the Advisory Group met as a whole during the course of its deliberations. This higher level of participation was possible because of the smaller size of the group compared to the Task Force in Oregon and may have been one factor contributing to a greater sense of accomplishment among Washington Task Force members.

A subcommittee was established to look at a number of issues regarding the handling of misdemeanor cases, particularly the manner in which these cases enter the criminal justice system and possible avenues for diversion. This subcommittee met on two occasions and provided proposals to the full Advisory Group that formed the basis of several important final recommendations.

The proceedings of the Advisory Group were taped, and summary minutes were prepared by AOC staff. Meetings were kept strictly to a two-hour timetable by the Chair. Although this occasionally foreshortened discussion, it provided members with certainty regarding the schedule that may have contributed to the high rates of participation. Robert Spangenberg, President of The Spangenberg Group, served as consultant to the Advisory Group and generally led its substantive discussions.

Several meetings were attended by guests invited to share their experiences with the Advisory Group. Two members of the Oregon Task Force were invited early in the process in Washington (when deliberations of the Oregon Task Force had already been concluded) to provide insight into the Task-Force process itself and compare notes on priority issues in both states. Later, members of the King County prosecutor's office and contract defense counsel were invited to give a presentation on the procedures

employed in arraigning criminal cases in that jurisdiction.

Issues for Consideration

After an initial informational meeting, the Washington Advisory Group began to review a preliminary list of issues for consideration provided by The Spangenberg Group. The ten items on this list were similar to those proposed in Oregon and included:

1. The scope of the right to counsel in Washington;
2. Charging practices of law enforcement and prosecution;
3. Decriminalization of minor offenses;
4. Judicial administrative practices;
5. Fiscal impact of new legislation;
6. Bail practices/pre-trial detention;
7. Contracting systems;
8. Marginal indigency/reduced fee representation;
9. Indigency standards; and
10. Alternative funding sources;

There was also a discussion at the October 1990 meeting regarding a number of other task forces or committees underway in Washington whose efforts might in some manner intersect with the Advisory Group. The Group decided to receive periodic updates on these various activities during the course of its meetings in order to benefit from information developed and to better coordinate outcomes.

Over the next several months, the Advisory Group discussed in detail each of the 10 issues set out above. One of the central themes of the Advisory Group was to consider the positive fiscal impact on indigent defense and the criminal justice system that would result from any recommendations that it might make. It was also determined that the Advisory Group would conduct its work consistent with maintaining quality legal services. At a critical

point in the Group's deliberations, the consultant provided a detailed summary of work accomplished to date and a checklist of issues yet to be discussed. This proved invaluable in focusing the Advisory Group's continued efforts.

The Advisory Group decided that major attention would be given to a few of these issues and that several, while important, were felt to have a lower priority. Ultimately, the Advisory Group decided not to make recommendations on several of these issues, including the scope of the right to counsel, judicial administration practices, marginal indigency and reduced fee representation, bail practices, the current contracting system, and indigency standards and cost recovery. These issues were eliminated from the Advisory Group's list of priorities either because it was determined that no significant cost savings could result from any proposed recommendations or because efforts were already underway to address those issues through some other vehicle.

In June 1991, the Advisory Group began to focus on a series of recommendations that might have a positive fiscal impact on indigent defense in the criminal justice system. After reviewing all of the issues originally set forth for consideration, all members received a mail survey in which they were asked to rank according to priority the issues that they felt should receive the highest priority of the Advisory Group.

Final Recommendations

A draft set of recommendations in the identified priority areas was presented to the Advisory Group for final discussion in August 1991, and over the course of the next three meetings, a consensus was reached on all of the final recommendations. A report outlining the Advisory Group goals, process and final recommendations was prepared by The Spangenberg Group and issued under the auspices of the Advisory Group and SJI.

The final recommendations outlined below were intended to be viewed as a total package and are not presented in any order of priority. While each of the recommendations was important, it was the belief of the Advisory Group that cost containment and quality representation could best be achieved by treating all 11 recommendations as a fully integrated package and by implementing them as soon as possible. It was hoped that the adoption of these recommendations would provide the final impetus for the state to provide 50% of the costs of indigent defense from the General Fund. The balance of this chapter was excerpted directly from the "Washington State Advisory Group on Indigent Defense Lieutenant Governor Joel Pritchard, Chair, Final Report," November 1991.

1. <u>The Advisory Group recommends that the misdemeanors listed in Appendix C[6] be made "bail forfeitable" and the cited person so informed by the arresting officer.</u>

<u>The Group further recommends that the District and Municipal Court Judges Association and the Board of Governors of the Washington State Bar Association, with the assistance of the Office of the Administrator for the Courts conduct a study of additional misdemeanors which might be classified as "bail forfeitable."</u>

While the Advisory Group could only agree on those misdemeanors appearing in Appendix C, all members felt that further review is necessary. One of the problems faced by the Advisory Group was the effort to select for bail forfeiture additional minor misdemeanors which are filed in large number and could have a substantial fiscal impact. In some cases this was not possible because of the nature of the offense. However, in the recommended review called for, consideration should be given to the fact that if a number of offenses were made bail forfeitable, the aggregate numbers for all offenses would have a strong fiscal impact.

The Group also concluded that the mechanism for establishing these offenses as bail forfeitable should be by Supreme Court Rule and should include or incorporate a statewide bail schedule for these offenses.

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[6]Shown here as Attachment C.

2. The Group recommends that the District and Municipal Court Judges Association and the Board of Governors of the Washington State Bar Association conduct a thorough study of offenses that could be de-criminalized entirely eliminating the need for appointed counsel, jury trials, and other expenses associated with criminal proceedings. Any de-criminalization should take place on a statewide level, to avoid discrepancies between state and local sanctions for violations of the newly de-criminalized offenses.

The Group further recommends that the State Parks and Recreation Commission complete a determination of which of its regulations should be treated as infractions only, as authorized by RCW 43.51.180(7) and Chapter 7.84.

The Advisory Group endorses the principle that further de-criminalization of minor offenses is appropriate. However, the Advisory Group did not have the time, the resources or reliable data to make additional recommendations in this area.

While earlier legislation resulted in the de-criminalization of a number of minor traffic offenses, the Group proposes additional review at this time. A particularly promising area for further review is that of parks and recreation offenses. The legislature has specifically given the Parks and Recreation Commission the authority to determine that violation of any of its rules can be made punishable as an infraction rather than a misdemeanor. The Commission has not, however, chosen to de-criminalize any of its rules and regulations, whether or not a comparable offense outside the parks would result in an infraction.

3. The Advisory Group recommends that legislation be enacted which would permit a local prosecutor to treat certain minor misdemeanors as civil infractions.

Further, that if the local prosecuting attorney elects to exercise this option, they shall upon the appearance of the defendant declare on the record their intention to treat the offense as an infraction, prior to the plea.

The question of the constitutionality of this recommendation was discussed by members of the Advisory Group. Some Group members suggested that it would be constitutional under Kennewick v. Fountain, 116 Wn.2d 189, 802 P.2d 1371 (1991). Some members remained concerned about this issue.

Some members of the Advisory Group strongly suggested that this recommendation include a statement encouraging statewide, uniform guidelines. Other members felt that because of the many differences that exist among the urban, suburban and rural counties in Washington that uniform statewide guidelines might make it impossible for prosecuting attorneys to agree on specific guidelines because of the attitude of the public in their county. This view suggested that a substantial fiscal impact might occur on one or more offenses if applied to a large urban county, but might not be acceptable in a small rural county.

The Advisory Group points out that a similar provision in Oregon resulted in a major cost savings in Multnomah County.

4. The Advisory Group recommends that the State of Washington Sentencing Guidelines Commission review all Class C or unclassified felonies for possible reclassification as gross misdemeanors or misdemeanors and report its findings to the Legislature.

Members of the Advisory Group gave further consideration to a second recommendation that would increase the value for theft and possession of property to reflect the change in the economy since the $250 value was established. The benefit of such a change would have positive fiscal impact for counties who pay a higher rate for felony representation than misdemeanors. The Sentencing Guidelines Commission should review this issue also.

5. The Advisory Group recommends that the Legislature adopt a statute specifically granting prosecuting attorneys the authority to provide pre-filing or pre-plea diversion in appropriate cases, defined in terms of specific criteria, as suggested by the "diversion guidelines" of the National District Attorneys' Association.

The Advisory Group endorsed the concept of pre-filing and/or pre-plea diversion by legislation in appropriate cases and feels guidelines should be developed to assure statewide implementation.

6. The Advisory Group feels strongly that the responsibility for funding adequately the right to counsel for indigent defendants is a shared responsibility of state and local government. The Group recommends that the state provide 50% of these costs out

of the general fund. Appendix D[7] provides a list of other alternative revenue enhancements beyond the 50%.

The Advisory Group has concluded that the responsibility for providing counsel to indigent defendants is a public responsibility and that the state should provide 50% of the costs from the general fund. At the present time, the state pays only the cost of appellate representation and the cities and counties are left with the $40 million cost of representation at the trial level.

At the present time, Washington is only one of nine states in the country where there is no state expenditures at the trial level for indigent defense. Of the eight other states, several lawsuits are currently underway which may result in the requirement of state funding. Such lawsuits have been successful in several other states in the past five years.

The Advisory Group takes a strong and unified position on the responsibility of state government to contribute one-half of all of these costs from the general fund. There are several alternative revenue enhancements set out in Appendix D which other states are currently using that might be considered once the 50% general fund appropriation is achieved.

7. The Advisory Group recommends that the Office of Financial Management (OFM) be responsible for preparing a fiscal impact statement for each proposed piece of legislation that would impact on indigent defense services.

The Advisory Group heard testimony from indigent defense administrators and local county officials concerned about the enactment of certain crime bills that increase the number of cases requiring appointment of counsel or otherwise add further responsibilities to the defense function. We were told that in some instances these measures were enacted without the careful review of their fiscal impact on indigent defense. The Advisory Group recommends that OFM undertake this responsibility in the next session of the legislature.

8. The Advisory Group recommends that both prosecuting attorneys and indigent defense administrators develop programs to assure that personnel with authority from both offices be directly involved in cases of indigent

[7]Appendix is not included in this report.

defendants at the earliest possible time following charging.

The Advisory Group was told that in some jurisdictions, personnel from both the prosecutors' and public defender offices assigned at initial appearance or arraignment were the least experienced in their office, which makes it more difficult to dispose of appropriate cases by an early plea.

The Advisory Group believes that substantial savings can be achieved if these cases are disposed of early and do not take the additional time of prosecutors, public defenders and the courts.

9. The Advisory Group recommends that priority be given to improving the Judicial Information System (JIS) to provide complete and reliable case statistics for purposes of better administration and improved forecasting of future costs of the criminal justice system, particularly costs of indigent defense services.

The Advisory Group believes that one factor weighing against state funding for indigent defense is the inability to provide full and reliable data to the legislature on the cost and caseload of indigent defense either on a county-by-county or statewide basis. The members believe that the development of these necessary data will best be achieved by establishing as a priority increased emphasis on the JIS computer system in relationship to indigent defense data.

The Advisory Group also recommends that priority be given to improvements in the state criminal records system in order to be able to obtain reliable prior conviction data at the earliest possible time to assist in disposing of appropriate cases early in the process.

10. The Advisory Group recommends that comprehensive standards be adopted through legislation for the screening of all criminal and juvenile offenses by local prosecutors.

The Advisory Group agrees that such standards should be adopted statewide through appropriate legislation. Every method should be used to encourage the mandatory screening of all cases, particularly misdemeanors.

11. The Advisory Group requests that the Office of the Administrator for the Courts provide continuing staff support for follow-up subcommittees:

a. Bail Forfeitable Misdemeanors. Purpose: to work with the District and Municipal Court Judges Association and the Board of Governors of the Washington State Bar Association to finalize and propose a Supreme Court rule for and list of bail forfeitable misdemeanors, by specific offense, including executive agency regulations; and to develop a statewide bail schedule for these misdemeanors for inclusion in the proposed rule.

b. Draft Legislation. Purpose: to draft and present proposed legislation as recommended by the Advisory Group to include (1) prosecutorial election, and (2) prosecutorial diversion.

c. Felony Review. Purpose: to work with the State of Washington Sentencing Guidelines Commission to review class C or unclassified felonies for recommendation regarding reclassification to gross misdemeanors or misdemeanors, and the possible change of definition of felonies and misdemeanors.

d. Funding. Purpose: to explore and determine feasible sources of revenue enhancement above the 50% general fund figure; to report the results of such study to the legislative Task Force on City/County Finances and appropriate legislative committees.

ATTACHMENT A

ATTACHMENT A

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ATTACHMENT C

WASHINGTON MISDEMEANORS

RECOMMENDED FOR BAIL FORFEITURE [or INFRACTION]
INDIGENT DEFENSE WORKING SUBCOMMITTEE
MEETINGS OF JUNE 27, 1991 and JULY 15, 1991

RCWA 9.04.090 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 9. CRIMES AND PUNISHMENTS CHAPTER 9.04. ADVERTISING, CRIMES RELATING TO 9.04.090. Advertising fuel prices by service stations

RCWA 9.16.020 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 9. CRIMES AND PUNISHMENTS CHAPTER 9.16. BRANDS AND MARKS, CRIMES RELATING TO 9.16.020. [Imitating lawful brand] .2 IMITATING LAWFUL BRAND/ WITHOUT INTENT

RCW 9.51.020 SOLICITING JURY DUTY

RCWA 9A.52.080 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 9A. WASHINGTON CRIMINAL CODE (SEE ALSO CRIMES AND PUNISHMENTS, TITLE 9 RCWA) CHAPTER 9A.52–BURGLARY AND TRESPASS 9A.52.080. Criminal trespass in the second degree. CREATE A THIRD DEGREE/INFRACTION.

RCWA 18.27.240 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 18. BUSINESSES AND PROFESSIONS CHAPTER 18.27--REGISTRATION OF CONTRACTORS 18.27.240. Notice of infraction--Form--Contents

RCWA 18.27.270 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 18. BUSINESSES AND PROFESSIONS CHAPTER 18.27--REGISTRATION OF CONTRACTORS 18.27.270. Notice of infraction--Response--Failure to respond, appear, or pay monetary penalties

RCW 9.91.050 IMPROPER USE OF STATE SEAL

RCWA 43.51.180 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 43. STATE GOVERNMENT–EXECUTIVE CHAPTER 43.51–PARKS AND RECREATION COMMISSION 43.51.180. Penalties .4 INJURY AND BURNING SIGN POST

RCWA 46.12.101 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 46. MOTOR VEHICLES CHAPTER 46.12--CERTIFICATES OF OWNERSHIP AND REGISTRATION 46.12.101. Transfer of ownership, how perfected–Penalty, exceptions

RCWA 46.16.010 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 46. MOTOR VEHICLES CHAPTER 46.16–VEHICLE LICENSES 46.16.010. Licenses and plates required--Penalties--Exceptions FAIL TO RENEW] (but not INTIALLY OBTAIN VEHICLE LICENSE)

RCWA 46.16.011 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 46. MOTOR VEHICLES CHAPTER 46.16--VEHICLE LICENSES 46.16.011. Allowing unauthorized person to drive–Penalty

RCW 46.16.015 FAIL TO OBEY FLAGMAN/OFFICER - certain circumstances.

RCWA 46.16.381 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 46. MOTOR VEHICLES CHAPTER 46.16–VEHICLE LICENSES 46.16.381. Special parking privileges for disabled persons--Penalties for unauthorized use or parking (UNLAWFULLY OBTAIN HANDICAP DECAL

RCWA 46.20.021 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 46. MOTOR VEHICLES CHAPTER 46.20--DRIVERS' LICENSES–IDENTICARDS 46.20.021. Driver's license required–Penalty--Surrender of other license-- Local license not required

RCWA 46.20.336 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 46. MOTOR VEHICLES CHAPTER 46.20--DRIVERS' LICENSES--IDENTICARDS 46.20.336. Violations--Penalty .4 FAILURE TO SURRENDER SUSPENDED LICENSE

RCWA 46.20.342 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 46. MOTOR VEHICLES CHAPTER 46.20--DRIVERS' LICENSES--IDENTICARDS 46.20.342. Driving while license suspended or revoked--Penalty--Extension of suspension or revocation period // [1991 amend. 46.20.342(1)(c)].

RCW 46.20.343 ALLOW UNAUTHORIZED MINOR TO OPERATE VEHICLE

RCW 46.20.344 ALLOWING UNAUTHORIZED DRIVER TO DRIVE

RCW 46.20.394 VIOLATION OF OCCUPATIONAL DRIVERS LICENCE

RCW 46.20.410 VIOLATION OF OCCUPATIONAL LICENCE RESTRICTION

RCW 46.29.605.4 FAILURE TO SURRENDER LICENSE PLATE

RCWA 46.29.610 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 46. MOTOR VEHICLES CHAPTER 46.29--FINANCIAL RESPONSIBILITY VIOLATIONS OF THIS CHAPTER 46.29.610. Surrender of license--Penalty

RCW 46.44.080 VIOLATION OF POSTED ROAD RESTRICTION

RCWA 46.61.535. WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 46. MOTOR VEHICLES CHAPTER 46.61--RULES OF THE ROAD, RECKLESS DRIVING, DRIVING WHILE INTOXICATED, VEHICULAR HOMICIDE AND ASSAULT. 46.61.535. Advertising of Unlawful Speed Attained--Reckless Driving.

RCWA 46.64.020 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 46. MOTOR VEHICLES CHAPTER 46.64--ENFORCEMENT 46.64.020. Nonappearance after written promise--Penalty--Response by mail, when--Arrest, when FAIL TO COMPLY- 2 OR MORE FTA [Spokane $500]

RCW 46.70.125 FAILURE TO DISCLOSE WRITTEN ASKING PRICE

RCW 46.70.140 IMPROPER USE DEALER PLATES

RCW 46.87.290 FAILED TO OBTAIN WASHINGTON PROPORTIONAL REGISTRATION

RCW 46.70.090 ILLEGAL USE OF DEALER LICENSE

RCWA 47.52.120 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 47. PUBLIC HIGHWAYS AND TRANSPORTATION CHAPTER 47.52--LIMITED ACCESS FACILITIES 47.52.120. Violations specified--Exceptions--Penalty .1 DRIVE ON/THROUGH CENTRAL SECTION [SPOKANE $250] .3 DRIVE ON SHOULDER/IMP DIRECTION

RCW 47.68.230 NO AIRCRAFT REGISTRATION

RCW 47.68.250 REGISTRATION OF AIRCRAFT

RCWA 66.20.200 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 66. ALCOHOLIC BEVERAGE CONTROL CHAPTER 66.20--LIQUOR PERMITS 66.20.200. Unlawful acts relating to card of identification and certification card--Penalty 66.20.200.2 FAIL TO PRESENT CARD ON REQUEST

RCW 66.28.090 FAILURE TO ALLOW INSPECTION

RCWA 66.44.100 WEST'S REVISED CODE OF WASHINGTON ANNOTATED

TITLE 66. ALCOHOLIC BEVERAGE CONTROL CHAPTER 66.44--ENFORCEMENT--PENALTIES
66.44.100. Opening or consuming liquor in public place--Penalty

RCWA 66.44.250 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 66. ALCOHOLIC BEVERAGE CONTROL CHAPTER 66.44--ENFORCEMENT--PENALTIES 66.44.250. Drinking in public conveyance--Penalty against individual-- Restricted application

RCWA 66.44.291 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 66. ALCOHOLIC BEVERAGE CONTROL CHAPTER 66.44--ENFORCEMENT--PENALTIES 66.44.291. Minor purchasing or attempting to purchase liquor--Penalty against persons between ages of eighteen and twenty, inclusive

RCW 66.44.310 MINOR FREQUENTING TAVERN (Diversion, alcohol school, 16-20)

RCWA 69.50.412 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 69. FOOD, DRUGS, COSMETICS, AND POISONS CHAPTER 69.50--UNIFORM CONTROLLED SUBSTANCES ACT ARTICLE IV--OFFENSES AND PENALTIES 69.50.412. Prohibited acts: E--Penalties/ Bail forfeiture for Paraphernalia possession, bong only

RCWA 70.93.060 WEST'S REVISED CODE OF WASHINGTON ANNOTATED TITLE 70. PUBLIC HEALTH AND SAFETY CHAPTER 70.93--MODEL LITTER CONTROL AND RECYCLING ACT 70.93.060. Littering prohibited--Penalties [suggest levels; some bail forfeitable]

RCW 81.80.211 HOURS OF OPERATION/RULES (DRIVERS LOGS)

RCW 81.80.070 NO VALID PERMIT (COMMON/CONTRACT) Bail forfeitable with copy of permit

RCW 81.80.371 FAIL TO REGISTER W/ ICC AUTHORITY

RCW 88.02.020 NO BOAT REGISTRATION

WAC: THESE ARE QUESTIONS ONLY, PENDING REVIEW OF WAC PROVISIONS
220.52.010(6) NO VESSEL NUMBERS
220.52.019(7) NO VALIDATION
220.52.035 FAILURE TO HAVE ESCAPE MECHANISM

220.56.220 POSSESSION OF EGGS W/O RETAINING; 220.56.355(1) FAILURE TO FILL HOLES
220.110.030(9) NO HYDRAULIC APPROVAL AT WORK SITE

308.51.060 WARNING DEVICE ON PREMISE
332.24.211 RECREATIONAL OR DEBRIS DISPOSAL/ bail forf. if is 'littering'

352.32.030 CAMPING VIOLATION
352.32.050 ENTERING PARK AFTER HOURS
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ASSESSMENT OF THE OREGON ADULT CRIMINAL INDIGENT DEFENSE SYSTEM

FINAL REPORT

March 1989

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EXECUTIVE SUMMARY

I. Background for the Study

The indigent defense system in Oregon has undergone extensive changes and experienced almost constant crisis in the administration and funding of defense services since the state took over the funding responsibility on January 1, 1983. The crisis came to a head during the 1985-87 biennium, when the state's indigent defense budget ran out in January 1987, six months before the end of the biennium period. Projected shortfalls over the next several months ranged from $10 to $15 million. This brought the indigent defense system to a state of near collapse and focused the attention of all interested parties on fashioning a long-term solution to the problem.

On July 18, 1987, the Governor signed into law, legislation returning the responsibility for the management of the indigent defense program to the State Court Administrator's Office (SCA). Extensive budget notes attached to the 1987-88 indigent defense budget by the Ways and Means Committee of the Legislative Assembly attempted to address a number of the funding related problems and specifically called for: the implementation of guidelines for determining and verifying indigency; a study of "minimum constitutionally required service levels"; a data gathering plan for court-appointed counsel and contractors that would provide basic kinds of information; the expectation that there would continue to be a mix of contracts and appointed counsel programs; and the study and analysis of the feasibility and cost effectiveness of various alternatives to current management and budgetary procedures.

In September 1987, the SCA entered into a contract with The Spangenberg Group of Newton, Massachusetts to conduct an "assessment of the current indigent defense legal services delivery system in Oregon." The study was designed to assess the

"feasibility (practicality, cost, availability) of specific alternatives or modifications to the present system that would (a) realistically help control or reduce costs, and/or (b) remedy any serious weaknesses in the current system." The primary focus of the study was to be the adult criminal justice system at the trial court level as the majority of costs to the indigent defense fund are incurred in this area.

The Spangenberg Group is a national private consulting firm with over ten years experience conducting research, providing technical assistance and studying indigent defense systems throughout the country. Over this period of time, The Spangenberg Group has conducted similar assessments to the one in Oregon in over a dozen states including a study just completed in the state of Washington.

II. Study Methodology

The methodology employed in conducting this study consisted of two principal elements: (1) a mail survey; and (2) a series of site assessments. The purpose of the mail survey was to gather both descriptive and statistical data, as well as to obtain objective opinions about the strengths and weaknesses of the current system from individuals working in and familiar with the indigent defense system in Oregon. It also solicited recommendations for improvement in the system.

The survey consisted of five sets of distinct questionnaires; one each for judges, trial court administrators/trial court clerks, prosecutors, private court-appointed attorneys, and contract attorney/public defenders. The responses to the mail survey were analyzed by computer. The results of this analysis are incorporated throughout this report.

To augment the quantitative assessment of defense services that resulted from the mail surveys, we also conducted on-site assessments of indigent defense services in a dozen counties

throughout the state. The following counties were visited during the spring of 1988: Clackamas, Deschutes, Jackson, Jefferson, Klamath, Lane, Marion, Multnomah, Umatilla, Union, Wallowa, and Washington. This selected sample of counties included the five largest in Oregon--Clackamas, Lane, Marion, Multnomah, and Washington--because a substantial portion of the criminal defense activity in the state occurs in these five jurisdictions. The remaining counties were chosen in order to include a representative range of demographic groups, indigent defense program types, and geographical regions.

The site assessments were conducted by a research team with broad experience in conducting studies of indigent defense systems, addressing indigent defense issues from a national perspective, providing criminal defense services, and managing indigent defense programs.

The members of the site assessment team conducted interviews with a wide range of persons in the criminal justice system including officials in the judicial, legislative and executive branches of government, staff of the contracting programs and other members of the bar. A total of more than 200 interviews were conducted during the course of the site assessment phase of the study.

The site visits also included time spent in court observing the representation of the indigent accused and court practices and procedures used to process these cases. Finally, the site teams gathered all available statistical data from the various courts and programs visited.

III. Results of the Study

The indigent defense system in Oregon currently processes a large volume of cases annually, which places it third nationally in terms of indigent cases per capita population. The reasons for this include a high rate of indigency; an expansive right to

counsel that exceed current minimum federal constitutional rights; the extensive interaction of other criminal justice components; and an environment which strongly favors appointment of counsel in the vast majority of cases.

The costs of indigent defense services in Oregon rose substantially from 1982 to 1986, approximately 77%, over the period that the state assumed the costs from the counties. However, during this same period, average costs nationally increased by approximately 60%, with state funded systems rising by 80%. Significantly, however, during this same period, the average cost per case declined markedly in Oregon from $282 per case (8th nationally) in 1982 to $160 per case (37th nationally) for 1986, a drop of 43%. Furthermore, between 1986 and 1988, the costs increased by only 5.3%, less than the comparable figure of 22.4% of other state-funded indigent defense systems.

The study found that the Judicial Department and SCA have instituted a number of major projects during the current biennium in an attempt to improve management and accountability of the indigent defense fund and program. These include the development of a computerized management information system; the establishment of standard indigency guidelines; the initiation of an indigency verification project; involvement in a pilot recoupment collections project; drafting of case expense guidelines and payment procedures; and promulgation of attorney qualification standards. Even with these important improvements, the costs of indigent defense are, predictably, continuing to rise due in large measure to increased criminal filings. The report contains, however, suggestions for further improvement in these areas.

The study further found that overall, the representation provided through the Oregon indigent defense system meets state and federal constitutional requirements. However, the quality of representation is uneven throughout the state depending on the type of providers in a given jurisdiction and the resources available to them. The unevenness, as explained in depth in the report, is

due to such factors as the current rate of compensation being too low, caseload per attorney being too high, variation in attorney resources, local resources and the present contracting system.

The contracting system in Oregon, despite the efforts of SCA and the forbearance of contractors, is beginning to face problems experienced by other contractors in other jurisdictions that we have evaluated. Our major concern for the future is that over the next several years, the system may continue to be underfunded, attracting many inexperienced and perhaps unqualified lawyers to submit bids, which will seriously compromise the adequacy of representation provided; or bidders may soon realize that they are not dealing with a strictly competitive environment and either separately or in collusion begin to bid the price up, thereby eliminating the supposed benefit--cost reduction--of the competitive bidding process.

Despite the efforts of SCA to control the costs of indigent defense services, if the overall criminal filings continue to rise, as they have in the last four years, statewide costs will continue to increase. The problem is further complicated by substantial increases in death penalty costs at trial and appeal.

There are a number of recommendations that we have made to assist in containing future costs. In addition, we strongly recommend that careful review be undertaken to address the potential conflict of interest posed by managing and administering the indigent defense fund through the Judicial Department. We also recommend that serious review be addressed to the overall contracting method of indigent defense services, a method that has proven to be unsuccessful over time in other jurisdictions.

The following material sets out the specific findings and recommendations of this year long study.

IV. Findings and Recommendations

For purposes of clarity and continuity, we have set out our specific recommendations addressed to each of the following findings. A page reference to the text of the report for each finding and recommendation described and discussed also is included.

Finding 1 (on page 105): The Oregon indigent defense system is processing annually an extremely high volume of cases compared to the rest of the nation. In fact, Oregon ranks third nationally in the number of indigent cases per 1000 population. In addition, the number of cases is steadily increasing.

Recommendation 1 (on page 106): The current indigency eligibility guidelines that were promulgated by Chief Justice Peterson in November of 1987 should be reviewed for effectiveness and tightened if feasible.

Recommendation 2 (on page 107): Efforts should be undertaken by the Judicial Department to assure that the current (or revised) indigency standards are effectively enforced throughout the state.

Recommendation 3 (on page 107): The Judicial Department should carefully review the results of its pilot program for screening and verification of indigency to determine whether the procedures tested can be applied statewide to reduce the total number of cases for which counsel is appointed.

Recommendation 4 (on page 107): The possibility of improved intake screening should be considered by all District Attorneys before cases are filed with the courts.

Recommendation 5 (on page 108): The results of the Judicial Department's Accounts Receivable Policy Committee's pilot recoupment collections project, completion of which is expected in the summer of 1989, should be carefully reviewed to determine whether alternative approaches to collections

can be implemented statewide which will increase the revenues collected from convicted defendants. In the meantime, efforts should be undertaken to ensure that standard approaches to ordering and collecting recoupment are utilized throughout the state. This should include establishing guidelines for the level of fees to be assessed in specific categories of cases.

Recommendation 6 (on page 108): The circumstances in which attorney fees can be ordered should be clarified, and consideration should be given to introducing legislation to make it permissible to order repayment in cases of civil compromise and other cases in which the defendant is not formally convicted of a crime. The possibility of requiring defendants to contribute to the costs of their representation following initial screening should be explored, in light of the ruling in the Fitch case, as this has proven an effective method of increasing revenues in a few jurisdictions.

Recommendation 7 (on page 109): Any proposed legislation that is intended to create new crimes should be accompanied, pursuant to recent legislation, by an assessment of the procedural and fiscal impact of the recommendation on the overall criminal justice system. This assessment should pay particular attention to the overall impact on the indigent defense component of the system.

Recommendation 8 (on page 109): The Judicial Department and the Legislative Assembly should review the various provisions of the law in regard to the right to counsel in order to determine whether some kinds of offenses could be treated in such a way as to avoid the requirement of the right to appointed counsel consistent with the federal and Oregon constitutions.

* * * *

Finding 2 (on page 110): The problems being experienced in recent years in the explosion of indigent defense costs go beyond the increase in caseload alone. They are the direct result of developments in virtually every other component of the criminal justice system. They cannot be controlled solely through changes directed at the indigent defense system. Thus, any attempt to improve cost-efficiency must address the complex web of factors found in the inter-relationship between indigent defense and the other major components of the criminal justice system.

Recommendation 9 (on page 111): We strongly support the efforts currently underway in the Legislative Assembly to examine the interaction of various criminal justice components with indigent defense cost and services.

* * * *

Finding 3 (on page 111): Substantial efforts have been undertaken by the Judicial Department over the past biennium to develop better methods to manage the program and to contain costs. Despite these strong efforts, the caseload and cost continue to rise, although at a reduced rate, in large measure because of increased filings.

Recommendation 10 (on page 113): The Judicial Department should continue its efforts to computerize its indigent defense database so that it will be able to provide consistent and reliable information on caseload and costs for better planning purposes.

Recommendation 11 (on page 113): The central administrative agency charged with administering the indigent defense system should be responsible for establishing standards and guidelines for all types of defense providers in the state to guarantee the provision of adequate and effective indigent representation. Implementation of these

standards should be regularly monitored and actions taken to ensure compliance.

* * * *

Finding 4 (on page 115): The current approach to contracting for indigent defense services fosters some instability which is detrimental to the operations of the public defender and contract defense programs as well as to the general administration of the system. This raises some questions about the effective delivery of indigent defense services consistently throughout the state and the basic principle of contracting for indigent defense services.

Recommendation 12 (on page 121): The approach to contracting for indigent defense services should be modified in order to increase equity among contractors and to improve the stability and efficiency of the contracting process.

Recommendation 12a (on page 121): Standard minimum costs per type of case generally should be established for use in all contracts throughout the state.

Recommendation 12b (on page 122): Contracts should be for a duration of at least two years.

Recommendation 12c (on page 122): Strict control should be exercised over the proliferation of small, "boutique" contracts.

Recommendation 12d (on page 123): The use of strictly percentage-based output contracts should be reviewed.

Recommendation 12e (on page 123): Contracts should include special provisions for administrative costs, in-

cluding any associated with recordkeeping and reporting requirements.

Recommendation 13 (on page 123): Further consideration should be given to a review of the proposed updated ABA Standards for Criminal Justice, which contain, for the first time, standards for the contracting of defense services as well as the contracting standards promulgated by the National Legal Aid and Defender Association.

* * * *

Finding 5 (on page 124): The strong historical desire to provide balance among contracts and private assigned counsel in order to bring diversity and stability to the indigent defense system in Oregon is threatened by:

1) The increasing number of individual qualified private attorneys who are withdrawing their names from lists of those willing to accept criminal appointments at current rates of compensation; and

2) The proliferation of multiple private attorney consortiums and contracts with individual private attorneys as part of their efforts to increase their rate of compensation.

Recommendation 14 (on page 126): Fees for appointed counsel should be raised to a reasonable level that reimburses attorneys for their overhead costs and provides direct compensation for their legal services. Hourly rates that compensate the attorney in a manner directly related to the amount of time spent on a case should continue to be the standard. Additional funds should be made available to provide training and necessary defense and support services to private attorneys representing indigent defendants.

* * * *

Finding 6 (on page 128): Overall, the representation provided through the Oregon indigent defense system to low-income persons accused of crimes meets state and federal constitutional requirements. However, the quality of representation is uneven throughout the state, depending on the type of providers in a given jurisdiction and the resources available to them.

Recommendation 15 (on page 129): To the extent that it is not currently doing so, the Oregon Legislative Assembly should fund the indigent defense system at a level sufficient to guarantee that defense services in all programs and regions of the state meet federal and state constitutional standards. Appropriations should be for a full biennium as soon as that is practicable, as the piecemeal release of funding over the course of the biennium fosters instability and inefficiency in the system.

* * * *

Finding 7 (on page 130): There is an inherent conflict of interest in the administration of the indigent defense system by the judicial branch.

Recommendation 16 (on page 131): Policymakers in Oregon should continue to build on recent efforts initiated by the Legislative Assembly, the State Court Administrator's Office, the Oregon State Bar, and the Oregon Criminal Defense Lawyers Association to gather baseline data regarding the operations of the indigent defense system and to assess the effectiveness and efficiency of the system (efforts of which this study is but one part). The next logical step is to engage in a thoughtful review of the administration of the indigent defense system. The system should continue to be administered by a central body on the state level. However, because of the inherent conflict represented by the current administration in the Judicial Department, alternative ap-

proaches to structuring the central administration of the indigent defense system should be carefully explored. These possible alternatives include establishment of an independent state-level commission to supervise and administer a mixed delivery system and/or creation of a statewide public defender program.

* * * *

CHAPTER I

INTRODUCTION

The indigent defense system in Oregon has undergone extensive changes and has experienced almost constant crises in the administration and funding of defense services during the 1980s. Throughout much of the decade the basic information necessary to manage the changes and deal effectively with the crises has been lacking. Only recently, through the efforts of the Judicial Department, has information begun to become available to assist the efforts of policymakers and practitioners in the Legislative Assembly, the Judicial Department, the Oregon Criminal Defense Lawyers Association (OCDLA), and the Bar, among others, to establish a cost-effective system that guarantees that indigent defendants receive the adequate assistance of counsel that is their constitutional right.

The crisis came to a head during the 1985-87 biennium, when the state's indigent defense budget ran out in January 1987, six months before the end of the budget period. Projected shortfalls over the next several months ranged from $10 to $15 million. This brought the indigent defense system to a state of near collapse and focused the attention of all interested parties on fashioning a long-term solution to the ongoing crisis.

As a result, the Legislative Assembly passed HB 2869 in June 1987, abolishing the State Indigent Defense Board (SIDB) and returning the responsibility for managing the indigent defense program to the State Court Administrator (SCA).

The new law established an indigent defense account in the general fund appropriated to the State Court Administrator to pay compensation of counsel and other expenses in connection with indigent representation in state courts. This account was designed to be separate and independent from other Judicial Department accounts. The SCA was also delegated the responsibility of monitoring expenditures from the account and preparing future

budget requests for the Legislative Assembly. The Legislative Assembly appropriated a total of $46,166,982 to this account for the 1987-89 biennium, of which $42.5 million was an initial appropriation.

Budget notes attached to the 1987-88 indigent defense budget contained a number of important additional tasks for the Office of the State Court Administrator. The SCA was required to make a report on these activities to the Emergency Board in March 1988 on behalf of the Judicial Department in order to obtain release of the funds for the second year of the biennium. Several of the key reporting requirements were:

- The implementation of the Chief Justice's guidelines for determining and verifying indigency, resulting in the presentation to the Legislature of definitive criteria;

- A study of "minimum constitutionally required service levels" for indigent defense, also identifying "enhancement services" which could be provided if a policy decision were made to offer such services and funding were provided;

- A data gathering plan for court appointed counsel and contractors that would provide basic kinds of information;

- The integration into the Indigent Defense Information System of historical data for each county that would help predict future budgets and caseloads in district, circuit, and juvenile courts, as well as in other cases in which counsel is appointed; and

- The study and analysis of the feasibility and cost effectiveness of various alternatives to current management and budgetary procedures.

The budget notes also incorporated a number of other significant provisions, including:

- The requirement that all attorneys providing indigent defense services should supply at their own expense any data requested by the Judicial Department in its study of comparative costs of providing services;

- The expectation that there would continue to be a mix of types of contracts and, also, a mix of contract and appointed counsel, with the intended outcome of achieving stability and economy;

- Continuation of a working group of interested legislators, defenders, prosecutors, and law enforcement people who would continue to explore criminal laws and penalties;

- The approval of funds within the agency's budget for an outside contractor to participate in the design of the data collection study; and

- Establishment of a one-year indigency review pilot program to research and determine the appropriateness of indigency claims.

Finally, the budget notes required that:

> The Judicial Department shall study and analyze the feasibility and cost effectiveness of various alternatives to current management and budgetary procedures, and report its findings, along with relevant data and analyses to the March 1988 meeting of the Emergency Board. Those options shall include but not be limited to:
>
> a. The establishment of prepaid "capitation" systems using such models as the "Diagnostic Related Groups" now used for providing medical services, especially for use in connection with Driving While Suspended, Driving Under the Influence, Theft II, and other high volume, low trial frequency misdemeanor, felony, and other cases.
>
> b. The application of a schedule of appropriate costs, for assigned counsel, based upon selected types of crime.
>
> c. Compensation of contractors according to a schedule of payments per defendant based upon the most serious accusatory instrument assigned to the case. Conflict-case compensation will be based on a separately determined schedule of appropriate costs and charges.
>
> d. Establishment of a billings-dispute resolution policy which provides for compensation of counsel

and contractors for extraordinary costs..

e. The appropriateness of not funding conflict cases where the conflict results from the unique corporate structure of the contractor.

f. Maintaining a balanced mix of contract and appointed counsel statewide with the intended outcome of achieving stability and economies by: (1) encouraging the use of appointed counsel for misdemeanor and minor felonies, (2) encouraging the submission of small contract proposals, and (3) appointment and contract specialization in the area of misdemeanor services, mental health, juvenile services, post conviction relief, etc.

g. Including within the periodic audit of providers an element that conforms with the Emergency Board's adopted position on the measurement of "base level services" and "additional services."

Even before the transfer of responsibility for the indigent defense system to the State Court Administrator, an administrative structure and a management information system was created to enable the State Court Administrator to respond to the legislative requests enumerated above. Substantial progress has been made in this effort to date.

1.1 Background of the Current Study

In September 1987, Ms. Kingsley Click, then Acting Director of the Indigent Defense Services Division of the State Court Administrator's Office, contacted The Spangenberg Group seeking assistance in responding to certain elements of the Legislative Assembly's requests for information. She outlined their needs as follows:

> (1) An assessment of the current indigent defense legal service delivery system in Oregon. We are interested in an assessment of its strengths, weaknesses, costs and economies. We would include quality and/or the level of services being provided as an issue to explore. (If possible, some national comparisons would be useful on the cost/level of services issue . . .)
>
> (2) An assessment of the feasibility (practicality, cost, availability) of specific alternatives or modifications to the present system that would a) realistically help control or reduce costs, and/or b) remedy any serious weaknesses in the current system. Some alternative options the Legislature wants explored are included in the budget notes, particularly under items 12. and 14., and will need to be addressed along with other ideas included in your report.
>
> (3) The above two issues should primarily address the "user" services system. Depending on the time and money we also would be interested in including an assessment of the current management system for overseeing the indigent defense program vs. the feasibility of other alternatives.

The Spangenberg Group, located in Newton, Massachusetts was selected to assist the newly formed Indigent Defense Services Division in assessing the operations of the Oregon indigent defense system. The Group is nationally recognized as the experts in the field of indigent defense research. Over the last decade, the senior members of the firm have conducted numerous

studies of indigent defense issues at the national, state and local levels and have provided technical assistance to programs in 46 states. National projects have included studies of cost containment and maximizing public defender resources conducted for the National Institute of Justice, U.S. Department of Justice; the development in 1982 (and updating in 1986) of the first national indigent defense database including costs, caseloads and program types for the Bureau of Justice Statistics, U.S. Department of Justice. Statewide evaluations of indigent defense systems have been conducted in 12 states by Group members including West Virginia, South Carolina, Massachusetts, Ohio, and Washington. As primary providers of technical assistance to the American Bar Association's Bar Information Program, The Spangenberg Group is involved in addressing a broad range of problems relating to indigent defense delivery in more than 25 jurisdictions across the country at any given time. Because of this wide experience and national perspective, The Spangenberg Group was the choice of the State Court Administrator's Office in seekin assistance in assessing the indigent defense system in Oregon.

A contract to "undertake for the Judicial Department, a study of the adult criminal case indigent defense delivery system in Oregon" was executed between the Office of the State Court Administrator and The Spangenberg Group, effective November 1, 1987. This report presents the results of the research project. The methodology employed in conducting this study is described in the following section.

1.2 Study Methodology

The methodology employed in conducting this study consisted of two principal elements: (1) a mail survey; and (2) a series of site assessments. Each of these elements is described in detail below.

1.2.1 Mail Survey

The purpose of the mail survey was to gather both descriptive and statistical data, as well as to obtain objective opinions about the strengths and weaknesses of the current system from individuals working in and familiar with the indigent defense system in Oregon. It also solicited recommendations for improvement in the system.

The survey consisted of five sets of distinct questionnaires; one each for judges, trial court administrators/trial court clerks, prosecutors, private court-appointed attorneys, and contract attorneys/public defenders. Questionnaires were mailed to all circuit and district court judges in Oregon presiding over adult criminal sessions. Likewise, all trial court administrators and clerks received questionnaires. Finally, questionnaires were mailed to a sample of prosecuting attorneys, private assigned counsel, and contract or public defender attorneys. We are greatly appreciative of the assistance we received from the Oregon Criminal Defense Lawyers Association, the Oregon State Bar, and the District Attorneys Association in providing the lists of attorneys from which these samples were drawn, as well as in assisting in encouraging non-respondents to complete and return their questionnaires.

We conducted extensive telephone follow-up with judges who had not responded to the survey within the designated time period, particularly in those judicial districts from which no responses had been received. Likewise, trial court

administrators/clerks/court operations supervisors from whom we had not received completed questionnaires were contacted by phone. Follow-up in the remaining categories of respondents was accomplished through the assistance of their constituent organizations, either through the posting of notices in their newsletters or other publications, and/or the mailing of separate reminders to their members.

The following table shows the number of questionnaires mailed, the number of completed questionnaires returned, and the response rate for each category of respondent:

Table 1

NUMBER AND TYPE OF MAIL SURVEYS AND RESPONSE RATE

Respondent Category	Number Surveys Mailed	Number Surveys Returned	Percent Surveys Returned
Judges			
District Court	58	27	47%
Circuit Court	85	31	36%
All Judges	143	58	41%
Trial Court Administrators/Clerks/Court Operations Supervisors	36	27	75%
Contract Attorneys/ Public Defenders	183	48	26%
Prosecutors	162	43	27%
Assigned Counsel	162	42	26%
TOTAL	686	218	32%

For surveys of this type an overall response rate of 25% is considered sufficient to provide statistically reliable information. Thus, we are confident that the overall response rate of 32% in this case provides a representative, statistically valid sample of respondents. Further, we are particularly pleased with the excellent response rate among trial court administrators and the high percentage of judges who returned completed questionnaires

The responses to the mail survey were analyzed by computer. The results of this analysis are incorporated throughout this report. Selected copies of the questionnaires are contained in Appendices D and E.

1.2.2 Site Assessments

To augment the quantitative assessment of defense services that resulted from the mail surveys, we also conducted on-site assessments of indigent defense services in a dozen counties throughout the state. The following counties were visited during the spring of 1988: Clackamas, Deschutes, Jackson, Jefferson, Klamath, Lane, Marion, Multnomah, Umatilla, Union, Wallowa, and Washington. This selected sample of counties included the five largest in Oregon--Clackamas, Lane, Marion, Multnomah, and Washington--because a substantial portion of the criminal defense activity in the state occurs in these five jurisdictions. The remaining counties were chosen in order to include a representative range of demographic groups, indigent defense program types, and geographical regions.

The site assessments were conducted by a well-qualified research team with broad experience in conducting studies of indigent defense systems, addressing indigent defense issues from a national perspective, providing criminal defense services, and managing indigent defense programs. The team consisted of members of The Spangenberg Group, as well as several expert consultants.

Members of The Spangenberg Group who participated in the site assessments included the three senior members of the firm--Robert L. Spangenberg, President; Patricia A. Smith, Vice President, and William J. Rose, Senior Associate. These individuals are noted experts in the field of indigent defense research, with collective experience of more than 30 years in conducting studies of this type. In addition, Alison Van Horn of The Spangenberg

Group staff participated in the site visits.

Three expert consultants assisted in conducting the site visit assessments. They brought to the project extensive experience in providing, managing, and studying defense services. Richard J. Wilson is the former Defender Director of the National Legal Aid and Defender Association (NLADA) and is currently a law professor at City University of New York (CUNY) Law School. During his tenure as Defender Director, Mr. Wilson was involved in numerous studies and evaluations of indigent defense services throughout the country. Since moving to CUNY, he has continued to be active in the criminal defense field through his association with the ABA Defense Services Subcommittee, as editor of the ABA's Criminal Justice Magazine, and through continued consulting with The Spangenberg Group on individual indigent defense research projects. Most recently, Mr. Wilson is serving as the Reporter to the ABA Criminal Justice Sections Standards Committee which is updating the ABA Standards Relating to Providing Defense Services.

David Garfunkel is the Director of the New Hampshire State Public Defender, a non-profit organization operating under a contract with the Judicial Council of New Hampshire. In addition to managing the contract program which serves most of the state through public defender offices, he also oversees several smaller offices which provide defense services in the northernmost rural regions of the state. Further, he is a member of the NLADA Defender Committee, and thus is involved on an ongoing basis in the national debate regarding indigent defense issues.

Nancy Gist is the Deputy Chief Counsel, Private Division, of the Massachusetts Committee for Public Counsel Services (CPCS). She is responsible for overseeing the Bar Advocate contracts between the county bar associations and CPCS, through which qualified private attorneys are given rotating indigent assignments; other ad hoc appointments of private counsel; and the compensation of private attorneys.

The members of the site assessment team conducted interviews with:

- District and circuit court judges;
- Trial court administrators and clerks;
- Court supervisors;
- Release assistance officers;
- Probation officers;
- District attorneys and their deputies;
- Representatives of all programs providing indigent defense in each county visited, including administrators, staff attorneys, investigators, and trial assistants;
- Private attorneys and local bar representatives, including those who provide indigent representation and those who do not;
- Legislators and legislative staff; and
- Other individuals familiar with or interested in the local criminal justice system.

A total of more than 200 interviews were conducted during the course of the site assessment phase of the study.

The site visits also included time spent in court observing the representation of the indigent accused and the court practices and procedures used to process these cases. Finally, the site teams gathered all available statistical data from the various courts and programs visited.

The site assessments were conducted according to criteria articulated in the following sources:

- The Oregon Professional Code of Responsibility;
- The Oregon Constitution and caselaw interpreting its provision governing the right to counsel in Oregon;
- Rules of the Oregon Supreme Court governing elements of the indigent defense system;

- State and federal caselaw defining the effective assistance of counsel; and

- ABA Standards for Criminal Justice: Chapter 4 - The Defense Function (regarding attorney performance) and Chapter 5 - Providing Defense Services (regarding program standards and procedures).

Accordingly, the site assessments were able to address both the quality and effectiveness of local program operation and to evaluate the system of delivery of indigent representation in indigent cases. A copy of the Site Protocol/Issues Checklist is attached in Appendix C.

1.3 Organization of the Report

The remainder of the report represents the synthesis of the quantitative and qualitative data collected through the mail survey and the site assessment phases of the study methodology. Throughout the report, we have included data from two national studies that we have conducted on indigent defense services, as well as information we have gathered from specific jurisdictions around the country facing similar problems, in order to add perspective to the discussion of issues in the provision of indigent defense services in Oregon. The final chapter sets out our findings and recommendations resulting from this research project.

CHAPTER II

THE CURRENT INDIGENT DEFENSE SYSTEM IN OREGON

This chapter provides basic information regarding the current indigent defense system in Oregon. This includes the types of programs in use, especially the contract system, caseloads, system costs, and the nature and quality of services being provided.

This information is drawn from a number of sources. Much of the data is derived from the mail survey and site assessments conducted for this study. Information is also presented here that was provided by the State Court Administrator's Office. Finally, national data collected through other research projects conducted by The Spangenberg Group are included, where appropriate, to provide additional perspective on the Oregon system. These national data are drawn primarily from two studies conducted by The Spangenberg Group for the Bureau of Justice Statistics, U.S. Department of Justice. The first of these, the National Criminal Defense Systems Study, was conducted in 1982 and represented the first comprehensive effort to provide a national database on indigent defense programs, costs and caseloads. This study was updated in 1986 in a report entitled Criminal Defense for the Poor, which has provided the first opportunity to analyze quantitatively national trends in the provision of defense services.

Throughout this chapter, we present the most up-to-date information available, indicating where necessary the year for which it applies. It should be noted that the study data are current as of 1988, whereas information from the State Court Administrator's Office is, in some cases, more recent. National data is generally applicable to the years from 1982 to 1986.

2.1 Types of Indigent Defense Programs

There are three basic program types used throughout the country to provide indigent defense services:

(1) Assigned counsel programs--In these programs there is case-by-case appointment of counsel who are local members of the private bar, usually on a rotating basis from a list of available attorneys.

(2) Public defender programs--In these programs a salaried staff of full-time or part-time attorneys is organized to provide defense services to indigent defendants. The organization may be a public agency that is part of a state or local government, or a private, non-profit corporation that contracts with state or local governments to provide indigent defense services.

(3) Contract attorney programs--In these programs the funding source contracts with individual private attorneys, private law firms, groups of attorneys, or local bar associations to provide representation to indigent defendants for a given period of time at an established cost.

Although the service delivery system in a given state or county usually consists of more than one type of program, within each jurisdiction there is normally one type of program that handles the majority of indigent cases. National data show that in 1986, assigned counsel programs were the most common type of primary program in use throughout the nation. However, during the period between 1982 and 1986 there was a decrease in the number of counties using this type of system and an increase in the use of public defender and contract programs. During this time period, the percentage of counties using assigned counsel programs decreased from almost 60% to 52% of all counties. Among the states, only Maine continued to rely exclusively on an assigned counsel system. Public defender programs increased from 34% to 37% of all counties nationally. Contract programs grew by

nearly two-thirds, from almost 7% in 1982 to 11% of all countie in the nation in 1986.

The Western region of the country experienced dramatic changes in primary program types between 1982 and 1986. In that region, the number of counties using assigned counsel programs declined by almost 45%, while the number of contract programs increased by nearly 75%. Changes in Oregon, New Mexico, and Washington accounted in large measure for these shifts.

Data for Oregon from the national studies show that the number of counties with primary contract programs more than quadrupled between 1982 and 1986. As a result, Oregon is now one of the six states in the nation characterized as contract-based. Information collected during the course of this study indicates that this trend toward the increased use of contracts in Oregon has continued in the years since 1986.

In FY 1988-89, according to the State Court Administrator's Office, there are only four counties in the state that rely exclusively on private assigned counsel for the provision of indigent defense services. These are: Clatsop, Marion, Tillamook, and Yamhill Counties. Four more counties use private assigned counsel to supplement defense services provided primarily by contract groups (figures in parentheses indicate the percentage of coverage provided by private assigned counsel): Crook (38%); Lane (40%); Multnomah (22%); and Washington (15%).

Nine counties in the state are served by public defender programs: Clackamas, Coos, Douglas, Jackson, Lane, Morrow, Multnomah, Umatilla, and Washington. Of these, Morrow and Umatilla counties are served exclusively by the public defender program with conflict cases assigned to private appointed attorneys. All public defender programs in Oregon operate under contract with the State Court Administrator's Office; none is a government agency as exists elsewhere in the country.

Looking at the state as a whole, 32 of its 36 counties are served by contract programs representing approximately 70-75% of

the indigent defense caseload statewide; 28 of these counties are served exclusively by contract programs, or more than three-quarters of the state. (The numbers of counties served by the various program types do not add up to 36 because of the mixed systems that exist in some counties and the fact that public defender programs are also counted as contracts.)

2.2 Organization of Indigent Defense Systems at the Trial Level

There are three basic ways that states have organized their overall indigent defense systems. First, a number of states have organized their system through a statewide public defender program. Under these systems, a statewide agency is created through the executive branch, judicial branch or as an independent public or private agency. In many states, a governing body is created to provide overall policy for the agency. In other states, the state public defender is appointed by the Governor, for a term, with no policy-making body.

Statewide public defender programs are responsible for providing indigent defense services throughout the state. Services, however, may be delivered through public defender offices, assigned counsel or contract defense programs. Typically, public defenders serve metropolitan areas, and private bar programs serve the less populous regions. Private bar programs are also necessary in all public defender regions in conflict and case overload situations.

Sixteen states could be classified as having statewide public defender systems: Alaska, Colorado, Connecticut, Delaware, Hawaii, Kentucky, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, New Mexico, Rhode Island, Vermont, Wisconsin and Wyoming.

On the other extreme of delivery systems are states where the type of program is determined independently by each county in the state. The decision may be made by the County Board, the local bar association, the local judges or a combination of these officials. Under this system there is no programmatic oversight at the state level. There is no board or state commission.

There are 22 states where the type of system and the administration of the program is left to local decisions. Those states are: Alabama, Arizona, Arkansas, California, Georgia, Idaho, Indiana, Louisiana, Maine, Michigan, Mississippi, Montana,

Nebraska, New York, North Carolina, Oklahoma, South Carolina (all 46 counties have selected a local public defender program), South Dakota, Tennessee, Texas, Utah and Washington. In over half of these states, however, there is substantial current activity to review the whole indigent defense system, particularly in terms of administration and state oversight.

The third method used by states to organize their indigent defense system is through the use of a state commission or board which is established to provide overall direction, and develop standards and guidelines for local program operation, develop comprehensive management information programs for the projection of costs and caseload throughout the state etc. The principal feature of this system is to provide a central, uniform policy across the state that provides accountability, often permitting local jurisdictions in the state to determine the type of program (public defender, assigned counsel, contract) that best suits their local needs.

There are six states that have adopted this system: Iowa, Kansas, Minnesota, North Dakota, Ohio and West Virginia. Again, there is substantial variation in terms of the duties and responsibilities of the various commissions or boards.

Finally, there are six states that do not neatly fall into any of these three categories:

- In Florida, the legislature has created 20 independent publicly elected public defender offices. There is one for each judicial circuit.

- In Illinois, by statute, every county with a population of 35,000 or more must have a local public defender program. In counties of lesser population, it is optional.

- In Pennsylvania, by statute, every county must have a local public defender program.

- In Nevada, there are two large county public defender programs in Reno and Las Vegas. The rest of the state is served by the Nevada State Public Defender.

- In Virginia, the legislature can create by statute a public defender program in any area of the state. The rest of the state is served by local assigned counsel programs.

- In Oregon, the type of system developed in the majority of counties is a product of a contract bid system administered by the State Court Administrator's Office.

The indigent defense systems in Oregon and Virginia are unique. In both states, the State Court Administrator's Office is responsible for oversight and management of the program. In three other states, Alabama, Maine and North Carolina, funds are channelled through the State Court Administrator's Office, but that office is not responsible for oversight or management of the program. All three states are currently reviewing their indigent defense system, with The Spangenberg Group providing technical assistance.

2.3 The Current Contract System In Oregon

For 1988-89 the State Court Administrator has entered into over 50 separate contracts, with 50 different providers. This compares with 43 contracts with 39 contract groups that served these same 32 counties in FY 1987-88.

There are four basic types of contractors currently operating in Oregon:

(1) nonprofit public defender organizations--as described above, these are programs of salaried staff established solely to provide representation to indigent defendants;

(2) law firm consortiums--these are groups of attorneys or law firms that have joined together for the purpose of contracting to provide indigent defense services. The firms retain their separate identities and also continue to have a private practice in addition to their public defense work;

(3) partnerships--these are individual law firms consisting of several partners that contract to provide indigent defense services in addition to their private practices; and

(4) solo contractors--these are individual attorneys who contract to provide indigent defense service, in addition to maintaining a private practice.

The following table shows the number of contractors in each group for the years FY 1987-88 and FY 1988-89:

Table 2

NUMBER OF CONTRACTORS PROVIDING INDIGENT DEFENSE SERVICES FOR FY 87-88 AND FY 88-89

Contractor Type	Number in FY 87-88	Number in FY 88-89
Nonprofit public defenders	7	8
Law firm consortiums	17	21
Partnerships	15*	16
Solo contractors	*	5
TOTAL	39	50

* Partnerships and solo practitioners were not distinguished by the SCA in FY 87-88, but were reported only as "law firms", shown here in the partnership category.

As the above table indicates, the number of contract groups has increased 28% from FY 1987 to FY 1988. This increase has occurred primarily in the number of law firm consortium contracts, which alone increased by 24%. With the growth in consortiums, considerable variation has developed in their structure and operation. For example, at least four of the consortium groups have set up an umbrella nonprofit corporation that administers the contract and has a governing board of directors and bylaws, while others have been established on a more informal basis. Various practices have also emerged in regard to the allocation of compensation under the contract to the consortium members, as well as in the day-to-day administration of the consortium's activities.

In FY 1988-89, there were 13 new individual contractors or contract groups, all of which were private attorneys. This reflects a trend among private practitioners observed during the course of the study away from accepting individual appointments on an ad hoc basis and towards forming consortiums with other attorneys. The primary motivation for this structural change, we were told, was the anticipation that private attorneys would be compensated more adequately under the contract system than was possible under the current $30 per hour rates for representati

in individual cases.

The scope of the types of cases included in contracts also varies widely. Contracts typically include coverage for felony, misdemeanor, probation violation, contempt, extradition, juvenile and mental health proceedings. There are also a number of "specialty contracts" that cover specific case types, such as juvenile, mental health, misdemeanor, or felony cases. A number of so-called "boutique contracts" have also been entered into in recent years. These are small contracts designed to handle only a low volume of cases, that are often intended to fill in the gaps remaining when contracts with the primary providers in the county do not provide coverage for all indigent cases.

Certain types of cases are typically excluded from coverage under the standard contracts. These are capital murder cases, non-capital murder cases, appeals, postconviction and habeas corpus cases. There are, however, two specialty contracts providing representation in capital and non-capital murder cases.

Conflict cases are also excluded from coverage in the individual contracts. Conflicts arise, for example, when co-defendants are involved in a case, when a witness is a current or former client, or when the client is a relative of someone associated with the contract. In some counties in Oregon, there are specialty contracts specifically to handle conflicts declared by the primary providers. In many counties there are several contractors, so that conflict cases from one are handled by another local contractor. In those counties served by consortiums of independently run separate law firms, conflicts cases from one firm in the consortium are currently being handled by one of the other firms, resulting in conflict rates from 0 - 3%. (Conflict rates of 20 - 25% are typical in other jurisdictions around the country.)

When the State Court Administrator's Office assumed the responsibility for the indigent defense system in July of 1987, it initiated a new contract negotiation process and entered into

11-month contracts for the 1987-88 fiscal year. Single-year contracts have also been entered into for the 1988-89 fiscal year (although these do include some provisions for contract renewal). The terms of these contracts differ in many regards from those that had been in place during the previous biennium. The traditional "unit system" or "case weighting" approach to determining caseloads and compensating contractors was abandoned because it was perceived, at least by members of the Legislative Assembly, as a factor contributing to increasing costs of indigent defense. It was replaced with a system based primarily on agreements to handle a certain percentage of cases for a given price.

Generally known as "output contracts", these bind a contractor to provide representation in all or some fixed percentage of cases, regardless of the number or complexity of cases included. For example, a contract may require the provision of representation in 100% of all types of cases requiring appointment of counsel; while another, for example, may cover 50% of all indigent felony cases. For the most part, the output contracts used in FY 1988 were modified, in that they were based on a percentage of court appointments, but also provided in an appendix, caseload estimates and a permissible range of fluctuation that further defined the parameters on the total number or types of cases the contractor would accept. For example, one contract called for representation in 100 percent of the court appointments in the body of the contract, while the appendix specified that the estimated caseload was 1,950 cases and that assignment to any number of cases within 15% on either side of this estimate would not require renegotiation. The terms of another contract called for representation in 60% of the court appointments, estimated to be 2,806 cases, allowing in the appendix for fluctuations in caseload within 3% on either side of the estimate, and establishing that contractors would not be required to handle more than two murder cases or three termination of parental rights cases during the contract period. Although the number of

pure output contracts is still small, it has doubled between FY 1987 and 1988, from 8 to 16.

A few contracts are based on specified caseloads, rather than percentages. These may cover a caseload range, with a minimum and maximum caseload figure, or may stipulate a set number of cases, both for a specified price.

Another major change in the contracts from the 1985-87 biennium to FY 1987-88 related to how a case is counted. In the earlier contracts, cases were counted as a single case if they were assigned separate case numbers. In the 1987-88 contract, however, a case is a single appointment, and an appointment is counted as one new case when the charge or charges arise out of a single transaction incident or occurrence, whether these are charged in the same charging instrument or not, and whether these are assigned the same case number or not.

In addition, terms were added to the 1987-88 contracts to require the maintenance and submission of time records, budgets, and statistical information on cases handled under the contracts. These requirements were added in response to the legislative directives to improve the type of data available for the management of the indigent defense system.

Some further modifications were made in the contract terms for the 1988-89 contracts, primarily in the tightening of real or perceived loopholes in case and case counting definitions. For example, a cap was introduced on the number of cases which can be credited to a contractor when charges against a single defendant relate to more than one criminal transaction, incident or occurrence, and are disposed of together through a single plea agreement, where some charges are dismissed in exchange for a guilty plea on others. In the FY 1988-89 contract, no more than a total of three cases may be credited towards the contractor's caseload obligation under these circumstances, even if more than three separate criminal transactions, incidents or ocurrences are negotiated in that plea agreement. No such cap existed in previous

contracts. Further, 1988-89 contracts substantially limit credi for cases in which the contractor withdraws from representation.

While the State Court Administrator's office relies on model contracts, the terms of which are intended to apply uniformly to all contractors, the most critical terms are subject to negotiation. These include the percent of caseload coverage, case types to be handled, and price.

In summary, there is clearly a trend in Oregon toward relying on an increasing number of contracts to provide indigent defense services throughout the state. This is particularly noticeable in the recent increases in the establishment of law firm consortiums, specialty and boutique contracts. This is resulting in the creation of a wide variety of contractor groups, types of contracts, specific contract terms, and rates of compensation. The SCA is to be commended for its efforts to rationalize and manage the increasingly complex contracting process, particularly given the recent circumstances in which contracts have had to be renegotiated on an annual basis. Contractors, to should be recognized for their forbearance and continued dedication in an environment where contract terms have changed substantially from year to year, and often with only short notice, and characterized by uncertainty and instability resulting from administrative changes that have often delayed final agreement on the terms well into the contract period.

2.4 Indigent Defense Caseloads in Oregon And Factors Accounting For The High Rate

In September 1988, the United States Department of Justice, Bureau of Justice Statistics (BJS) published its report, "Criminal Defense for the Poor, 1986." The report resulted from a study conducted by The Spangenberg Group that gathered indigent defense data for all 50 states for 1986 in an effort to update the earlier study previously mentioned which reported on 1982 data.

According to the report, the total indigent defense caseload in Oregon in 1986 was approximately 140,000 cases (more than half of which were misdemeanors). This figure represents a 214% increase over the nearly 45,000 cases reported in the companion survey conducted in 1982. Nationally, this was the second highest increase in caseload reported for this period. Hawaii was first with an increase of 261%, and Oregon was followed by the District of Columbia, in third place with an increase of 184%. Four other states--Arkansas, Iowa, Massachusetts and Montana--experienced caseload increases of between 80% and 100%.

Interestingly, three of these states shifted during this time period from exclusively county funding to either full or partial state funding of their indigent defense system, as did Oregon. Our observations in studying indigent defense systems throughout the country over the past decade have identified a substantial increase in caseload when funding is shifted from county to state responsibility. While it is difficult to account definitively for this phenomenon, it may be due in part to counties not always providing counsel where required, or simply to the failure of counties to keep as accurate data as is subsequently accomplished at the state level. If the latter is the case, the actual increases in caseload may be less than indicated by available data.

Although specific data regarding indigent defense caseloads is not yet available for a full year from the computerized management information system established by the SCA, when it is available, it will provide the first reliable caseload data ever

available in Oregon. Statistics provided by the SCA indicate that overall criminal filings in both the district and circuit courts in Oregon have been increasing at an average of 5% each year since the state takeover of funding in 1983. District court felony filings, however, increased 17% in 1987 and are projected to go up by 25% in 1988. Criminal filings in the circuit courts have been increasing at the rate of approximately 10% per year since 1986. In 1988, circuit court criminal filings have been increasing at a rate of nearly 4% per quarter or at an estimated annual rate of 15%. Some individual jurisdictions throughout the state are experiencing even higher rates of increase in criminal filings.

In December 1988, The Spangenberg Group completed a statewide study of indigent defense services in the state of Washington required by legislation adopted earlier in that year. In the process of collecting expenditure and caseload data in each of the 39 counties in Washington for 1987, we determined that Washington had appointed counsel in 144,303 cases which, when compared to the data in our 1986 study, would have placed them fourth nationally, slightly behind California with 31 indigent cases per 1,000 population and ahead of Oregon.

Previously, members of The Spangenberg Group also conducted a statewide assessment of indigent defense services in Massachusetts in cooperation with the National Legal Aid and Defender Association. The total indigent defense caseload in Massachusetts has grown dramatically in the last five years and has now joined Oregon and Washington among the top ten states nationally in the rate of court-appointed counsel to total population.

Having studied these three states in substantial detail, we have been able to find what we believe are several common threads to the caseload growth. They are as follows:

- High rate of indigency;

- An environment that strongly favors appointment of counsel in the vast majority of cases;
- The availability of counsel in the courtroom at first appearance;
- An expansive right to counsel that exceeds minimum federal constitutional requirements; and
- Extensive interaction of other criminal justice components.

Our experience leads us to believe that each of these factors plays a role in the total number of indigent cases in these three states.

While our experience further shows that in some states, the total caseload increases when funding shifts from the county to the state, we do not believe that state funding itself is a major factor in determining caseload. For example, our 1986 study indicates that of the ten states with the highest rate of indigent cases, five were states that were predominantly county funded and five predominantly state funded. Thus, it appears that factors other than source of funding affect the rate of indigent cases.

Our study in Oregon has led us to several conclusions regarding the causes behind the high indigent defense caseload.

The first factor relates to the expansive rights of those accused of criminal, juvenile and quasi-criminal offenses in Oregon.

2.4.1 The Federal Requirement of Right to Counsel

The Sixth Amendment to the United States Constitution mandates that a defendant accused in a criminal prosecution is entitled "to have the assistance of counsel for his defence [sic]." However, it was not until 1928 that the United States Supreme Court established this right in federal criminal prosecutions in Johnson v. Zerbst, 304 U.S. 358 (1928). In Powell v. Alabama, 287 U.S. 45 (1932), the U.S. Supreme Court extended the right to counsel

through the Fourteenth Amendment, guaranteeing due process, to state court criminal prosecutions for indigent defendants in capital cases.

In 1963, the U.S. Supreme Court in the landmark decision of Gideon v. Wainwright, 372 U.S. 335 (1963), extended this right in state court to all indigent defendants charged with a "serious crime," or felonies. In 1972, in Argersinger v. Hamlin, 407 U.S. 25 (1972), the court further extended the right in all criminal prosecutions involving a sentence of imprisonment, including misdemeanors. Juveniles charged with delinquent acts were accorded the right to counsel in the case of In Re Gault, 387 U.S. 1 (1967).

The decision in Argersinger was further interpreted by the Court in 1979 in the case of Scott v. Illinois, 440 U.S. 367 (1979). In this case, a divided Court decided that the right to counsel in misdemeanor cases provided in Argersinger applied only when the trial judge determined that a sentence of imprisonment would be imposed if the defendant were convicted, and, thus, not to all classes of misdemeanors in which a sentence of imprisonment might be imposed under state statute.

Other decisions by the Court have addressed an indigent defendant's right to counsel at pre- and post-trial proceedings:

- Custodial interrogation--Miranda v. Arizona, 384 U.S. 436 (1966);
- Preliminary hearings--Coleman v. Alabama, 399 U.S. 1 (1970);
- Pre-indictment lineups--Kirby v. Illinois, 406 U.S. 682 (1972);
- Post-indictment line-ups--U.S. v. Wade, 388 U.S. 218 (1967);
- Arraignment--Hamilton v. Alabama, 368 U.S. 52 (1961);
- Sentencing--Townsend v. Burke, 334 U.S. 736 (1948);
- Appeal of right--Douglas v. California, 372 U.S. 353 (1963);
- Collateral attack--Johnson v. Avery, 393 U.S. 483 (1969);
- Probation and parole revocation--Gagnon v. Scarpelli, 411 U.S. 778 (1973).

Gideon, Argersinger, and Gault provide the broad federal constitutional mandate for counsel in criminal and juvenile delinquency cases. Implementation of these decisions has been left to the states, whether by state constitutional mandate, statute, and/or state Supreme Court decision. Some states have chosen to expand on the federal constitutional right to counsel. For example, some states provide for a right to counsel in all misdemeanor cases, defining the right more broadly than the federal mandate. (In fact, nearly half the states already had broader mandates when Scott was decided in 1979.) In addition, many states provide the right to counsel in other criminal and quasi-criminal proceedings such as: ordinance violations; civil commitment; and post-conviction petitions. Such policy decisions directly affect the structure and cost of state and local defense programs.

2.4.2 The Right to Counsel in Oregon - Expansion of Federal Requirements

The right to counsel under the Oregon Constitution and by statute and caselaw is expansive and goes substantially beyond federal constitutional requirements.

Article 1, Section 11 of the Oregon Constitution provides:

> "In all criminal prosecutions, the accused shall have the right...to be heard by himself and counsel...."

However, both by statute and caselaw, appointment of counsel for indigent persons in Oregon is authorized in the following types of cases:

- Defendants charged with a crime from the time of arrest through acquittal or the imposition of punishment. ORS 135.050(4)(a),5; 135.896 (diversion).
- Defendants facing an enhanced sentence that may result in the

imposition of a felony sentence. ORS 135.050(4)(b).

- Persons facing termination of DUII diversion agreement. State v. Vest, 88 Or. App. 101, 744 P.2d 288 (1987).
- Persons facing extradition proceedings. ORS 133.787.
- Probationers facing any proceeding concerning an order of probation. ORS 135.050(d).
- Defendants facing contempt of court proceedings. ORS 33.095.
- Persons seeking habeas corpus relief. ORS 34.355 (including on appeal).
- Parolees facing proceedings to revoke parole. ORS 144.317, 144.343, 144.337 (appeal from Parole Board to Court of Appeals).
- Prisoners confined for a minimum of 30 years without possibility of parole in proceedings to review likelihood of rehabilitation. ORS 163.105.
- Defendants appealing conviction or final orders. ORS 138.480 - 138.500.
- Persons seeking post-conviction relief. ORS 138.590 (including on appeal).
- Juveniles charged with crimes facing dependency proceedings. ORS 419.498, 419.563 (appeal), 419.655 (informal disposition agreements).
- Parents facing proceedings to terminate parental rights and in some dependency proceedings. State v. Jamison, 251 Or. 114, 444 P. 2d 15 (1968); Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981); ORS 419.563.
- Persons alleged to be mentally ill or retarded. ORS 426.100; 426.135; 427.265; 427.295.
- Persons facing petitions for determining ability to consent to sterilization. ORS 436.265; 436.315.
- Persons seeking judicial review of a final order of the Psychiatric Security Review Board. ORS 161.385(8).
- Persons facing hearings before the Psychiatric Security Review Board on application for discharge, conditional release,

commitment, or modification. ORS 161.346(11).

As previously stated, the United States Constitution and the Oregon Constitution differ on the scope of cases in which a defendant is entitled to appointed counsel. Under federal authority, there is no constitutional violation of the right to counsel as long as a defendant is not committed to incarceration as a result of a criminal conviction.

In contrast, Article 1, Section 11 of the Oregon Constitution has been interpreted to require the appointment of counsel in any criminal case or in any offense or violation that has the character of a criminal prosecution, regardless of whether the defendant is actually incarcerated. In Brown v. Multnomah County District Court, 280 Or. 92, 570 P.2d 52 (1977), the Oregon Supreme Court held that although the legislature had "decriminalized" the offense of driving under the influence of intoxicants, the offense still retained sufficient penal characteristics of a criminal prosecution to require the appointment of counsel for indigent defendants under Article 1 Section 11 of the Oregon Constitution. This right exists independently of any sentence of incarceration which may be imposed.

The Oregon Supreme Court has adopted the federal rule that an uncounseled prior conviction may not be used to enhance the sentence of a later criminal charge. State v. Grenvik, 291 Or. 99, 628 P. 2d 1195 (1981). It is obvious, then, after reviewing the right to counsel in Oregon that the large indigent caseload is due in part to the expansive rights of indigent defendants.

The second major factor affecting the high caseload in Oregon is the unusually high indigency rate.

2.4.3 Rates of Indigency in Oregon and Nationally

One of the major factors affecting both the total number of cases and expenditures for indigent defense services in any state

is the percentage of criminal defendants before the court who are determined to be indigent and for which counsel is appointed.

During the course of our 1982 national study, respondents were asked to report on the indigency rate in their jurisdiction for felony, misdemeanor, juvenile, mental commitment and appellate cases. The data disclosed that the average nationwide indigency rate was as follows:

Felonies	48%
Misdemeanors	25%
Juvenile	80%
Mental Commitment	85%
Appeals	90%

Data from Oregon was obtained in 1982 through a sample of 13 counties, which included the counties with the largest population size and a random sample of all other counties. The average indigency rate for Oregon in 1982 was as follows:

Felonies	70%
Misdemeanors	48%
Juvenile	65%
Mental Commitment	95%
Appeals	90%

While most of the counties reported that their data was estimated rather than documented, Oregon's 1982 data does show a substantially higher rate of indigency than the national average for felony and misdemeanor cases and a somewhat lower rate for juvenile cases. Indigency percentages have continued to increase in Oregon since 1982. Estimated percentages in 1987 are displayed in Table 3, on pages 36-37.

It is important to note, however, that variations among the states will have some bearing on the above rates. For example,

some jurisdictions require misdemeanor appointment only if there is a reasonable likelihood that a jail sentence will be imposed. There is also substantial variation among jurisdictions regarding the definition of a felony and a misdemeanor.

Because of the limitations in our 1986 study, we were not able to gather comparable data on indigency rates around the country. However, based upon work we have performed in several states since that time, we believe that indigency rates have gradually increased.

For example, in 1987 we completed a statewide study of misdemeanor representation in the municipal and county courts in Ohio and determined that the average indigency rate in misdemeanor cases was over 40%.

More recently, in 1988 in our study on indigent defense services in the state of Washington, we determined that indigency rates in 1987 across the state averaged as follows:

Capital cases	96%
Felony cases	80%
Non-traffic misdemeanors	46%
Misdemeanor traffic	46%
Juvenile cases	93%

Finally, in our study of private bar representation in indigent defense cases in Massachusetts in 1986, the rates of indigency reported were similar to those we found in the state of Washington. We believe that these data and information obtained from other states support our opinion that indigency rates have risen generally across the country since 1982.

In our current Oregon study, we asked mail respondents to provide estimates of the percentage of cases for which counsel is appointed across 12 case type categories. Table 3 displays responses for various respondent groups.

Table 3

ESTIMATES OF PERCENTAGE OF CASES FOR WHICH COUNSEL ARE APPOINTED BY RESPONDENT TYPE

	Contract/Attorney Public Defender TOTAL	Prosecutors TOTAL	Judges TOTAL	Private Assigned Counsel TOTAL
Murder				
Total Responses	30	35	49	20
% Found Indigent	93	88	93	92
Class A Felony				
Total Responses	32	36	51	20
% Found Indigent	85	91	89	84
Class B Felony				
Total Responses	32	36	51	20
% Found Indigent	84	91	86	80
Class C Felony				
Total Responses	32	36	51	20
% Found Indigent	81	88	83	76
Traffic Felony				
Total Responses	32	34	47	19
% Found Indigent	79	81	79	73
DUII				
Total Responses	33	34	42	18
% Found Indigent	69	74	62	53
Misdemeanor				
Total Responses	32	32	39	18
% Found Indigent	70	75	64	61
Misdemeanor Traffic				
Total Responses	31	32	38	17
% Found Indigent	68	75	61	56
Probation Violation				
Total Responses	31	34	48	4
% Found Indigent	80	88	77	76
Contempt				
Total Response	22	30	39	11
% Found Indigent	69	49	56	63

(continued)

Table 3 continued

	Contract/Attorney Public Defender - TOTAL	Prosecutors TOTAL	Judges TOTAL	Private Assigned Counsel TOTAL
Juvenile				
Total Responses	22	29	30	15
% Found Indigent	75	67	68	68
Mental Health				
Total Responses	22	28	35	10
% Found Indigent	92	96	96	88

It is important to point out that the data reported in Table 3 and all subsequent tables that report results of the Oregon mail survey are based upon the "estimates" or "opinions" of the various respondents and not upon documented data.

An analysis of Table 3 is important. First, with very few exceptions, there is basic uniformity of opinion across all respondent types for almost every category. We find this to be extremely significant and suggests a high degree of reliability. Second, the rates of indigency substantially exceed the 1982 national average for both felony and misdemeanor cases. They are slightly lower for juvenile cases. However, when comparing the data from Table 3 with the 1982 study, it is apparent that the rate of indigency has increased in Oregon for felonies, misdemeanors and juvenile cases.

The high indigency rates reported in Table 3 were confirmed during our site visits to 12 counties. While judges and other court officials were in fact aware of the new indigency guidelines and standards promulgated by the Chief Justice (discussed later in this report), appointments continued to be made in a large majority of cases. We were told some areas of the state continue to be economically depressed. The high indigency rate in these areas may, in part, reflect high unemployment rates. In our extensive interviews on site, we reached the following conclusions regarding

the high rate of appointment of counsel:

- There has been a longstanding tradition in Oregon courts to appoint counsel in most cases and that tradition is deeply ingrained in the system. In cases where there is a serious doubt about a person's indigency, judges will err in favor of giving the defendant a lawyer to protect his or her rights.
- The availability of appointed counsel in the courtroom, at the initial appearance of the defendant, encourages the appointment of counsel, but may in fact save indigent defense costs overall.
- Some judges are concerned about docket delay if the case is continued in order for the defendant to obtain retained counsel. The expectation of the judges is that the defendant will reappear without counsel at the time of the next appearance.
- Some judges are concerned about potential law suits if counsel is denied and the defendant is later to be found indigent.
- There are insufficient numbers of private attorneys willing to provide representation to defendants at a rate below their normal retainer should the court wish to deny counsel in close cases. One public defender estimated that an average DUI II fee to retain private counsel was $1,500. In addition, in some areas of the state we were told there are not many private attorneys who specialize in criminal law.
- Some judges believe that pro se cases (cases where the defendant acts as his/her own counsel) take considerably more time and more court resources than when counsel is appointed and thus believe that appointment in these cases is more cost effective.

In identifying these factors that we believe contribute to a high indigency rate in Oregon, we wish to state in strong terms that most of the appointment practices are required by Oregon law

and the United States Constitution. Further, some of these practices such as availability of counsel at initial appearance will result in an overall savings by disposing of some cases at the outset, which would otherwise progress unnecessarily into the criminal justice system at greater expense. Our intent is not to be critical of policies required by law, but rather to identify what we believe to be some of the reasons for the high indigency rate in Oregon.

Another reason for high caseloads in Oregon is policies and practices of other criminal justice components that impact on indigent defense services.

2.4.4 Impact of Other Criminal Justice System Components in Oregon

The criminal justice system has been fundamentally challenged in recent years by major changes in society at large. Economic adjustments and changes in the family structure throughout the nation have apparently contributed to increases in drug use and in crime rates. In Oregon, as well as many other states we have worked in, the 1980s have been characterized by a drug explosion and alarming increases in violent crimes, particularly homicides and other crimes that flow from drug use such as property offenses. One prosecutor told us his office is "not used to the current crunch." In the past, he said, they "had lots of space and time to handle cases."

In response to these trends, the public has become increasingly concerned that authorities "get tough on crime". The Legislative Assembly has begun to define more behavior as criminal as a result of this public pressure. This increases the number of cases and case types in which there is a right to counsel. Law enforcement resources have been increased to implement this policy, and, thus, arrest rates have gone up; again, increasing the number of cases in which counsel must be appointed.

Likewise, prosecutorial practices have changed in many

jurisdictions throughout the state, as well as in many other states. For example, some district attorneys may be unwilling to offer plea bargains generally or on certain types of high profile cases, increasing the likelihood that they will go to trial and, thus, the amount of time that must be spent by defense attorneys, district attorneys, and the courts in disposing of the cases. Also, as a result of the recession suffered in 1983, district attorney staffs were decreased by as much as 20% in some jurisdictions, which resulted in a temporary reduction in case filings. Subsequent efforts to regain staff have, we are told, increased filings again, and thus, also the number of indigent cases requiring counsel. We were told that statutory diversion programs (other than those for DUII) are not used in most counties.

Inadequate supervision of Deputy District Attorneys is also reported to contribute to an increase in filings. During site visits, we were told that some deputies overcharge because they lack the experience to weed out charges that can not be proven.

The courts are also faced with burgeoning caseloads and pressures to move cases. Speedy trial requirements in Oregon put added pressures on judges, prosecutors and defense counsel. The courts are also continually reviewing and altering their administrative procedures in order to better manage their operations. The addition of proceedings designed to ensure that all parties are prepared to proceed and are notified of the next court dates increases the time that attorneys must spend in court, including travelling and waiting time, and also increases the opportunities for defendants to fail to appear and require the issuance of bench warrants.

Further, attempts by the courts to expedite the processing of criminal cases have an impact on the number of defendants for whom counsel must be appointed at public expense. One judge reported to us that marginally indigent defendants, who might be able to come up with the money to retain counsel over the course of several months, may not be able to do so if they have only a few weeks

before the case is scheduled to be heard. He considers that defendant to be "effectively indigent."

All of these factors have an immediate impact on the workload that must be handled by indigent defense attorneys throughout the state, the level of effort required, and the cost of providing representation.

Another extremely significant aspect of the broader justice system currently having an appreciable effect on the indigent defense system is the corrections crisis in Oregon. The severe shortage of jail space at the local level, with many jails under court order limiting their maximum capacity, and the extremely crowded conditions in the state's prisons have led to a situation where few convicted defendants are actually incarcerated for any significant period of time. We were told repeatedly that under the matrix system established by the Corrections Department, a convicted felon sentenced to five years may serve no more than a month or two of that sentence, assuming that he or she will do any time at all. Apparently, some convicted criminals actually arrive to serve their sentence, only to be turned away at the prison gate because of lack of space. This problem has several facets. First, it increases the danger of recidivists recycling back through the courts accused of new crimes, requiring the appointment of counsel and the expenditure of numerous other scarce resources. One judge responding to our survey felt that this was the most critical problem facing the indigent defense system:

> We just keep reprocessing the same individuals month after month and year after year. Many should be locked up for extended periods of time to keep them off the streets and out of the system. Right now, it's just a revolving door for many of them, and we pay an attorney to be the doorman each time they go through.

The problem is complicated by the fact that there is a lack of sufficient local resources for alcohol and drug treatment, which exacerbates the problem and causes an even greater recycling of defendants. Further, it creates an atmosphere in which some

criminal defendants are aware of the unlikelihood that they will face any serious sanctions, even if apprehended and convicted of criminal behavior. Thus, it is suggested by some that more individuals are likely to take the risk, with a resulting increase in the frequency of criminal activities. Other individuals told us that there is a further impact of increased numbers of probation violations and show cause hearings, with little likelihood of incarceration, which may prove to be a disincentive for some defendants to properly comply with their probation and parole conditions. Obviously, the increase in the number of required hearings in these cases adds to the cost of indigent defense services.

Our experience reviewing indigent defense systems around the country in the last decade has led us to conclude that the indigent defense function does not operate independently from the rest of the criminal justice system. It acts and interacts with virtually every other component. In the Spring of 1987, efforts were made in Oregon to look at certain types of cases that were classified as crimes, resulting in the right to counsel, that might be decriminalized in an attempt to reduce somewhat the volume of indigent appointments. For example, DWS cases were reported to represent as much as a quarter of programs' caseloads.

A related effort was undertaken to reduce the number of misdemeanors in which appointments would be required by allowing the reduction of nontraffic misdemeanors to violations, which was passed into law by the Legislative Assembly during the 1987 session. However, this new law has not resulted in a meaningful reduction to date in most counties other than Multnomah, largely because of a failure on the part of the courts and district attorneys to take advantage of the opportunity. As a reason for this reluctance, some pointed out the potential equal protection problems associated with the discretionary nature and its differential impact on defendants with similar cases who may be treated differently by the system. In addition, we received some

reports that some judges do not appoint counsel in misdemeanor cases when the prosecutor states at the outset that a jail sentence will not be sought.

Others suggested that since it is unclear whether district attorneys offices are entitled to collect victim's fund assessment fees on cases reduced to violations, they may be reluctant to agree to the policy's implementation. In one of the few counties which has adopted the policy and has some preliminary data, approximately 20% of the total misdemeanor complaints issued during a three-and-a-half month period received violation treatment. Of these, 32% were pled guilty, 29% were set over, and 11% requested trial. Much more information will be necessary before any conclusions about the potential impact of this new law can be properly evaluated.

We conclude that each of the factors discussed above has played a significant role in the increasing caseload in Oregon. In addition, there has been created over a number of years a clear environment within the court system that resolves most conflicts in favor of appointment of counsel, a policy that is fostered by the in-court presence of court-appointed counsel at the time of first appearance in most courts. The policy of appointing counsel at this point is mandated by Oregon law. However, we believe that certain procedures can help control the number and rate of appointments. For example, better District Attorney screening practices are needed, and the guidelines of the Chief Justice should be fully implemented in order to assure that only the truly eligible receive counsel. Several measures have been undertaken in the last three years by SCA to address this issue. These efforts will be discussed throughout the remaining text of this report, and we will add a series of our own recommendations in the final chapter.

2.5 Indigent Defense Costs in Oregon and Across the Nation

Comparing cost trends in Oregon to those around the country shows clearly that the increases experienced in recent years are not unique, particularly in relation to the other 19 state-funded systems. According to our national survey, between 1982 and 1986 total indigent defense costs in Oregon increased 77% from $12.6 million to $22.4 million. This increase ranked 15th in the country, where the average increase in costs was 60%. Nationally, state expenditures showed a greater overall increase (80%) than county expenditures (52%) between 1982 and 1986. Per capita costs in Oregon have increased 73% from $4.80 in 1982 to $8.31 in 1986. While the 1986 national average is half the per capita cost in Oregon, the highest rate of increase was still 3.5 times Oregon's.

Despite this substantial increase in cost over the four year period, recent data in Oregon shows an apparent slow down in total indigent defense system costs. In August 1988, The Spangenberg Group conducted a study in West Virginia for the State Bar under the auspices of the American Bar Association Bar Information Program in response to a lawsuit pending before the West Virginia Supreme Court challenging the adequacy of court-appointed counsel fees in that state. The following table, contained in that report, sets out total expenditures for 17 out of the 20 states that fund their indigent defense system entirely from state funds, for 1982, 1986, 1987, and 1988 with the total percentage increase between 1982 and 1986 and between 1986 and 1988 indicated for each state.

Table 4

COMPARATIVE COST DATA FOR STATE FUNDED INDIGENT DEFENSE SYSTEMS
FY 1982 THROUGH FY 1988

	FY 1982	FY 1986	FY 1987	FY 1988	% Increase 1982/1988	% Increase 1986/1988
Colorado	8,468,313	12,126,270	17,560,167	18,725,704	+121.1	+54.4
Connecticut	4,524,870	9,251,316	9,100,000	10,000,000	+121.0	+8.1
Hawaii	3,500,000	4,382,609	4,331,409	5,020,409	+43.4	+14.6
Maine	1,088,653	1,962,694	2,088,586	2,162,648	+98.7	+10.2
Maryland	10,270,310	20,042,024	19,811,991	22,162,681	+115.8	+10.6
Massachusetts	13,092,198	20,761,822	24,744,702	32,456,751	+147.9	+56.3
Missouri	4,408,413	6,746,272	7,778,643	8,242,641	+87.0	+22.2
New Hampshire	2,146,999	4,329,960	4,014,101	4,700,000	+118.9	+8.5
New Jersey	19,681,656	31,025,000	32,300,000	35,100,000	+78.3	+13.1
New Mexico	3,981,763	6,283,700	6,283,700	6,442,200	+61.8	+2.5
N. Carolina	11,004,038	16,480,870	17,274,416	20,816,749	+89.2	+26.3
Oregon	12,639,051	22,432,300	21,646,068	23,625,770	+86.9	+5.3
Rhode Island	1,299,684	2,083,091	2,466,000	2,491,000	+91.7	+19.6
Virginia	8,776,311	10,122,671	10,848,393	14,513,563	+65.4	+43.4
Vermont	1,873,264	2,777,798	2,890,635	3,257,425	+73.9	+17.3
:t Virginia	3,214,107	4,981,560	4,413,994	3,504,104	+9.0	-29.7
Wisconsin	13,350,200	20,061,508	25,303,900	26,535,700	+98.8	+32.3
TOTAL	123,319,830	195,851,465	212,856,705	239,757,345	+94.4	+22.4

An analysis of this table shows that there was an overall increase in expenditures in these 17 states of 94.4% from 1982 to 1986. Oregon's increase was slightly below the average at 86.9%. Between 1986 and 1988, state funded system costs increased overall by 22.4%; during this same time period, Oregon's indigent defense costs increased by only 5.3%, to the rate of $23.6 million in FY 1987-88. The highest cost increases during the two year period were experienced in Massachusetts which went up by 56% and Colorado which increased by 54%, each more than ten times the rate of increase in Oregon at the height of the funding crisis. Only West Virginia and New Mexico experienced a lower rate of growth. A

request has been made in the 1989-90 budget in New Mexico for a 55% increase in the overall budget, while West Virginia is currently grappling with a statewide lawsuit.

As noted earlier, much of the increase in indigent defense cost in Oregon over this period can be attributed to increasing caseloads. The national study for 1986 disclosed that overall, throughout the nation, caseloads grew by approximately 40% from 1982 to 1986.

Significantly, further analysis of the 1986 study discloses that the average cost per case in Oregon declined almost by half between 1982 and 1986. In 1982 Oregon spent $282 per indigent defense case and ranked eighth in the nation. This figure was 44% higher than the national average of $196. In 1986, Oregon's cost per case dropped dramatically by $160, a decrease of 43% since 1982. Not only did this drop Oregon's ranking from 8th in 1982 to 37th in 1986, but it also put the state in the position of spending 28% less per case in 1986 than the national average of $223.

There is one caveat that should be considered in comparing our data for Oregon between 1982 and 1986. The source of the data in 1982 was obtained from individual counties, inasmuch as the state did not take over the funding responsibility until 1983. It may well be that the data reported to us by the counties in 1982 for both caseload and expenditures was understated. If so, then the crisis in indigent funding in Oregon over the past five years may in fact be due in large measure to a first time biennium state budget that understated the cost for budgeting and state funding assumptions. These facts would not, however, affect the reported cost per case in Oregon for 1982.

The problem of understated data was recently demonstrated in our study in Washington state. The counties in Washington are currently responsible for all indigent defense costs, except for appeals. Our 1986 data, based upon county reporting, disclosed that the counties spent approximately $16.6 million in 1986 for approximately 101,000 cases. In our 1988 study we obtained

accurate data from each county for the year 1987. The resulting information showed that for 1987 the counties spent almost $26 million for over 144,000 cases. It was apparent to us that in the case of Washington, the 1986 figures were substantially under-reported compared to our more reliable data in 1987.

The SCA in Oregon was given an adjusted appropriation for the indigent defense account for the 1987-89 biennium of $46,166,982. Originally, $42.5 million was appropriated, equivalent to the final total expenditures for the previous biennium despite the budget request of the State Indigent Defense Board for $50 million. Of this total, 51% or $21.6 million was initially released for the first fiscal year. In March of 1988, the Legislative Assembly released the remaining $20.7 million for FY 1988-89.

The Judicial Department and the SCA have undertaken a number of specific projects to date in an attempt to effectively manage the expenditure of these funds. These include the development of a computerized management information system; the establishment of standard indigency guidelines; the initiation of an indigency verification project; involvement in a pilot recoupment collections project; promulgation of case expense guidelines and payment procedures; and promulgation of attorney qualification standards. In spite of these efforts, the costs of indigent defense are, predictably, continuing to rise, in large part due to rising caseloads.

In January 1989, the SCA reported to the Emergency Board that its estimate for the total cost of providing indigent defense services for the 1987-1989 biennium, excluding the cost of death penalty appeals was estimated to be $49,030,619. This figure was based upon actual expenditures for the balance of the biennium using the monthly average to date.

One other fact that has had a significant impact on these costs is the increase in the numbers and costs of death penalty cases. The total 1987-89 biennium budget for death penalty cases at the trial court level was $1,426,031. Current estimates of the

cost of death penalty cases at the trial court level for 1987-89 are at least three million dollars, based upon average monthly expenditures to date. Actual expenditures for this fiscal year were $1,226,995, for a deficit of $499,679 during the first fiscal year of the biennium. Expenditures for death penalty cases increased by 175% from 1985 to 1986, and by 100% from 1986 to 1987. At the end of the first 6 months of 1988, expenditures in this category already equalled 90% of those in 1987.

At the January 1989 meeting of the Emergency Board, SCA reported that the projected death penalty trial expenditures for the 1987-89 biennium would be more than double the amount projected by the Legislative Fiscal Office in its funding recommendations for indigent defense to the 1987 Legislative Assembly.

Expenses for counsel in death penalty appeals are also sharply on the rise as cases proceed through the appellate process. The SCA reported in January 1989 that their estimated costs for these cases in the current biennium would be $408,486.

SCA has made substantial headway in attempting to contain rising indigent defense costs in Oregon. They have instituted a number of methods to try to restrain the costs. A substantial amount of time was spent during the first year in creating a system for data gathering, where none previously existed, and in developing policies and procedures that help define the proper parameters for incurred indigent defense costs and the proper disbursement of those funds and to set up systems for accountability and for budgeting and planning. The Judicial Department has almost completed the development of a new computerized database that will permit an analysis of what elements are driving the costs and how to develop methods to assure maximum effectiveness and efficiency. <u>However, as long as the overall criminal filings continue to increase in Oregon, the total costs for indigent defense services will continue to rise at a clearly predictable rate.</u> Therefore, we strongly believe that the best hope in the future for containing costs is to attempt to find

acceptable means to decrease the overall number of cases requiring appointment of counsel, consistent with public policy and the rights of indigent persons.

2.6 The Appointment Process in Oregon

The following material highlights various aspects of the appointment process in Oregon. It includes information on how indigency is determined, the timeliness of appointment, time of first contact with clients and issues relating to the waiver of counsel.

2.6.1 Indigency Determination

The issues of who determines whether a defendant is indigent, how indigency is determined, and on what basis, has been a continuing problem dating back before the state took over the funding responsibility in 1983.

In an attempt to standardize the indigency determination process and better ensure that only the truly indigent receive appointed counsel, Chief Justice Peterson promulgated and issued uniform indigency guidelines effective November 1, 1987. The Federal Food Stamp Eligibility Standards were adopted in the guidelines as the level of necessity for the income guidelines eligibility. A detailed memorandum was sent by the Chief Justice to all courts with instructions on how to implement the guidelines and included standard forms.

In conducting our field work, we discovered that the new guidelines were not being strictly applied. For example, one judge conducts all of the financial inquiry in open court. He told us the forms have too much detail and he can't figure out what the relevant information is, so he just asks the defendant. In other courts, they use a "simplified" form or have "modified" it to add information about assets, current employment and bond amounts.

While refinements to the standards, forms and instructions may be helpful, most of those who worked with the system were positive about it. They felt it was fairer and that screening results were now more consistent from judge to judge within the court.

We included in our mail survey questions to judges and trial court administrators regarding these various issues. These data disclose that in almost every case, respondents report that they use a standard reporting form. The judge in all cases must make the final determination, but is assisted frequently by a release assistance officer or other court personnel.

During our site visits, we further found that courts who did not have a release assistance officer wished they did. They felt there was not enough time in court to apply the guidelines and that filling out the screening forms would better be done outside of court by a release officer or other screening specialist. Because an adequate interview necessarily takes time, we found that paperwork is often not completed if it is the responsibility of a judge. One district attorney pointed out that the judge's responsibility to move cases mitigated against looking deeply into every defendant's finances.

Respondents were also asked whether their court applies written indigency criteria. Table 5 sets forth the following responses:

Table 5

DOES JURISDICTION APPLY WRITTEN INDIGENCY CRITERIA?

	Judges	Court Administrators
Total Responses	57	26
Yes	51	20
	89%	76.9%
No	5	6
	9%	23.1%
Don't Know	1	-
	2%	-

While these data disclose that the vast majority of jurisdictions were applying written indigency criteria in the

Spring of 1988, there were still a few jurisdictions that were not.

Finally, we asked whether the court or any other entity routinely verifies the information provided by defendants for purposes of determining indigency.

Table 6

IS INFORMATION ROUTINELY VERIFIED?

	Judges	Court Administrators
Total Responses	56	26
Yes	4	3
	7%	11.5%
No	52	23
	93%	88.5%

Both sets of respondents stated that with few exceptions, information obtained from defendants is not verified. This is largely due to the fact that there are not sufficient personnel available to verify and it is not feasible or effective to attempt to perform this task during a session in open court.

One judge told us that the criminal cases in the circuit court were mostly drug-related. He pointed out that these defendants usually do not keep their funds in bank accounts that can be traced.

But, financial information is sometimes verified by outside sources. For example, a member of The Spangenberg Group observed a court session during which there was a trial of a defendant who was accused of falsifying a financial affidavit. He had allegedly not disclosed assets that were later discovered.

In summary, in our field work we determined that most judges and court officials appear to be aware of the Chief Justice's guidelines, but they are not being applied uniformly and have not had a major impact on the indigency rate to date.

Last year, the Legislative Assembly provided funding for a one year pilot project on indigency verification for persons requesting court-appointed counsel at state expense. The project became fully operational in four counties on July 1, 1988, prior to the responses obtained in Table 6. At the end of five months of operation, the project has verified 2024 applications for court-appointed counsel. Of those applications, 327 (16.2 percent) defendants were found to have sufficient resources to hire private counsel. In addition, the presence of the project, it is reported, has resulted in some applicants withdrawing their requests for appointment of counsel when they were notified that the information they provide will be verified. The SCA reports that approximately $110,000 (on appointments not made) was estimated to be saved.

2.6.2 Timeliness of Appointment

Under Oregon law, defendants charged with a crime are entitled to counsel from the time of arrest through acquittal or the imposition of punishment. The effectiveness of counsel can be measured in part by the point in time that counsel is first appointed and the time that counsel first makes contact with the defendant. There are no jurisdictions in the country that we are aware of that make counsel available in all cases immediately following arrest. Under constitutional law, counsel must be available, upon request, following arrest in serious cases such as murder, but it is not practical to assume that counsel will be requested in every case upon arrest. Rather, our experience has shown that the best system will make counsel available in the vast majority of cases at the time of first appearance. This is the point in time when the defendant first appears before the court to be apprised of the charges. In some cases, the initial appearance may be solely to determine bail, while in most cases a formal arraignment is held at which time the defendant enters a plea, bail is determined, counsel appointed and a date for trial set. In our

mail survey we asked judges, contract attorneys/public defenders and assigned counsel to indicate at what stage of the proceeding counsel is appointed for various types of cases in their courts. The following tables provide responses for various types of cases.

Table 7[1]

STAGE OF APPOINTMENT IN MURDER CASES

	Judges	Contact Attorney/ Public Defender	Assigned Counsel
Number of Responses	57	24	13
Immediately After Arrest	11 19%	5 21%	3 23%
Just Prior to Initial Appearance	14 25%	5 21%	4 31%
At Initial Appearance	32 56%	14 58%	6 46%

Table 8

STAGE OF APPOINTMENT IN FELONY CASES

	Judges	Contact Attorney/ Public Defender	Assigned Counsel
Number of Responses	58	31	25
Immediately After Arrest	2 3%	- -	1 4%
Just Prior to Initial Appearance	12 21%	4 13%	3 12%
At Initial Appearance	44 76%	27 87%	21 84%

[1]In Tables 7-14, in some cases the total number of responses does not equal the total number of respondents because a few respondents did not answer this question and because a few respondents checked more than one answer.

Table 9

STAGE OF APPOINTMENT IN DUII CASES

	Judges	Contact Attorney/ Public Defender	Assigned Counsel
Number of Responses	47	39	24
Immediately After Arrest	-	-	1
	-	-	4%
Just Prior to Initial Appearance	6	1	2
	13%	3%	8%
At Initial Appearance	41	38	21
	87%	97%	88%

Table 10

STAGE OF APPOINTMENT IN NON-TRAFFIC MISDEMEANOR CASES

	Judges	Contact Attorney/ Public Defender	Assigned Counsel
Number of Responses	44	39	23
Just Prior to Initial Appearance	5	1	2
	11%	3%	9%
At Initial Appearance	39	38	21
	89%	97%	91%

An analysis of these tables shows clearly that judges almost uniformly make appointments in all cases at least by the time of the defendant's first appearance. In almost 25% of the murder cases, appointments are made immediately following the arrest. It is significant to note that both categories of appointed counsel confirm almost universally the reports of the judges. Furthermore, our extensive on-site observations in the courts of the 12 counties that we visited further confirm these facts.

2.6.3 Timeliness of First Defendant Contact

While the early appointment of counsel is critical to an adequate defense, it is also important to learn when court-appointed counsel first makes contact with the defendant. We asked both sets of court-appointed counsel to indicate when they first make contact with their clients. The following tables display responses to that question for various categories of cases.

Table 11

FIRST CLIENT CONTACT IN MURDER CASES

	Contract Attorney/ Public Defender	Assigned Counsel
Number of Responses	23	11
Immediately After Arrest	8 35%	6 55%
Just Prior to Initial Appearance	5 22%	1 9%
At Initial Appearance	10 43%	4 36%

Table 12

FIRST CLIENT CONTACT IN FELONY CASES

	Contract Attorney/ Public Defender	Assigned Counsel
Number of Responses	33	20
Immediately After Arrest	1 3%	1 5%
Just Prior to Initial Appearance	4 12%	2 10%

(continued)

Table 12 continued

	Contract Attorney/ Public Defender	Assigned Counsel
At Initial Appearance	19 58%	14 70%
Immediately Following Indictment	9 27%	3 15%

Table 13

FIRST CLIENT CONTACT IN DUII CASES

	Contract Attorney/ Public Defender	Assigned Counsel
Number of Responses	36	15
Just Prior to Initial Appearance	3 8%	2 13%
At Initial Appearance	16 44%	13 87%
Immediately Following Indictment	17 48%	- -

Table 14

FIRST CLIENT CONTACT IN NON-TRAFFIC MISDEMEANOR CASES

	Contract Attorney/ Public Defender	Assigned Counsel
Number of Responses	38	15
Just Prior to Initial Appearance	3 8%	2 13%
At Initial Appearance	35 92%	13 87%

Once again an analysis of these tables indicates that appointed counsel in most types of cases is present at the first

appearance and makes contact with their clients at that time. There is also evidence that in murder cases, counsel is frequently available immediately following arrest. During our site observations we were told that in most jurisdictions, counsel is informed by the police when they have arrested a person charged with murder who seeks counsel. In a number of such cases, counsel appears at the police station even before an appointment can be made by the court. This policy is consistent with Oregon law.

In our mail survey we also asked assigned counsel and contract attorneys/public defenders what their usual initial form of contact was with their clients. 83% of the contract attorney/public defenders reported that their first contact was an in-person interview. 87% of assigned counsel attorneys responded in a similar fashion. Once again, our site observations and interviews confirmed the fact that appointed counsel makes early contact with clients and with the exception of out-of-custody misdemeanants, that contact either takes place in jail or in the attorneys' office through personal interviews either before or shortly after first appearance.

In our opinion, the indigent defense system in Oregon provides counsel as soon as feasible after arrest and conforms with applicable Oregon law. It also conforms with Standard 5-5.1 of the ABA Standards for Criminal Justice which states:

> Counsel should be provided to the accused as soon as feasible after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest. The authorities should have the responsibility to notify the defender or the official responsible for assigning counsel whenever a person in custody requests counsel or is without counsel. Upon request, counsel should be provided to persons who have not been taken into custody but who are in need of legal representation arising from criminal proceedings.

2.6.4 Waivers of Counsel

In prior studies we have conducted in other states, we have been told and personally observed numerous instances in which counsel is waived by indigent defendants, particularly in less serious cases. Unfortunately, on occasion, the waiver is based upon pressure from the judge, the prosecutor or other court officials.

Under constitutional law, a defendant may decline to have counsel appointed at all, initially at the time of arraignment or at any other stage of the proceeding, provided that the defendant makes a knowing and intelligent waiver of the right to the assistance of counsel. Faretta v. California, 422 U.S. 806, (1975).

In our mail survey we asked each judge to estimate the percentage of indigent cases in which counsel was knowingly and intelligently waived in 1987 in various types of cases. The results of the survey are as follows:

Table 15

PERCENTAGE OF CASES IN WHICH WAIVERS ARE APPROVED BY JUDGES

Type of Case	Percentage of Waivers Approved
Murder	-
Class A Felony	2%
Class B Felony	3%
Class C Felony	7%
Traffic Felony	9%
DUII	20%
Misdemeanor	26%
Misdemeanor Traffic	29%
Probation Violation	30%
Contempt	41%
Juvenile	33%
Mental Health	-

There is no national data that we are aware of to compare with these results. However, our observations in numerous courts in the 12 counties that we visited confirmed the fact that in the vast majority of cases, when a waiver of counsel was made, it was both a knowing and intelligent waiver and was made in open court, on the record, with the defendant present. Judges in Oregon appear to take these responsibilities seriously, and we found no evidence of forced waivers either by the judge or other court officials. These facts were also confirmed on site through interviews of both prosecutors and court-appointed counsel and reflect positively on the rights of indigent defendants in the Oregon courts.

2.7 Compensation for Court-Appointed Counsel in Oregon and Nationally

Compensation of court-appointed counsel in felony cases in Oregon dates back at least to 1935. By 1979 it was established by statute that court-appointed counsel should be paid "fair compensation" for representation in county, circuit or district court. The statute (ORS 135.055) established a minimum rate of compensation of $30/hour. Each private court-appointed counsel is required to submit a voucher to the local trial judge setting out the number of hours worked on the case. The trial judge must then review the voucher and certify that the figure approved is reasonable compensation for the time spent on the case.

For years, court-appointed counsel have complained that this rate of compensation is inadequate and in many cases does not even meet office overhead. We heard these same complaints repeatedly during our site interviews. In addition, many private lawyers have complained that some trial judges arbitrarily cut their bills without consultation and without notice. In a survey conducted by the Oregon Criminal Defense Lawyers Association in 1986-87, data obtained from a large sample of private attorneys arrived at a net average hourly overhead figure of approximately $45-$50/hour. Twenty-three percent of 213 attorneys surveyed recommended increasing the hourly rate to $45/hour; 34.6% to a rate of $50/hour and 16.8% to a rate of $60/hour. Legislation filed by the Oregon State Bar in the 1989 session of the legislature calls for an increase in hourly rate from $30 to $60/hour.

In our mail survey, we asked each set of respondents to indicate whether in their opinion, the fees or hourly rates paid were sufficient to attract and retain qualified defense counsel. Table 16 displays the responses to this question.

Table 16

ARE FEES OR HOURLY RATES ADEQUATE TO ATTRACT OR RETAIN QUALIFIED DEFENSE COUNSEL BY TYPE OF RESPONDENT?

	Judges	Contract Attorney/ Public Defender	Prosecutors	Assigned Counsel
Total Responses	48	44	37	27
Yes	10 21%	5 11%	19 51%	7 26%
No	38 79%	39 89%	18 49%	20 74%

Except for the responses of the prosecutors, which were evenly split, the overwhelming response of judges (79%), contract attorneys/public defenders (89%), and assigned counsel (74%) was that fees were not adequate.

Respondents were also asked whether, in their opinion, the level of compensation paid to defense counsel in any way affected the quality of representation provided to indigent defendants in their court. Table 17 sets forth the responses.

Table 17

DOES THE LEVEL OF COMPENSATION FOR COURT-APPOINTED COUNSEL AFFECT THE QUALITY OF REPRESENTATION?

	Judges	Contract Attorney/ Public Defender	Prosecutors	Assigned Counsel
Total Responses	56	48	38	26
Yes	24 43%	40 83%	17 45%	7 27%
No	32 57%	8 17%	21 55%	19 73%

Our interviews on site confirmed the responses to the mail survey regarding the effect of low compensation on the quality of

representation. Judges and attorneys frequently stated that $30/hour was not enough to attract qualified lawyers. A few said that low compensation was depleting the pool of attorneys willing to participate in the system. The most common opinion was that only new attorneys would be willing to take cases at this rate of compensation. Nearly all of our interviewees concurred that $30/hour was too low. In one circuit court, the judges voted to recommend strongly that the Legislative Assembly increase the rate.

The response to this question was similar to results obtained in recent studies that we have conducted in Massachusetts and Virginia on court-appointed counsel systems. While the answer to this question in Oregon varied among respondent types, slightly more than 52% of all those reporting indicated that the level of compensation does affect the quality of representation. Significantly, 43% of the judges responded in the affirmative. While some might criticize the lawyers providing service, there is no doubt that these cases have a serious negative impact on private law practices, since the hourly fees do not even cover average office overhead. In our judgment, relief is required as soon as possible.

In the last section of this chapter, we have provided information obtained from the mail survey on respondents' identification of the most critical problems regarding indigent defense services in Oregon and the solutions they offered. By far the most frequent problem reported was inadequate compensation for contract attorneys and private assigned counsel.

Before instituting this study, we had heard numerous complaints that court-appointed counsel in Oregon were frequently required to represent indigent defendants without compensation. Consequently, we asked this question to each set of respondents. Table 18 sets forth their responses.

Table 18

ARE COURT-APPOINTED COUNSEL REQUIRED TO REPRESENT INDIGENT DEFENDANTS WITHOUT COMPENSATION?

	Judges	Contract Attorney/ Public Defender	Prosecutors	Assigned Counsel
Total Responses	56	43	38	26
Yes	4 7%	11 26%	2 5%	2 8%
No	52 93%	32 74%	36 95%	24 92%

An analysis of Table 18 shows that except for contract attorney/public defenders, respondents suggest that free counsel is required only in a small percentage of the cases. In interviewing judges and attorneys on site, we confirmed that uncompensated representation is indeed rare and almost always occurs when a judge asks an attorney already in court to advise an indigent defendant on a matter briefly, without becoming counsel of record for purposes of compensation.

During our site interviews, we heard many complaints that trial court judges regularly cut attorney fee vouchers. While nearly all of the judges we interviewed thought that the $30/hour rate of compensation is much too low, many also felt obligated to try to "cut corners" on total bills. In interviews on site, we received mixed responses from the judges. A few judges in several jurisdictions admitted that they cut fee vouchers frequently, because it is their view that the indigent defense fund could not afford to pay for every hour actually expended by court-appointed attorneys. Other judges told us that they have established informal maximum fee levels, particularly for less serious cases, and that the local lawyers understand the problem facing the judges. Finally, some judges told us that they cut fee vouchers only when they believe that the amount requested is not justified, based upon the judge's observation of the work performed.

In our mail survey, we asked both private assigned counsel and trial court administrators and clerks if fee vouchers are ever cut in the course of being reviewed by the court. 85% of the private assigned counsel who responded to the question and all but one of the trial court administrators responding stated that fees were cut in their court. When asked with what frequency vouchers were cut by 25% or more from the initial request to the court, 25% of the trial court administration stated often or sometimes and 50% of the assigned counsel attorneys responded in a similar fashion.

During site interviews, trial court administrators and attorneys also remarked on "pressure on judges to critically review bills," which stems from the fiscal problems of the indigent defense system. A few also stated that bill cutting drives attorneys off the district court lists.

In our experience in the past few years addressing the issues of indigent defense services throughout the country, we have identified inadequate compensation for court-appointed counsel as a universal problem. Two years ago, the United States Congress doubled the hourly rate for Criminal Justice Act panel attorneys in federal court to $40/hour for out-of-court work and $60/hour for in-court work with up to $75/hour available for capital habeas corpus cases.

The upward trend on hourly rates has also been noticeable in a number of individual states. Most of the increases have occurred as a result of legislation or decisions of State Public Defenders who are charged with establishing the rates. However, in the past three years, there has also been an increase in litigation in the state courts in this area. In 1988, Kansas was required by its State Supreme Court to raise its hourly rates from $25 to $50. Litigation has also been successful in Tennessee, Florida, Alaska, Nebraska and New Hampshire. This litigation has focused on the issues of the right to compensation for court-appointed counsel and the adequacy of the rate. Other lawsuits are pending in Alabama, Virginia, Mississippi, Georgia, Michigan, Missouri, Arizona and New

Jersey. There is no more far-reaching indigent defense issue nationwide than defining "adequate compensation" or "reasonable compensation."

The Spangenberg Group completed a survey of assigned counsel fees in each of the 50 states in early 1988. There is a statute in every state establishing the right to compensation for court-appointed counsel. In 21 states, however, the statute speaks only of "reasonable compensation" and the amount of payment is left to the discretion of each of the local trial court judges. In 19 of these 21 states, the statute is completely silent on both the hourly rate of compensation or a maximum fee per case. In both Mississippi and Louisiana, however, there is a maximum fee of $1,000 by statute for both felony and misdemeanor cases. In Louisiana, the maximum fee is waived, we are told, on a regular basis, as it was in Oregon prior to 1979.

Thirteen states have established an hourly rate of compensation by statute. Those states and the statutory amounts are as follows:

	Hourly Rate	
State	Out-Of-Court	In-Court
Alabama	$20	$40
Hawaii	30	40
Illinois	30	40
Kansas	50	50
Kentucky	25	35
Nevada	40	60
New York	25	40
Oregon	30 (minimum)	30 (minimum)
South Carolina	10	15
Tennessee	20	30
Virginia	40	60
West Virginia	20	25
Wisconsin	35	45

There are nine states where hourly rates are established by State Supreme Court Rule. Those states and the hourly rates are as follows:

	Hourly Rate	
State	Out-Of-Court	In-Court
Alaska	$50	$60
Colorado	25	35
Delaware	50	50
Maine	25	35
Montana	40	40
New Hampshire	25	35
North Dakota	50	50
Rhode Island	20	30
Vermont	25	35

There are five states where hourly rates are established by the State Public Defender. Those states and the hourly rates are Connecticut - $20/25, Maryland $20/25, Massachusetts $25/35, New Mexico $20/30, and Ohio $40/50.

In reference to maximum fees per case, it is important to note that 28 states do not have maximum fees established by statute, State Supreme Court Rule or State Public Defender authorization. Thus the total fee in any given case is subject to the total discretion of the approving authority.

There are 22 states in which a maximum fee is established by statute, Supreme Court Rule or Public Defender Authority. They are as follows:

State	Maximum Fee In Non-Capital Cases
Alabama	$1,000
Alaska	4,000
Arkansas	450
Colorado	2,500
Hawaii	2,000
Kentucky	1,250
Louisiana	1,000
Maine	1,500
Maryland	1,000
Mississippi	1,000
Montana	2,500
New Hampshire	2,000
Nevada	2,500
New Mexico	4,000
New York	1,200
Ohio	6,000
Pennsylvania	1,500
South Carolina	500
Tennessee	1,000
Vermont	1,000
Virginia	500
West Virginia	1,000

Most states that have established a maximum fee also have provisions for waiving that fee in unusual or extraordinary circumstances, such as in capital cases or prolonged trials. In a few states, this provision has been interpreted in such a way that waivers are generously granted in a large number of cases.

While the material set out above is the most recent national data available on the subject, it is a year old and several changes have occurred since it was collected.

The SCA has recently finalized the structure and methodology for the promulgation of statewide fee guidelines. These guidelines, which will be distributed sometime in 1989 for review and comment are designed to aid in determining amounts of payments for non-contract, private bar appointed attorneys. While we have not had an opportunity to review the draft guidelines, we support the overall concept, which has worked effectively in some states and which also responds to one of the options set out in the 1987-88 budget notes.

2.8 Qualifications for Assigned Counsel Attorneys

In February 1988, the State Court Administrator published and circulated a draft of revised "Eligibility Standards for Appointed Counsel." The standards subsequently issued, define eligibility criteria in the following case categories:

1. Misdemeanors
2. Minor felonies (Class C)
3. Major felonies (Class A and B)
4. Death penalty and murder cases
5. Appellate cases
6. Civil commitment and psychiatric security review board
7. Juvenile cases

The standards set forth minimum professional requirements that an attorney must possess before he or she can be appointed in an indigent defense case. For example, for each case category, the standards define licensing requirements, minimum levels of criminal defense experience in each category and minimum numbers of trials both jury and non-jury. The standards require references and other types of evidence that show the attorneys' expertise in a particular area of criminal practice.

In our study, we included a general question about how lawyers get their names on a court's list of attorneys who can be appointed to indigent defense cases. Of the trial court administrators and clerks, 38.9% responded that an attorney had to meet statewide eligibility standards and 27.8% responded that the person administering the system had to determine that the attorney was qualified. Thirty-eight percent of the private assigned counsel who answered the questionnaire reported that an attorney had to meet statewide standards before being included on a court's list of assigned counsel. Fifty-five percent of the assigned counsel reported that the administering personnel determined eligibility.

We also asked whether lawyers on the list of assigned counsel were categorized by area of specialization. Of the attorneys responding, 67% said the courts did not categorize by specialization; and of the court administrators and clerks, 72.2% said they did not categorize.

These results were reflected in the information we obtained during our site interviews. Most of the judges we talked to were aware of the statewide standards and felt that they were useful and important. One judge emphasized that the standards needed to be applied on an even-handed basis to all who worked in the assigned counsel system.

However, again and again, judges, prosecutors, private attorneys and public defenders told us that the low fees paid to assigned counsel are a substantial obstacle to recruiting qualified lawyers for the assigned counsel list. One judge said "the list of counsel willing to take cases is virtually non-existent. When a case arises which requires the appointment of counsel, one of the circuit judges simply selects a lawyer. I call to give them the bad news." Although rare, several people reported that it was so difficult to find attorneys who would accept appointments that judges were appointing inexperienced criminal defense lawyers. We were told that in one court, attorneys just out of law school are sometimes appointed on Class A and B felonies. A court administrator told us that the $30/hour rate is insufficient to meet attorney overhead and that the judges will not force attorneys to work at a loss.

Thus, it is evident that while the mechanism and motivation is there for standard qualifications for appointed counsel, the system will not work if the funding is insufficient to interest qualified attorneys in appointed counsel work.

2.9 Availability of Expert Witnesses, Investigators And Other Mandated Defense Services

In Ake v. Oklahoma, 470 U.S. 68 (1985), the U.S. Supreme Court ruled that the Fourteenth Amendment to the United States Constitution requires that indigent defendants be provided access to services that are necessary to prepare an adequate defense. Failure to provide access to those services or 'basic tools of defense' constitutes denial of due process and fundamental fairness as guaranteed by the Fourteenth Amendment. In Ake, the Court held that where the defendant makes an ex parte showing to the trial court that his sanity would be a significant factor at trial, the state must provide access to a competent psychiatrist to examine the defendant and to assist in evaluation, preparation and presentation of the defense.

A defendant may also apply for investigative and other expert services at state expense, provided that there is sufficient information presented to the trial court to demonstrate the necessity and reasonableness of the requested services, and that denial would result in a fundamentally unfair trial. Absent such a showing, denial of a request for expert services will be upheld. Caldwell v. Mississippi, 472 U.S. 320 (1985).

Oregon law is consistent with Ake. ORS 135.055(3) provides that a defendant is entitled to reasonable expenses for expert services to assist in the investigation, preparation and presentation of his or her defense. To obtain state funds for such services, the defendant or counsel must present a motion with accompanying affidavit to the trial court setting out why the service is reasonable and necessary to the defense, the cost of the service, who will provide it, and when it will be provided.

While the Supreme Court in Ake noted that its ruling allowed a defendant one competent psychiatrist, the Oregon appellate courts have declined to adopt a rule setting the number of psychiatric examinations a defendant may obtain at state expense. In State v. Glover, 33 Or. App. 553, 577 P.2d 91 (1978), the defendant sought

a second psychiatric examination at state expense to support one already obtained. The trial court denied the request after finding the defendant had been provided with sufficient means to adequately prepare and present his defense. The Court of Appeals specifically declined "to give a stamp of approval to a hard and fast rule that an accused is entitled to only one psychiatrist at state expense . . .".

While the Oregon courts rely upon ORS 135.055(3) to authorize funds for expert services, the procedure is the same as under the federal rule of Ake and remains within the sound discretion of the trial court to authorize or deny expenses for services based upon the showing of necessity made by the defendant. Most public defender programs in Oregon employ investigators. Thus for the most part, they do not have to petition the court for these services on an individual case-by-case basis. Private assigned counsel and contract counsel do, however, need to petition the court.

Some assigned counsel told us that they use secretarial staff and attorneys to do investigations in misdemeanor cases. While some cost savings may result, a prosecutor reported that this was less desirable than having a staff investigator because counsel could not respond to district attorney offers until the 11th hour. In an effort to gather data on the availability of these and other mandated defense services, we asked all judges in the mail survey to indicate in what percentage of felony cases private assigned counsel and contract counsel request the following services: investigators; expert witnesses; transcripts (trial only); social services (e.g., substance abuse counseling); medical/psychiatric exams; forensic/lab tests; interpreters; and polygraph tests. The following table sets forth the responses to the question.

Table 19

PERCENTAGE OF FELONY CASES IN WHICH JUDGES REPORT RECEIVING REQUESTS FOR SPECIFIC SERVICES BY TYPE OF COUNSEL

Services	Private Assigned Counsel	Contract Counsel
Investigators	25%	22%
Expert witnesses	16%	16%
Transcripts	2%	6%
Social Services	21%	14%
Medical/Psychiatric exams	12%	10%
Forensic/lab tests	9%	10%
Interpreters	8%	6%
Polygraph tests	3%	4%

An analysis of Table 19 indicates very little difference in the percentage of cases in which counsel requests various services between private assigned counsel and contract counsel.

By way of comparison, in our mail surveys we asked contract counsel and private assigned counsel in what percentage of felony cases they normally request the same types of services contained in Table 19. Their responses appear in the following table.

Table 20

PERCENTAGE OF FELONY CASES IN WHICH CONTRACT COUNSEL AND PRIVATE ASSIGNED COUNSEL REQUEST SPECIFIC SERVICES

	Contract Attorneys	Private Assigned Counsel
Investigators	26%	51%
Expert witnesses	10%	30%
Transcripts	3%	9%
Social Services	16%	22%

(continued)

Table 20 continued

	Contract Attorneys	Private Assigned Counsel
Medical/Psychiatric exams	9%	20%
Forensic/lab tests	11%	20%
Interpreters	9%	10%
Polygraph tests	2%	13%

An analysis of Table 20 shows that private assigned counsel state that they request the various services almost twice as often as do contract attorneys. When these private counsel data are compared with the data reported by the judges in Table 19, it appears that private counsel believe that they make requests for these services far more frequently than the judges report.

In our mail questionnaires, we asked the judges how frequently they allowed the various services requested by counsel. We asked them to rank their responses from one to four, with one indicating they never allowed the service and four indicating that they always allowed the service. The average ranking for all judges who responded to this question is as follows:

Table 21

AVERAGE FREQUENCY OF ALLOWANCE OF SERVICES REPORTED BY JUDGES

Type of Service Allowed	Average Frequency of Allowance
Investigators	3.03
Expert witnesses	2.84
Transcripts	1.97
Social services	2.45
Medical/psychiatric exams	2.88
Forensic/lab tests	2.63
Interpreters	3.24

(continued)

Table 21 continued

Type of Service Allowed	Average Frequency of Allowance
Polygraph tests	1.78

We also asked both contract attorneys and private assigned counsel to provide the same ranking (one to four) for the frequency with which judges allow their requests. Table 22 sets forth their responses.

Table 22

FREQUENCY WITH WHICH JUDGES APPROVE REQUESTS FOR CERTAIN SERVICES REPORTED BY PRIVATE ASSIGNED COUNSEL AND CONTRACT ATTORNEYS

Type of Service	Private Assigned Counsel	Contract Attorneys
Investigators	3.80	3.50
Expert witnesses	3.67	3.40
Transcripts	3.27	3.10
Social services	3.00	2.30
Medical/psychiatric exams	3.61	3.50
Forensic/lab tests	3.60	3.30
Interpreters	3.84	3.70
Polygraph tests	2.83	2.70

A comparison of Table 21 and Table 22 yields interesting results. Both sets of counsel report that 1) judges more frequently grant their requests than the judges report; and 2) their requests for ancillary services are granted in a very high percentage of cases. These results support the views of those individuals we interviewed on site and lead to the conclusion that all of these necessary services are provided by the courts in most cases upon proper request.

Finally we asked private assigned counsel and trial court administrators whether or not attorney expense vouchers were ever cut in the course of being reviewed by the court? 68% of private

assigned counsel and 80% of the court administrators responding reported that expense vouchers were cut by the court and in response to a second question, the attorneys reported that in 38% of the cases their expense vouchers were cut "often." Thus while judges are generous in their allowance of ancillary services, it appears that they tend to cut the expense vouchers frequently. On-site, some judges told us that these vouchers were cut because they exceeded pre-authorized limits. Other judges suggested that the reductions were based upon their concern about the limits of the indigent defense fund.

2.10 Recoupment

All 50 states in the country have provisions that are designed to identify those individuals who can afford to pay for some or even all of their defense services, either before or after disposition.

Two approaches to cost recovery are currently in use, recoupment and contribution. In recoupment - the most common procedure - the judge assesses the cost of representation after the disposition of the defendant's case. Often, payment by the defendant is ordered as a condition of probation, though it may also be in the form of a judgement, lien, or simple court order. In contrast, contribution is a more recently developed method that asks partially indigent defendants to contribute to the cost of their defense before disposition. At least 11 states now authorize contributions through a state statute.

While both of these approaches must have screening and collection mechanisms to be effective, there are some substantial differences between recoupment and contribution. Each has unique implementation concerns, both legal and practical. Recoupment, because it occurs after disposition of the case, raises certain concerns about due process that may not be raised by contribution programs. Similarly, certain enforcement procedures in recoupment (such as imposing recoupment as a condition of probation) may raise questions about the possibility of imprisonment for debt.

The leading constitutional case on recoupment is Fuller v. Oregon, 417 U.S. 40 (1974), which established the specific due process requirements necessary at sentencing in order to impose a cost recovery requirement on defendants who have the present ability to pay.

Under Oregon law (ORS 161.665), recoupment is authorized following disposition in criminal cases. However, the U.S. District Court in Oregon in Fitch v. Belshaw, 581 F. Supp. 273 (D. Or. 1984), ruled that the state's recoupment statute, used to

recoup attorney fees from acquitted as well as convicted indigent defendants, violated constitutional rights of due process for those who were acquitted of all charges.

While the recoupment statute has been on the books for many years in Oregon, according to the results of our mail survey and site assessments, it is not now being uniformly applied in all courts and the total revenue obtained has been relatively small until the current biennium. This result is common to most jurisdictions around the country. In our 1982 national study, we designed a series of questions on recoupment. While the vast majority of counties nationwide reported having a recoupment process, few counties reported collecting payments from a substantial number of defendants. One-fourth of all counties reporting in 1982 indicated that no payments had been made in the previous year. Another 45% reported that collections were made in less than 10% of the total recoupment orders. Only 17% of the counties reported collections in more than 25% of all cases ordered.

As part of our mail survey, we asked judges, contract attorneys/public defenders, prosecutors and assigned counsel several questions on recoupment. Table 23 sets forth responses to the question what percentage of indigent defendants found guilty in your court do you estimate are assessed a portion of the cost of their defense in several types of cases:

Table 23

PERCENTAGE OF DEFENDANTS ASSESSED COSTS
OF INDIGENT DEFENSE SERVICES REPORTED BY RESPONDENTS

	Contract Attorney/ Public Defender	Prosecutors	Judges	Private Assigned Counsel
Murder				
Total Number of Responses	25	31	30	5
% Assessed	13	13	12	22
Felonies (A,B,C)				
Total Number of Responses	39	37	37	10
% Assessed	68	56	73	36
DUII's				
Total Number of Responses	43	33	42	10
% Assessed	81	70	80	46
Misdemeanors (Non-Traffic)				
Total Number of Responses	43	32	38	10
% Assessed	80	48	81	38
Misdemeanors (Traffic)				
Total Number of Responses	43	32	40	10
% Assessed	81	48	80	44

An analysis of Table 23 shows inconsistencies between information supplied by judges and that observed by private assigned counsel and prosecutors. Contract Attorney/Public Defenders responses are consistent, however, with the judges. We are not able to account for these discrepancies.

Table 24 displays answers from the same respondents to the question of what percentage of attorney fee assessments ordered are actually collected.

Table 24

PERCENTAGE OF ATTORNEY FEE ASSESSMENTS ACTUALLY COLLECTED

	Contract Attorney/ Public Defender	Prosecutors	Judges	Private Assigned Counsel
Murder				
Total Number of Responses	5	15	11	14
% Collected	2	7	-	13
Felonies (A,B,C)				
Total Number of Responses	12	19	16	24
% Collected	24	44	24	72
DUII's				
Total Number of Responses	11	17	21	20
% Collected	41	69	44	79
Misdemeanors (Non-Traffic)				
Total Number of Responses	11	18	18	19
% Collected	35	61	39	77
Misdemeanors (Traffic)				
Total Number of Responses	11	18	18	19
% Collected	37	48	39	75

An analysis of Table 24 shows the same type of discrepancies reported in Table 23. Judges and Contract Attorney/Public Defenders report uniformly lower collection rates than are reported by prosecutors and private assigned counsel. Based upon information available on collections in the State Court Administrator's office, even the former collection figures would appear to be substantially higher than the revenue collected, in part because a number of courts have placed a low priority on recoupment orders in relation to other costs (restitution to victims, fines, fees, etc.) imposed following disposition of criminal cases.

Finally, we asked each group of respondents to estimate the

average amount of assessment made on individual cases by type of case. After analyzing the results of this question, we determined that the answers were again so inconsistent and confusing that they should not be set out in this report.

In our site assessments, it was apparent that a wide variety of methods to obtain repayment for attorneys fees are used in Oregon. In most courts, we found that recoupment orders are a condition of probation. In other courts, judges order that the defendant provide community service in lieu of paying attorney fees. And in a few courts, judges order court costs and attorneys fees as a lien on property as a result of a civil judgement.

During our on-site work, we made a particular effort in our interviews to determine policy regarding recoupment in each of the sites visited. There was a general attitude opposed to the recoupment process in many courts. The primary reasons given were the following:

- The cost of collection would exceed the revenue recovered.
- The court is too busy to conduct lengthy hearings on the current ability to pay.
- Most indigent defendants do not have the current ability to pay at the time of disposition; and their ability to pay doesn't improve if they are incarcerated.
- After victim restitution, fines, fees and forfeiture and other costs are collected, there will be nothing left for recoupment.
- There is no real sanction for those who fail to pay because of the jail overcrowding problem.

It is clear to us that many judges, for the above reasons, are willing to exert only limited energy and scarce resources on recoupment. But people we interviewed often told us that they believed a significant number of defendants were able to pay something toward their attorney's fees and thus there may be more

support for a different method of cost recovery. We have seen similar responses in most other jurisdictions and will recommend in the last chapter of this report that a pilot program be undertaken on contribution, as an alternative to recoupment.

In the meantime, the SCA has recently reported that for this biennium to date (July 1987-December 1988), the Oregon Judicial Department has recouped $2,082,491 from convicted defendants for court-appointed attorney fees and expenses. A recoupment total of $2,775,000 is estimated for the 1987-89 biennium. This figure is higher proportionally to the total indigent defense budget than we have found in most states and is particularly significant given the reluctance of many trial judges in Oregon to enter recoupment orders. The Judicial Department has collected from convicted defendants substantial amounts for fines, fees and for restitution that is paid through the court. This is because, as previously stated, court-appointed attorney fees and expenses are often the last amounts to be collected from convicted defendants or applied to the defendant's accounts because of priorities established by statute and by the trial courts' accounting systems.

2.11 Quality of Representation

There are a number of basic requirements regarding the nature and quality of indigent defense services that must be met in order for an indigent defense system to provide adequate representation to indigent defendants consistent with state and federal constitutional mandates. This section of our report is intended to address many of these requirements.

Defense counsel do not have a checklist of procedures that when followed will guarantee that the assistance provided a defendant is effective or adequate. Every attorney must independently evaluate the facts of a case, investigate those facts, make appropriate motions to the court and proceed with whatever legal actions are in the client's best interest.

The Code of Professional Responsibility in Oregon contains Disciplinary Rules, the violation of which can lead to sanctions imposed by the Supreme Court. Among other things, every attorney is required to preserve the confidences and secrets of clients, exercise independent professional judgment on behalf of a client, and represent a client completely and zealously within the bounds of the law.

In addition to the Oregon Code, specific norms of professional skill and practice in criminal defense cases are set forth in the American Bar Association Standards for Criminal Justice, Chapter 4: The Defense Function. The Standards establish norms for lawyer-client relations, investigation and preparation, plea negotiations and trial and post-trial proceedings. These again are only guidelines, but define acceptable practices for adequate assistance of counsel.

Federal and state caselaw regarding the definition of effective or adequate assistance of counsel also establishes norms for the individual defense attorney. In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court articulated a standard of reasonableness under prevailing professional norms

in evaluating attorney performance in regard to claims of ineffective assistance. The Court specifically held that the defendant must overcome the presumption that under the existing circumstances, counsel's decisions were reasonable and trial strategy sound. Further, the defendant must demonstrate that any errors identified were so serious as to prejudice the outcome of the case in order to prove ineffective assistance.

The Oregon Supreme Court adopted a standard similar to that of the United States Supreme Court in the case of Krummacher v. Gierloff, 290 Or 867, 872, 627 P2d 458 (1981). The thrust of the Krummacher decision is that counsel appointed in criminal cases are expected to provide the reasonable skill and judgement of an attorney applying the professional norms and standards of criminal defense.

The appellate courts in Oregon have also established some specific requirements for appointed counsel;

- To consult with the client--State v. Pflieger, 15 Or App 383 (1973);
- To investigate the facts and to interview all witnesses--Howe v. Cupp, 55 Or App 247 (1982); State v. Vargas, 74 Or App 588 (1985);
- To thoroughly inform and advise the defendant of his or her rights, defenses and the consequences of any plea made in the case--ORS 135.425;
- To be prepared on relevant legal issues--Krummacher;
- To be prepared at trial to conduct the defense and subject the state's case to scrutiny--Krummacher;
- To act at sentencing to minimize a potential sentence--Steffans v. Keeney, 82 Or App 625 (1986); and
- To prepare the trial court record for appeal--State ex rel Acocella v. Allen, 288 Or 175 (1979).

During the course of the negotiations for the current study, we were asked to "include quality and/or the level of services being provided as an issue to explore. (If possible some nationwide comparisons would be useful on the cost/level of services issue; not to just say whether we cost more or less comparatively, or that we are high quality or low quality in comparison, but how much service we get for the dollar comparatively.)"

Despite our vast experience in the field of indigent defense services, we are unable to respond in a complete way to the above request. There are simply no national studies or national data which would permit a quantitative assessment among the states in terms of the amount of services provided for on a dollar basis.

Throughout the course of this report, however, we do provide extensive data on other jurisdictions, and when compared to Oregon, these data are useful in discussing the overall question of quality in Oregon. During our on-site work, we interviewed judges, prosecutors, court-appointed attorneys, court officials and other individuals who are in a position to assess the quality issue. We also made numerous court observations with our experienced criminal research staff and consultants and were able to see first hand how court-appointed attorneys were functioning. Furthermore, several members of the on-site research team had conducted similar studies to the one in Oregon in other jurisdictions and therefore had a personal basis of comparison, which was structured carefully through our site protocol/issues checklist contained in Appendix C. Finally, we asked each of the mail survey respondents to specifically assess the quality of representation provided by various types of criminal attorneys in Oregon.

The majority of individuals interviewed by the research team during on-site assessments of the indigent defense delivery system in the dozen counties that were visited believed that the quality of representation provided in their counties was adequate and that defense attorneys are meeting the minimum constitutional

requirements of their indigent clients. Our observations verified that, for the most part, this appears to be true.

In spite of these positive observations, in part because of the differences in the rates of compensation paid to the many contractors throughout the state, the level and quality of services that they are able to provide their clients vary somewhat. For example, some public defender offices suffer from high caseloads and are not able to pay competitive salaries, both of which result in high turnover, particularly among attorney staff.

There are other basic requirements regarding the nature and quality of indigent defense services that are needed to assure adequate representation. These include training opportunities for court-appointed counsel and support staff; caseload/workload standards (particularly for contract counsel and public defenders); law books, brief banks, motion banks, and computerized legal research.

The results of our research indicate a mixed response to the availability of some of these resources. The respondents to our survey indicated that resources such as brief banks, law libraries, motion banks, and trial books were generally available and adequate. More than 70% of the private attorneys responding indicated that this was the case; more than 60% of the contract/public defender attorneys so indicated. Our experience in conducting site assessments throughout the state suggested, however, that the situation is much more varied than these survey results indicate. Too many offices we visited simply did not have sufficient resources of this variety at their disposal, not even the most basic law libraries in some instances. This was particularly true of private counsel, but also of some contract programs.

Training and supervision of attorneys seems to differ markedly depending on the type of program. This became evident during the course of our site interviews. While public defender programs provided in-house training sessions and participated in OCDLA

training, many of our interviewees remarked that there were few such opportunities or requirements for private assigned counsel within the assigned counsel system. One lawyer commented that a judge would appoint him as co-counsel for training purposes, but would not approve any bills he submitted for that case. Contract attorneys told us that, although CLE is now mandatory, their contracts either did not include funds for participation in CLE or that such funds had recently been cut back so that individual attorneys were compelled to pay part of their expenses (e.g., for travel and lodging) themselves. SCA reported to us that the proposed budget form to contractors asked specifically for CLE needs as a separate line item. Where requested, they were approved based upon the percentage of attorney time to total contract time (i.e., proportionally). Thirty-one percent of assigned counsel responding to the survey indicated that legal training opportunities relevant to their indigent defense practice was not available in their county; whereas 83% of the contract/public defender attorneys indicated that training was available. Fifty-three percent of contract/public defender attorneys indicated the existence of standards or methods for supervising the performance of counsel; while 71% of private attorneys indicated that no such supervision took place.

As noted above, however, the level of services provided throughout the state is uneven. Some programs have investigators and trial assistants/social workers on staff who are able to provide critical and necessary services to their clients, while others do not have even the most basic law books available for their attorneys. While some of these problems are the result of structural differences between the different types of programs that can be addressed administratively, most result from the variations in the fiscal resources made available to the numerous indigent defense service providers throughout the state.

As we noted above, one of the most striking characteristics of Oregon's indigent defense system is increased caseloads.

There are three sets of national standards for indigent defense systems. These are the American Bar Association's Standards on Criminal Justice, the National Study Commission on Defense Services, and the National Advisory Commission on Criminal Justice. All three set standards for attorney caseload and workload. ABA Standard 5-4.3 states:

> Neither defender organizations nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Whenever defender organizations or assigned counsel determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organizations or assigned counsel must take such steps as may be appropriate to reduce their pending or projected workloads.

The National Advisory Commission on Criminal Justice Standards established numerical caseload standards in 1973. They are the following:

- No more than 150 felonies per full-time attorney, or
- No more than 250 juvenile cases per full-time attorney, or
- No more than 400 misdemeanor cases per full-time attorney, or
- No more than 25 appeals per full-time attorney.

These standards have not been revised in 14 years, and it is our opinion that these numbers are too high because of the increased complexity of criminal law and procedure, District Attorney practices, trial rates, the increased complexity and severity of sentencing practices, and budgetary constraints on public defender programs, among other reasons. The Spangenberg Group is currently working on a national review of caseload and workload standards to bring these numbers up to date.

Responses to our mail survey and information we collected on

site suggest that caseloads of some defense programs exceed those recommended even by outdated national standards. Among the five problems identified by respondents to our questionnaire as the most critical, excessive caseloads ranked third, having been identified by 13% of all respondents as one of the three most critical problems affecting the quality and/or cost efficiency of the representation of indigent defendants. Furthermore, although indigent caseloads have increased by 214% in Oregon since 1982, not all defender or prosecutor offices have formal caseload/workload standards for their staff attorneys. On our mail survey, we asked public defenders, contract attorneys, and prosecutors if they had any formal or informal caseload standards. Their responses were as follows:

Table 25

DOES YOUR OFFICE HAVE ANY FORMAL OR INFORMAL CASELOAD STANDARDS?

	Contract Attorneys/Public Defenders	Prosecutors
Yes	56%	19%
No	40%	81%
Don't Know	4%	-

While the majority of defender offices who responded reported having some kind of caseload standards, only 19% of prosecutors claimed that they did.

The effect of rapidly increasing caseloads on attorney workload was an issue that judges and attorneys brought up repeatedly during our site interviews. In one public defender office, the average number of open misdemeanor cases per attorney between June 1987 and February 1988 ranged from a low of 64 to a high of 82. Another public defender office reported during the interview that each attorney carried between 60 and 80 open felony cases, that caseloads were "way up" and that there was a great deal of multiple charging. One contractor said that yearly contract

negotiations produced a feeling of "doom" because his office had no control over caseload. Yet another remarked that "caseloads are too heavy to try many cases." One misdemeanor attorney reported that attorneys in their office had anywhere from 90-120 open misdemeanors at a time. Other comments we heard on site included:

- "There are just not enough P.D.'s to handle the number of clients." This attorney reported that three attorneys received 451 new appointments in a four-month period.
- "We are taking in more cases, and more are staying in the system longer."
- Judges in both circuit and district courts in one county described private assigned counsel as "at or near capacity" in their ability to absorb the increased number of assignments and characterized the situation as one of "near-crisis."
- Another judge stated that there were 3,000 felonies in his county in 1984 and 7,000 in 1987 and that in 1988 there would be 8,000.

Finally, particular problems were identified in the adequacy of representation provided by private assigned counsel in many areas of the state, in part because of the extremely low fees paid. In addition, the limited resources available to private attorneys for the necessary expenses of investigators, expert witnesses, and other necessary expenses of litigation is a concern. This is especially so because few attorneys come from the type of firm that can make those resources available independently; 45% of the private attorneys responding to our survey were sole practitioners and another 45% came from firms with only two to five attorneys. On-site observation indicated that some private attorneys are handling large numbers of indigent clients without the most basic resources or support services. The lack of an administrative structure for local assigned counsel programs places an additional management burden on those courts that rely heavily on their

services. The related lack of resources for supervision and monitoring of attorneys' performance makes it more difficult to assure consistently adequate representation by private assigned counsel.

One aspect of the quality of representation that has generated much discussion and comment over the last several years is the distinction between "enhancement or additional services" (the "Cadillac" model) and "minimum constitutionally required or base level services" (the "Ford" model). Specific mention was made of this issue in the 1987-88 budget notes. Some observers have suggested that the provision of Cadillac services may have played a major role in the escalating costs of indigent defense.

One example given was the employment of trial assistants in several public defender offices, perhaps viewed by those not familiar with their work as providing "additional services" not required by constitutional mandates. These individuals, we determined, work closely with defendants to keep them apprised of the schedule of proceedings in their cases, to identify particular medical and social problems that need to be addressed, and to locate the resources to provide these necessary services as well as alternative placements in lieu of sentences to incarceration.

These services have a number of positive impacts on both the indigent defense system and the criminal justice system overall. First, the availability of trial assistants enables attorneys to provide representation to a larger number of defendants. Second, the close contacts that they maintain with defendants reduces the likelihood that they will fail to appear for scheduled court dates, a problem that imposes costs on all components of the criminal justice system. Third, they uncover alternative sentencing options that can contribute to reductions in the jail and prison populations in the state. Finally, they are able to get defendants into programs that can begin to address the root causes of their criminal behavior and decreases the chance that they will commit further crimes and continue to be a drain on the criminal justice

system. Looking at the overall system in this way, it is clear that spending a modest amount for a service provided as a part of indigent representation can result in net savings and increased efficiency and effectiveness in the criminal justice system as a whole.

After careful review and discussion, we have been unable to identify any number of services being provided during the course of our study that we felt could be defined as "enhanced."

In a further attempt to gather specific data on the quality of all types of criminal attorneys in Oregon, we prepared questions for our mail survey that asked judges, private assigned counsel, prosecutors and contract attorneys/public defenders to compare the quality of private assigned counsel, retained counsel, public defenders and contract counsel in their courts. We asked each respondent to rate on a scale of five (highest rating) the criminal advocacy skills of each type of counsel in the following areas:

- Preparation/investigation of case.
- Bail release hearings.
- Pre-trial conferences.
- Negotiations with prosecutors.
- Motions preliminary to trial.
- Bench trial advocacy.
- Jury trial advocacy.
- Sentencing hearings.
- Identification of diversionary alternatives.
- Knowledge and application of criminal procedure and law.
- Timeliness.

The following tables provide responses for four of the criminal advocacy functions: Preparation/investigation of case; jury trial advocacy; identification of diversionary alternatives; and knowledge and application of criminal procedure and law. We received responses on this question from 42 judges, 39 contract

attorneys/public defenders, 39 prosecutors, and 24 private assigned counsel.

Table 26

QUALITY OF REPRESENTATION:
RESPONSES REPORTED BY JUDGES

	Retained Counsel	Private Assigned Counsel	Public Defenders	Contract Counsel
Preparation/investigation of case	4.1	3.5	4.0	3.9
Jury trial advocacy	4.0	3.5	3.9	3.9
Identification of diversionary alternatives	3.9	3.3	4.0	3.8
Knowledge and application of criminal procedure and law	3.8	3.6	4.1	4.1

Table 27

QUALITY OF REPRESENTATION:
RESPONSES REPORTED BY PROSECUTORS

	Retained Counsel	Private Assigned Counsel	Public Defenders	Contract Counsel
Preparation/investigation of case	4.0	3.5	3.4	3.3
Jury trial advocacy	3.7	3.5	3.1	3.6
Identification of diversionary alternatives	3.6	3.1	3.6	3.4
Knowledge and application of criminal procedure and law	3.5	3.1	3.4	3.7

Table 28

QUALITY OF REPRESENTATION:
RESPONSES REPORTED BY CONTRACT ATTORNEYS/PUBLIC DEFENDERS

	Retained Counsel	Private Assigned Counsel	Public Defenders	Contract Counsel
Preparation/investigation of case	4.1	2.8	4.3	3.6
Jury trial advocacy	4.0	2.7	4.3	3.9
Identification of diversionary alternatives	3.6	2.6	4.4	3.8
Knowledge and application of criminal procedure and law	3.9	2.8	4.5	4.0

Table 29

QUALITY OF REPRESENTATION:
RESPONSES REPORTED BY PRIVATE ASSIGNED COUNSEL

	Retained Counsel	Private Assigned Counsel	Public Defenders	Contract Counsel
Preparation/investigation of case	3.6	3.4	3.9	2.8
Jury trial advocacy	3.9	3.2	4.0	3.1
Identification of diversionary alternatives	3.5	3.2	4.4	3.4
Knowledge and application of criminal procedure and law	3.7	3.0	4.3	3.0

In addition to the data displayed in the above four tables, we have calculated an average quality rating for the four types of attorneys across all 11 criminal advocacy functions.

Table 30

AVERAGE RATING FOR EACH TYPE OF CRIMINAL DEFENSE COUNSEL

Public Defenders	4.02
Retained Counsel	3.79
Contract Counsel	3.60
Private Assigned Counsel	3.09

Overall, there is little variation in the reported ratings for public defenders or retained counsel. Contract counsel ratings are higher than those of private assigned counsel. While based entirely upon opinion, the data contained in the above five tables is useful in addressing the overall issue of quality, but could be interpreted in different ways when analyzed separately. How the data is interpreted also depends in part on one's definition of a rating of three or four, for example.

2.12 Perceptions of the Most Critical Problems Affecting Quality and/or Cost Effectiveness in Oregon Reported in Mail Survey

In our mail survey we asked each respondent to indicate what they feel are the three most critical problems in their court affecting the quality and/or cost-efficiency of representation provided to indigent defendants. In tabulating the responses, we determined for each of the six respondent types the five most frequent problems identified. The following tables set forth these data.

Table 31

MOST FREQUENT PROBLEMS IDENTIFIED BY JUDGES

Problem	Percentage of Responses
Lack of adequate compensation for contract attorneys/private assigned counsel	36.6%
Unavailability of sufficient qualified counsel (contract/private assigned counsel)	33.3%
Excessive caseloads of public defenders/ contract counsel	16.7%
Inadequate funding for ancillary services	13.3%
Overcharging by prosecutors	10.0%

Table 32

MOST FREQUENT PROBLEMS IDENTIFIED BY PRIVATE ASSIGNED COUNSEL

Problem	Percentage of Responses
Lack of adequate compensation for contract attorneys/private assigned counsel	24.7%
Unavailability of sufficient qualified counsel (contract/private assigned counsel)	17.2%
Excessive caseloads of public defenders/ contract counsel	12.9%
Lack of quality control of private assigned counsel	8.6%
Overcharging by prosecutors	6.5%

Table 33

MOST FREQUENT PROBLEMS IDENTIFIED BY PUBLIC DEFENDERS

Problem	Percentage of Responses
Lack of adequate compensation for contract attorneys/private assigned counsel	27.8%
Excessive caseloads of public defenders/ contract counsel	17.5%
Unavailability of sufficient qualified counsel (contract/private assigned counsel)	15.4%
Inadequate funding for ancillary services	7.2%
Inefficient docketing and scheduling	7.2%

Table 34

MOST FREQUENT PROBLEMS IDENTIFIED BY CONTRACT ATTORNEYS

Problem	Percentage of Responses
Lack of adequate compensation for contract attorneys/private assigned counsel	29.7%
Excessive caseloads of public defenders/ contract counsel	10.8%
Overcharging by prosecutors	9.6%
Inefficient docketing/unnecessary court appearances	8.1%
Inadequate funding for ancillary services	6.7%

Table 35

MOST FREQUENT PROBLEMS IDENTIFIED BY TRIAL COURT ADMINISTRATORS/COURT CLERKS

Problem	Percentage of Responses
Unavailability of sufficient qualified counsel (contract/private assigned counsel	23.5%
Trial court reporting requirements/paperwork	15.7%

(continued)

Table 35 continued

Problem	Percentage of Responses
Excessive caseload of public defenders/ contract counsel	13.7%
Lack of indigency verification	7.8%
High expense of expert witnesses	5.9%

Table 36

MOST FREQUENT PROBLEMS IDENTIFIED BY PROSECUTORS

Problem	Percentage of Responses
Lack of adequate compensation for contract attorneys/private assigned counsel	26%
Unavailability of sufficient qualified counsel (contract/private assigned counsel)	24.7%
Lack of adequate indigency screening	19.2%
Excessive caseload of public defenders/ contract counsel	9.6%
Excessive caseload for prosecutors	5.8%

Overall there were more than 250 responses to this question. Among some of the other problems mentioned were the following:

- Constant tampering with the system;
- Lack of computers;
- Lack of adequate training;
- Lack of qualification standards for private court-appointed counsel (although such standards have been developed by the Judicial Department);
- Inadequate data on cost and caseload;
- Inadequate salaries for public defender staff;
- Lack of standards in declaring a conflict;

- o Lack of qualified attorneys for capital cases;
- o Burnout of some attorneys;
- o Lack of proper intake screening by prosecutors;
- o Too many minor offenses charged as misdemeanors; and
- o Too much waiting time in jail.

Finally we tabulated overall the most critical problems reported among the individuals who responded to the mail questionnaire. They are the following:

Inadequate compensation for contract attorneys/private assigned counsel.	24%
Unavailability of sufficient qualified counsel (Contract/private assigned counsel)	17%
Excessive caseloads of public defenders/contract counsel	13%
Overcharging by prosecutors	5%
Inadequate funding of ancillary services	4%

2.13 Recommended Improvements in Indigent Defense System Reported in Mail Survey

The final question asked in each of the mail questionnaires was, "What specific improvements, if any, would you suggest in the present system in your court for the delivery of indigent defense services? In the state of Oregon as a whole?

We tabulated the results for each of the six respondent groups and have displayed the most frequently mentioned improvements in the following tables.

Table 37

MOST FREQUENTLY MENTIONED IMPROVEMENTS BY ASSIGNED COUNSEL

Recommendation	Frequency of Responses
Increase compensation for all counsel	44.7%
More reasonable practices of prosecutors	10.6%
Quality control/performance standards	8.5%
Improved training	6.4%
Increased funding for ancillary services	4.3%

Table 38

MOST FREQUENTLY MENTIONED IMPROVEMENTS BY PUBLIC DEFENDERS

Recommendation	Frequency of Responses
Increase compensation for all counsel	53.8%
Reduce caseloads	25.0%
More reasonable practices of prosecutors	7.7%
Increased funding for ancillary services	5.8%
Streamline docketing system	5.0%

Table 39

MOST FREQUENTLY MENTIONED IMPROVEMENTS by JUDGES

Recommendation	Frequency of Responses
Increase compensation for counsel	36.6%
Establish statewide public defender system	22.4%
Tighten indigency screening	8.2%
Improve recoupment practices	6.1%
Reduce caseloads	4.1%

Table 40

MOST FREQUENTLY MENTIONED IMPROVEMENTS BY CONTRACT ATTORNEYS

Recommendation	Frequency of Responses
Increase compensation for all attorneys	35.5%
Reduce unnecessary appearances	16.1%
Decriminalize minor offenses	9.7%
Improve recoupment practices	6.5%
Reduce caseloads	6.5%

Table 41

MOST FREQUENTLY MENTIONED IMPROVEMENTS BY
TRIAL COURT ADMINISTRATORS/COURT CLERKS

Recommendation	Frequency of Responses
Increase compensation for all attorneys	14.8%
Improve recoupment practices	13.0%
Tighten indigency screening	11.1%
Establish statewide public defender system	9.3%

Table 42

MOST FREQUENTLY MENTIONED IMPROVEMENTS BY PROSECUTORS

Recommendation	Frequency of Responses
Tighten indigency screening	23.0%
Increase compensation for all attorneys	21.2%
Quality control of contract attorneys/ public defenders	13.5%
Eliminate public defender offices	13.5%
Improve recoupment practices	9.6%

In analyzing the data for over 300 suggested improvements, it is obvious that the most frequently mentioned recommendation was to increase compensation for all attorneys. This was the only suggested improvement, among the five most frequently mentioned, that appears in each of the six tables. In all but one respondent category it is number one. The other most frequently mentioned improvements are to tighten indigency standards, improve the recoupment process, reduce caseloads and establish more reasonable prosecutorial practices.

Other responses to this question include:

- Better training;
- Eliminate the cutting of counsel's vouchers;
- Reduce waiting time in court;
- Improve salaries for public defender staff;
- Establish qualification standards for counsel;
- Establish front-end contribution;
- Eliminate counsel in Fish and Wildlife offenses;
- Reduce paperwork;
- More funds for capital cases;
- Improve pre-trial conference procedures; and
- Remove the responsibility for indigent defense from the court

system.

CHAPTER III
FINDINGS AND RECOMMENDATIONS

The material that follows is a list of the findings and recommendations resulting from our year long study. For purposes of clarity and continuity we have set out our specific recommendations addressed to each of the findings.

Finding 1: The Oregon indigent defense system is processing annually an extremely high volume of cases compared to the rest of the nation. In fact, Oregon ranks third nationally in the number of indigent cases per 1000 population. In addition, the number of cases is steadily increasing.

There are a number of reasons why the total number of indigent defense cases in Oregon is high. To begin with, the indigency rate exceeds the national average for both felony and misdemeanor cases. While the overall rate may be affected by a downturn in the economy, it also, in our judgment, reflects the fact that judges do not systematically implement the standards and guidelines promulgated by Chief Justice Peterson.

The high caseload also reflects an expanded right to counsel in Oregon that is broader than federal constitutional requirements. Furthermore, changing policies of several criminal justice components such as law enforcement, district attorneys, courts and corrections add to the existing caseload of indigent defense, as well as an increase in the complexity of cases. Other reasons for the high caseload include the large number of offenses that are defined as crimes by the Legislative Assembly; caselaw that requires appointment of counsel in all misdemeanor and some ordinance violation cases; and a constant increase in criminal and juvenile filings generally.

The Legislative Assembly in Oregon has mandated a set of expansive requirements relative to the right to counsel and the courts have zealously attempted to protect those and other rights

of indigent defendants.

It is important to repeat, with emphasis, that the overal number of criminal filings continue upward each year in Oregon. This fact alone will ensure an increase in caseload and costs of indigent defense services. In addition, the total number of death penalty cases requiring appointment of counsel has risen significantly each year and because of the special requirements associated with these cases, attorney fees and related expenses are necessarily high. It is predictable that expenditures in these cases will continue to grow substantially over the next few years.

There continues to be a perception on the part of many, both within and outside the criminal justice system, that persons who do not truly qualify are receiving counsel at taxpayers' expense. As a representative of the Oregon District Attorney's Association commented: "As D.A.s we see inconsistencies in application of [the indigency] standard. Many people who have steady jobs and who could afford the defense of a misdemeanor or a class C felony are appointed counsel simply to expedite the case for the benefi of the judge's docket." Sufficient information is not currently available to determine whether or not these perceptions are true, but pilot projects currently underway in several jurisdictions to collect and verify defendants' financial data should ultimately provide critical information on this question.

Efforts should continue to be undertaken to reduce the total number of cases entering the indigent defense system in Oregon consistent with public policy, public safety and the rights of indigent persons entitled to counsel at state expense.

Recommendation 1: The current indigency eligibility guidelines that were promulgated by Chief Justice Peterson in November of 1987 should be reviewed for effectiveness and tightened if feasible. There has been little noticeable change in the rate of indigency since the Chief Justice promulgated the guidelines. It

is our understanding that the guidelines are currently under review and that revisions are scheduled to be completed in the near future.

Recommendation 2: Efforts should be undertaken by the Judicial Department to assure that the current (or revised) indigency standards are effectively enforced throughout the state. Many judges are not applying the indigency standards uniformly in all cases for a number of reasons discussed in Chapter II. Because of the high rate of indigency throughout the state, all judges must be diligent in applying the standards to assure that only the truly indigent receive counsel at state expense.

Recommendation 3: The Judicial Department should carefully review the results of its pilot program for screening and verification of indigency to determine whether the procedures tested can be applied statewide to reduce the total number of cases for which counsel is appointed.

Early results of the indigency verification pilot program are encouraging. The lack of verification in most courts is due to insufficient staff. The pilot program should be monitored carefully to determine whether it has proved to be cost effective and can be implemented throughout the state.

Recommendation 4: The possibility of improved intake screening should be considered by all District Attorneys before cases are filed with the courts. Careful intake screening by experienced assistant district attorneys will ensure that appropriate cases are screened out of the system and are not subject to additional expenses for court-appointed counsel and other criminal court expenses. Effective screening should also ensure that only the charges that can ultimately be proven are formally filed, thus again reducing the cost of indigent defense services.

Recommendation 5: The results of the Judicial Department's Accounts Receivable Policy Committee's pilot recoupment collections project, completion of which is expected in the summer of 1989, should be carefully reviewed to determine whether alternative approaches to collections can be implemented statewide which will increase the revenues collected from convicted defendants. In the meantime, efforts should be undertaken to ensure that standard approaches to ordering and collecting recoupment are utilized throughout the state. This should include establishing guidelines for the level of fees to be assessed in specific categories of cases.

Implementation of recoupment practices are uneven throughout the state. A sound, uniform and consistent plan should be implemented throughout the state. We believe that the results of the pilot program will be useful in implementing this recommendation.

Recommendation 6: The circumstances in which attorney fees can be ordered should be clarified, and consideration should be given to introducing legislation to make it permissible to order repayment in cases of civil compromise and other cases in which the defendant is not formally convicted of a crime. The possibility of requiring defendants to contribute to the costs of their representation following initial screening should be explored, in light of the ruling in the Fitch case, as this has proven an effective method of increasing revenues in a few jurisdictions.

There are 11 states that authorize by statute a voluntary contribution by those defendants who are found marginally indigent or partially indigent. At the present time, the state of Washington is undertaking pilot programs in five counties on indigency screening and contribution. The indigent defense program in Seattle (King County) has had such a program for several years and is predicting revenues of approximately $270,000 for the coming year under the program.

We strongly recommend that such a voluntary contribution program be pilot tested in Oregon with the provision that those defendants who are acquitted be reimbursed for their contribution in order to comply with Fitch.

Recommendation 7: Any proposed legislation that is intended to create new crimes should be accompanied, pursuant to recent legislation, by an assessment of the procedural and fiscal impact of the recommendation on the overall criminal justice system. This assessment should pay particular attention to the overall impact on the indigent defense component of the system.

The state of Oregon has a large number of crimes on its books and should recognize that each new piece of legislation adds substantial cost to the criminal justice system, including indigent defense.

Recommendation 8: The Judicial Department and the Legislative Assembly should review the various provisions of the law in regard to the right to counsel in order to determine whether some kinds of offenses could be treated in such a way as to avoid the requirement of the right to appointed counsel consistent with the federal and Oregon constitutions. We recommend the following:

- The possibility of increasing the number of reductions of misdemeanors to violations pursuant to Chapter 783 of the 1987 Oregon Session Laws.
- Continued efforts to determine whether or not some minor crimes can be decriminalized. A specific effort should be developed in regard to Fish and Wildlife offenses.
- Efforts should be undertaken to examine the possibility of expanding the use of diversion and civil compromise wherever appropriate.

* * * *

Finding 2: The problems experienced in recent years in the explosion of indigent defense costs go beyond the increase in caseload alone. They are the direct result of developments in virtually every other component of the criminal justice system. They cannot be controlled solely through changes directed at the indigent defense system. Thus, any attempt to improve cost-efficiency must address the complex web of factors found in the inter-relationship between indigent defense and the other major components of the criminal justice system.

As one survey respondent pointed out: "It is hard to maintain control over indigent defense expenditures when the rest of the criminal justice system is out of control."

In our opinion, any effort to address the problem of increased caseload and costs must recognize the interaction of other criminal justice components with the indigent defense system. Specifically, we refer to the actions, policies and procedures of law enforcement, prosecution, the courts and corrections. This is a problem not unique to Oregon, but one that we have found in virtually every jurisdiction we have visited. Efforts to address this issue typically are met with responses such as the need to maintain the independence of the prosecutorial function or the court function; and the need to respond to the will of the public to get tough on crime or to increase the requirement of public safety. We understand fully these concerns and do not suggest that methods be undertaken to undermine these concerns or principles. Our point is that some current practices such as prosecutorial overcharging and lack of diversion opportunities add to the problem of the high caseload as pointed out by the results of our study. Therefore, we propose that practices and policies of all criminal justice agencies be examined to determine methods that could be instituted that would reduce the indigent defense caseload and at the same time preserve the concerns of the public and the independence of the prosecutors

and the courts.

Recommendation 9: We strongly support the efforts currently underway in the Legislative Assembly to examine the interaction of various criminal justice components with indigent defense cost and services.

We heard repeatedly during our study about the outstanding efforts undertaken by Representative Hooley and the Ad Hoc Committee which she chaired during the 1987 legislative session. We are encouraged to learn that a similar committee has recently been established to address these problems and strongly recommend the continued efforts of the new committee.

* * * *

Finding 3: Substantial efforts have been undertaken by the Judicial Department over the past biennium to develop better methods to manage the program and to contain costs. Despite these strong efforts, the caseload and cost continue to rise, although at a reduced rate, in large measure because of increased filings.

In our opinion, the Judicial Department has instituted a large number of policies and procedures over the past biennium to attempt to begin to control the costs of indigent defense services. Among these efforts have been the following:

- The development of indigency standards and guidelines.
- The development of an indigency verification pilot project.
- The development of eligibility standards for representation of the indigent accused.
- The establishment of a professional Indigent Defense Services Division within SCA.
- The development of a draft set of standards for statewide fee guidelines.
- Tightening of the requirements and procedures for contract-

ing generally.

- o The development of a computerized management information system.
- o The establishment of a pilot recoupment collections project.
- o The promulgation of case expense guidelines and payment procedures.

The Judicial Department should be commended for these efforts and the contractors and private bar attorneys for their efforts to comply with the new procedures.

However, we are reminded of a similar study that we conducted in Virginia in 1985 for the Virginia General Assembly. That state had experienced major increases in caseload and expenditures during the 1970's, and in 1978, the responsibility for administering the indigent defense fund was placed in the Judicial Department, Office of the Executive Secretary (the counterpart to the State Court Administrator's Office in Oregon). For the next seven years, the Virginia Judicial Department develope a large number of policies and procedures similar to those instituted by SCA during the current biennium in Oregon.

In our report to the General Assembly in Virginia in October 1985 we stated:

> All of these methods, procedures and policies have contributed to the overall level of cost containment. Judges are now clearly more careful when it comes to applying indigency standards, private attorneys are more precise in submitting their vouchers, and court officials are more diligent in pursuing orders for recoupment. All of this has no doubt resulted in fewer cases in the system for which court appointments are made. Even with all these procedures in place, however, we are absolutely convinced that little more can be done by way of new policies to contain additional costs. We are not

aware of any significant additional methods that can be imposed. That means that it is predictable that costs will be on the rise again in the near future.

Unfortunately our predictions proved to be accurate inasmuch as the costs in Virginia rose by over 43% between 1986 and 1988.

The example of Virginia is provided not to suggest that there is nothing left for SCA to consider. Rather it is to state that SCA has already instituted most of the major procedures and programs that have proved effective in other states and they should not be expected to develop important new procedures that will sharply contain costs. As long as overall criminal filings continue to increase, the costs of indigent defense services will continue to rise. The following recommendations are, however, in our judgment, worthy of pursuing.

Recommendation 10: The Judicial Department should continue its efforts to computerize its indigent defense database so that it will be able to provide consistent and reliable information on caseload and costs for better planning purposes.

The computerized database developed by SCA will very shortly provide comprehensive and detailed data on many aspects of the indigent defense system. These new data should be extremely useful in providing information for better fiscal and budget planning in the future.

Recommendation 11: The central administrative agency charged with administering the indigent defense system should be responsible for establishing standards and guidelines for all types of defense providers in the state to guarantee the provision of adequate and effective indigent representation. Implementation of these standards should be regularly monitored and actions taken to ensure compliance.

The types of additional standards that we recommend include:

training requirements, both for attorneys new to the system as well as experienced counsel; revised indigency guidelines; per formance standards for attorneys; guidelines regarding the use of investigators, expert witnesses and other defense services; rules regarding the availability of support services and other basic resources.

Where appropriate, standards should be developed specific to the various types of defense providers throughout the state. For example, standards that would apply to the operations of a public defender office would not be applicable to private assigned counsel or to many smaller contractors. Particular problems in some areas with the quality of representation provided by private assigned counsel indicates that standards should be established that would include availability of critical resources and support services. The increasing use of law firm consortiums suggests that guidelines governing their operations are also needed. Questions that should be addressed in this area include: who should be responsible for administration within the consortium and how this task should be funded; assignment of cases to attor neys within the consortium group; rules regarding the declaration of conflicts as recommended in the 1987-88 Budget Notes; standards for fiscal accountability; and standards governing the division of attorney and other staff time between court appointed and retained cases.

The SCA and the Judicial Department have made considerable progress in setting standards during the past biennium since they have been in charge of administering the indigent defense system. Indigency guidelines and qualifications standards for attorneys have been developed, and contract terms have been modified to incorporate some minimal performance standards. A few questions still remain about the adequacy of the standards that have been developed and the record on compliance throughout the state is mixed. These existing standards should be reviewed and modified, as needed, and further efforts to monitor compliance should be

undertaken. In addition, work should begin on drafting standards in the areas mentioned in the preceeding paragraph that have not yet been addressed.

As noted above the purpose of these standards would be to guarantee the provision of adequate and effective indigent representation. Other standards that should be developed to improve the operational and cost efficiency of the indigent defense system are recommended elsewhere in this section.

* * * *

Finding 4: The current approach to contracting for indigent defense services fosters some instability which is detrimental to the operations of the public defender and contract defense programs as well as to the general administration of the system. This raises some questions about the effective delivery of indigent defense services consistently throughout the state and the basic principle of contracting for indigent defense services.

The negotiation of contracts on a year-to-year basis has fostered an environment of instability and inefficiency and has kept the indigent defense system in a state of crisis. There are several elements of this problem. The first is the piecemeal funding of the system that has occurred in the last several years as a result of careful legislative monitoring of costs during and following the funding crisis of 1987. Sufficient funds have not been appropriated and released to support full operations over the course of the current biennium. During the 1987 crisis, funds were provided only in sufficient volume to keep the system afloat for weeks or months at a time. Concerns about the possible unavailability of additional funds and the potential necessity of relying on attorneys providing services on a pro bono basis also contributed to this problem during the crisis. Many of these concerns have haunted the delivery of indigent defense

services during the current biennium.

Second, many changes in administration of the system have occurred since state takeover in 1983. In the history of the state-funded system, no one administrative entity had negotiated for more than one contract cycle until the SCA completed the most recent round of negotiations in the summer of 1988. Each new agency has been faced with the difficult task of negotiating with contractors on the basis of existing arrangements in which they had no part. Contract terms have changed from year to year, sometimes substantially, and often with only short notice to potential contractors. The timing of administrative changes has also led to delayed consideration of contracts, often into the next contract period. This has led to some situations in which both parties have had to rely on short-term agreements that have involved the release of large sums of money by the administrative agency and required contractors to enter into long-term agreements with landlords, staff, vendors, etc. in order to maintain operations. In addition, it has put undue pressure on both parties to agree to less than satisfactory terms at the 11th hour.

This annual contracting process has absorbed an enormous amount of energy and resources, and created frustration and distrust both at the local contractor level and the state administrative level. Further, it has severely limited the possibility for long-term planning. Contractors are not sure what terms they will be asked to comply with, what resources will be made available to them, what staff they will be able to retain, or even whether they will continue to participate in the next contract cycle. This is a particular problem for the larger contractors and the public defender offices. Likewise, the state administrative agency is not able to realize efficiencies that would result from knowing with certainty which contractors they will be dealing with on what terms in the future.

The argument that "competition in the marketplace" will lead

to reductions in the cost of indigent defense services has not proven to be the case elsewhere and may be flawed and short-sighted. The level of demand for the constitutionally mandated defense services in question is not subject to change in response to price fluctuations. The number of defendants who will have to be represented is ultimately beyond the control of the courts, the contractors or the SCA. Likewise, the level of service that must be provided cannot be compromised in order to accommodate lower funding levels, without raising the possibility of petitions for postconviction relief based on ineffective assistance of counsel and malpractice suits, as well as costly lawsuits challenging the constitutionality of the system, as have recently been successful in Kansas and Nebraska.

The desire on the part of some individuals in the system to have a proliferation of small "boutique" contracts appears to stem largely from a belief that this approach also fosters competition that will result in cost reductions. Not only does this hypothesis appear to be false for the reasons cited above, but these contracts raise other issues of concern. For one thing, the attorneys most likely to be interested in having one of these contracts, particularly to provide representation in the less serious cases, may be the attorneys who are the least experienced in criminal practice and not prepared or able to provide competent counsel. Second, the more contracts and contractors there are, the more complex and time-consuming program administration and, more importantly, contract negotiation become. Finally, the smaller the contract and the smaller the percentage of an attorney's overall practice that it represents, the greater the likelihood that financial and ethical conflicts will arise between the attorneys contract cases and those being handled privately. While this is a concern for contract programs of all sizes, the pressures may be greater on the smaller programs to make inappropriate trade-offs to the detriment of their indigent clients.

Another aspect of the current contract approach that is of concern is the move towards "output contracts" that bind a contractor to provide representation in all or some fixed percentage of cases, regardless of the number or complexity of cases included. For example, a contract may require the provision of representation in 100% of all types of cases requiring appointment of counsel; while another may cover 50% of all indigent felony cases. For the most part, the output contracts used in FY 1988 were modified, in that they were based on a percentage of court appointments, but also provided in an appendix caseload estimates and a permissible range of fluctuation that further defined the parameters on the total number or types of cases the contractor would accept. This modification is essential in order to avoid problems that have been created in other states.

Output contracts and competitive low-cost bidding have increasingly been discouraged in recent years by leading national organizations in the indigent defense community, such as the National Legal Aid and Defender Association and the American Bar Association. These methods have also been under attack in several states. In 1984, a county contract program that combined both approaches was held unconstitutional by the Arizona Supreme Court in Smith v. State, 140 Az. 355 (1984). The Court held that the program violated the Fifth and Sixth Amendments of the U.S. Constitution for the following reasons:

1) The system did not take into account the time the attorney is expected to spend in representing his or her share of the indigent defendants.

2) The system did not provide for support costs for the attorney, such as investigators, paralegals, and law clerks.

3) The system failed to take into account the competence of the attorney. An attorney, expecially one newly admitted to the bar, for example, could bid low in order to obtain a contract but would not be able to represent adequately all of the clients assigned acording to the standards.

4) The system did not take into account the complexity

of the case.

Finally, our study showed that a number of contract terms regarding recordkeeping and reporting requirements were the source of considerable complaint from both the attorneys and court personnel who were burdened with additional responsibilities without receiving additional resources to cover the costs of fulfilling those responsibilities. At least insofar as attorneys are concerned, the failure to provide additional resources to support recordkeeping efforts is the result of a specific mandate of the Legislative Assembly, which stipulated in the Budget Notes for 1987-88 that:

> All attorneys providing indigent defense services shall supply any data requested by the Judicial Department in its study of comparative costs of providing services. Attorneys are expected to absorb the expense of providing this data.

Specific requirements that were often mentioned as problems were the monthly case inventory and information reports that must be completed by the contractor and verified (or reconciled) by the appropriate court; timekeeping requirements that must be fulfilled by all contractors; rules regarding the handling of payments for withdrawals and conflict cases requiring the certification of attorney hours by the courts and the splitting of credit between the attorneys handling the case at different stages; and the 90-day rules which apply to counting new cases on probation violations, bench warrants, etc., which again involve both the contractors and court personnel.

The many concerns just expressed in this finding should not be interpreted as an indictment of the manner in which SCA has administered their responsibilities over the past biennium. They have worked conscientiously to respond to the requirements of the Legislative Assembly. Rather our problem is addressed to the whole process of contracting as a method of providing indigent defense services and the experiences in other jurisdictions that

have developed contracting systems.

It is not that the current contract system in Oregon has to tally failed. It is not that the system has degenerated into output contracts and competitive low cost bidding over the past several years. Rather it is our concern that over the next several years, one of two things may occur: either (1) the system may continue to be underfunded, attracting many inexperienced and perhaps incompetent lawyers to submit bids, which may seriously compromise the quality of representation provided; or (2) bidders may soon realize that they are not dealing with a strictly competitive environment and either separately or in collusion begin to bid the price up, thereby eliminating the supposed benefit--cost reduction--of the competitive bidding process.

Experiences elsewhere in the country point to some of these danger signs. We previously addressed the contracting problems in Arizona spelled out in State v. Smith.

The most comprehensive contracting program in the country, with the exception of the Oregon system, is found in San Diego County, California. After six years of operation, a Blue Ribbon Commission appointed by the county concluded in 1987:

> The present system is inadequate to ensure quality representation. First, although the two-step bidding process instituted in 1983, whereby groups are first screened to determine qualifications and, if found qualified, are allowed to participate in the bidding process, is an improvement, it is still deficient. The determination of qualifications is subjective and is done by persons who have neither the time nor the resources to conduct a thorough investigation. Most importantly, the use of competitive bidding places an incentive on weighing cost over quality so that even qualified groups may not have sufficient funds to provide competent representation. Second, there is an absence of the monitoring of defense services by ODS. Judges in all jurisdictions informed the Commission that they have had infrequent, if any, contact with ODS with an absence of inquiry on the part of ODS as to services provided by ODS contract attorneys. Third, "block grant" contracts create a conflict between competent representation and economic self interest. While such

contracts may be helpful in projecting and controlling costs, defender offices, as pointed out by the National Study Commission on Defense Services, offer a "product" which is not susceptible to product specifications. The "block grant" system does not have a proper place in the provision of defense services.

The three year contracts now utilized provide more stability than one year contracts. Nevertheless, because of the possibility that existing groups will be underbid after their three year contracts have expired and the fact that due to inadequate contract rates, qualified groups will leave the indigent defense system, the contract system is inherently unstable.

Although the criticism in this report of the San Diego contracting authority clearly does not apply to the SCA in Oregon, the fact remains that in 1988, the county commissioners terminated the contract system and created a county agency public defender and an administered assigned counsel system to provide representation in conflict and case overload cases.

More recently, after almost a decade of contracting with multiple programs, King County in Seattle, Washington has mandated a study to determine the feasibility of establishing a simlar program to the one now in effect in San Diego County.

To date, we are unaware of any sizeable program in the country that has successfully implemented and maintained a contract defense program over any substantial period of time.

Having said all of this, we fully understand the current commitment in Oregon to a contract defense system. Given that fact, we have a number of recommendations that we believe are necessary to improve the program at this time.

<u>Recommendation 12: The approach to contracting for indigent defense services should be modified in order to increase equity among contractors and to improve the stability and efficiency of the contracting process.</u>

<u>Recommendation 12a: Standard minimum costs per type of case</u>

generally should be established for use in all contracts throughout the state. This would eliminate the difference that currently exists in the rates of compensation in the approximately 50 contracts throughout the state. It would also eliminate competitive bidding on a cost basis, allowing decisions among bidders to be made on the more appropriate basis of quality and experience. It would also vastly simplify the negotiation process so that it would take less time and require the expenditure of fewer administrative resources.

In recognition of the fact that there are some regional differences in the cost of doing business, the standards could allow for upward adjustments from the minimum in certain pre-designated high cost jurisdictions. This would provide for limited flexibility without seriously compromising the principle of equitable compensation.

Recommendation 12b: Contracts should be for a duration of at least two years.

While it has been less by design than by the force of circumstance that contracts have been limited to one year for the last several years, this practice should be discontinued. Two-year contracts in most instances, and possibly longer-term contracts for some of the larger public defender offices, will provide the opportunity for planning both at the local and the state level, will provide greater stability in the system, and will again result in a reduction in the energy and resources that are expended in the contract negotiation process on an annual basis.

Recommendation 12c: Strict control should be exercised over the proliferation of small, "boutique" contracts. Such contracts which are established to handle a small number of the overall cases usually serve only to complicate administra-

tion of the system and may be subject to problems with attorney competence and conflicts between appointed and private clients. Certain types of specialty contracts in particular areas of the law, such as mental health, juvenile representation, and capital cases should continue to be encouraged, as suggested by the 1987-88 budget notes where it is necessary in order to guarantee the assignment of counsel qualified to handle that type of case.

Recommendation 12d: The remaining use of strictly percentage-based output contracts should be reviewed. Contracts should be based on projected caseloads, broken out by type of case, where possible. Only in this way can the contract appropriately take into account the complexity of cases in the mix, the time required to provide adequate representation and the necessary costs of support and other ancillary defense services.

Recommendation 12e: Contracts should include special provisions for administrative costs, including any associated with recordkeeping and reporting requirements. In order to operate efficiently, contracts of any size, will require funds for administration. Further, to increase accountability and to ensure that data provided to the courts and the SCA are accurate, in the future contracts should specifically provide for funds in support of mandated data collection activities.

Recommendation 13: Further consideration should be given to a review of the proposed updated ABA Standards for Criminal Justice, which contain, for the first time, standards for the contracting of defense services as well as the contracting standards promulgated by the National Legal Aid and Defender Association.

* * * *

Finding 5: The strong historical desire to provide balance among contracts and private assigned counsel in order to bring diversity and stability to the indigent defense system in Oregon is threatened by:

1) The increasing number of individual qualified private attorneys who are withdrawing their names from lists of those willing to accept criminal appointments at current rates of compensation; and

2) The proliferation of multiple private attorney consortiums and contracts with individual private attorneys as part of their efforts to increase their rate of compensation.

The extremely low hourly rate of $30 which is currently paid to private indigent defense counsel throughout Oregon does not even cover overhead in many areas of the state, as was demonstrated in the survey of office overhead conducted by OCDLA in 1986, as well as in several informal surveys conducted by the bar and the courts. Several jurisdictions have also imposed mandated maximum compensation levels for certain types of cases or proceedings, which many attorneys feel are unrealistically low. The low fees paid have led to two problems: the withdrawal of experienced attorneys from the appointments list; and the inability to attract and retain qualified defense counsel.

The following excerpt from a letter from a law firm which had been accepting indigent appointments in a major metropolitan court for more than seven years to the presiding judge eloquently states the reasons why experienced attorneys are withdrawing from the system:

> It is with sincere regret that we are forced to withdraw from accepting adult felony and misdemeanor cases on a court-appointed basis. . . . It has become painfully clear that our basic overhead costs are more than $40/hour. Consequently, we lose more than $10 per hour for each hour performed and billed to the Court.

> Apart from the inadequate compensation rate, the rate schedules . . . do not allow for the minimum efffective representation that we have set as a standard for ourselves as well as those established by the American Bar Association and the Oregon State Bar. . . .
>
> The current court appointed compensation system favors rapid disposition of cases through plea bargaining. While this is appropriate in many cases, the financial pressure imposed by the current rate structure makes this factor a consideration in the nature and quality of work peformed in improper situations. We feel that the current compensation system exposes us to allegations of ineffective assistance of counsel in post-conviction proceedings and malpractice suits. We cannot continue to work under these strains.

In addition to losing experienced, competent attorneys such as those who wrote the above letter, the low fees are making it difficult to attract and retain additional qualified attorneys. With the exception of prosecutors, who were evenly split on the question, all other survey respondents indicated that they believe that the fees paid were too low to accomplish this goal. Nearly 80% of the judges believe that this was true and, not surprisingly, so did 74% of the private attorneys responding.

Even if attorneys were willing to continue to accept appointments at the current rate of compensation (or any other, for that matter), the proliferation of multiple contractors has effectively eliminated the need to assign conflict cases to the private bar in several jurisdictions around the state. Normally conflicts would represent 15% to 20% of all indigent cases in a jurisdiction with a large primary public defender provider, guaranteeing a certain level of participation for the private bar. However, where there are multiple contracts, fewer conflicts will arise. Most consortiums of private counsel from several firms consider themselves independent for the purpose of determining whether a conflict exists and therefore are able to

handle most cases internally without having to rely on appointment of outside counsel.

The above trends, combined with the increasing numbers of private attorneys forming consortiums and entering into individual contracts, result in dependence on an ever smaller number of private counsel, as well as the loss of experience, diversity, and political influence that the broad participation of the bar brings to the system. Because of the high rate of indigency in Oregon and the resulting very small proportion of retained criminal cases, the criminal justice system is moving slowly toward one in which fewer and fewer private attorneys will be participating. This in our judgment, is an unfortunate trend and appears to be in conflict with options suggested in the 1987-88 budget notes.

The practice of judges' cutting attorneys' bills and expense vouchers documented in our study is another aspect of the compensation problem that reduces private defense counsels' willingness to participate. It is also inconsistent with the 1987-88 budget notes that called for the continuation of a mix of contracts and appointed counsel programs.

Recommendation 14: Fees for appointed counsel should be raised to a reasonable level that reimburses attorneys for their overhead costs and provides direct compensation for their legal services. Hourly rates that compensate the attorney in a manner directly related to the amount of time spent on a case should continue to be the standard. Additional funds should be made available to provide training and necessary defense and support services to private attorneys representing indigent defendants.

As noted above, the low rate of compensation is resulting in a dwindling attorney-base and the exodus from the system of some of the best-qualified, most-experienced attorneys.

Efforts are already underway by the Oregon State Bar and OCDLA to work with the Legislative Assembly and the Judicial

Department to establish a reasonable hourly rate, as a part of the overall efforts of both organizations, some conducted individually and others in cooperation, to improve the indigent defense system in Oregon. While we agree that this is an important and well-justified effort, it should be recognized that, as the cost of private counsel is raised to a reasonable level, the cost-efficiency of these services will decline relative to other types of providers. Thus, the increase in fees, though well-deserved and necessary, may also increase the pressures that are beginning to upset the historical balance among contracts and private assigned counsel in the indigent defense system in Oregon and may result in the further diminution of the role of the individual private practitioner in the indigent defense system. We believe strongly that some balance needs to be retained.

As part of the process of reviewing private attorney compensation, the practice in some jurisdictions of setting informal, arbitrary and unreasonably low maximum levels of compensation should be discouraged. If policymakers feel strongly that some controls need to be imposed on assigned counsel costs, maximum fees per type of case can be established by statute, Supreme Court rule, or administrative guideline, as has been done in 22 states across the nation. However, such maximums must be consistently applied throughout the state and they must be reasonable, so that they cover the actual attorney fees and expenses of the majority of cases in any given category. Second, provisions should be made for waiver of the maximum fee whenever justified. Efforts by SCA are already underway to address these problems through the establishment of statewide fee guidelines. We view this effort as a positive step forward provided that they are flexible to account for work performed on complicated or unique cases.

Finally, attorney vouchers should not be arbitrarily cut by judges in the process of review. The courts should be able to expect that attorneys will bill accurately for the amount of time

spent on a case, and attorneys should be able to expect that they will get paid for their services rendered. - Standard procedures should be established for the rare case in which a bill appears to be inflated, and a dispute resolution process should be developed to address any billing disputes as recommended in the budget notes in 1987-88. We understand that such an effort is now underway.

As noted elsewhere in these findings and recommendations, national standards suggest that it is a conflict of interest for the judge to be reviewing and approving attorney fee payments, and that it undermines the professional independence of defense attorneys as well as the neutrality of judges. It also would be administratively more efficient if this task were the responsibility of the central agency that administers the entire system.

* * * *

Finding 6: Overall, the representation provided through the Oregon indigent defense system to low income persons accused of crimes meets state and federal constitutional requirements. However, the quality of representation is uneven throughout the state, depending on the type of providers in a given jurisdiction and the resources available to them.

The majority of individuals interviewed by the research team during on-site assessments of the indigent defense delivery system in the dozen counties that were visited believe that the quality of representation provided in their counties is adequate and that defense attorneys are meeting the constitutional requirements of their indigent clients. Our observations verified that, for the most part, this opinion is true. The majority of respondents to the mail survey conducted as part of this study indicated that the overall quality of representation by all types of defense counsel is higher than average. Judges

in particular rated public defenders and contract counsel as providing quality services, better than or almost equivalent to those provided by retained counsel.

In spite of these positive observations, the level and quality of services that they are able to provide their clients vary markedly. Some public defender offices suffer from high caseloads as indicated in Chapter II and are not able to pay competitive salaries, both of which result in high turnover, particularly among attorney staff.

Finally, particular problems were identified in the adequacy of representation provided by private assigned counsel in many areas of the state, in large part because of the extremely low fees paid. In fact, 86% of the private attorneys responding to the survey admitted that the level of compensation paid to defense counsel for indigents affected the quality of representation provided. In addition, the limited resources available to private attorneys for the necessary expenses of providing law libraries, training, investigators, expert witnesses, and support services is a concern.

Recommendation 15: To the extent that it is not currently doing so, the Oregon Legislative Assembly should fund the indigent defense system at a level sufficient to guarantee that defense services in all programs and regions of the state meet federal and state constitutional standards. Appropriations should be for a full biennium as soon as that is practicable, as the piecemeal release of funding over the course of the biennium fosters instability and inefficiency in the system.

Despite the fact that costs continue to rise in the indigent defense system in Oregon, there are still aspects of the program that need increased funding. They include adequate compensation for private appointed counsel; increased funding for necessary expenses of counsel; increased staff of contract programs to

reduce caseloads where they are excessive; training; and other support services. It is important that attention be addressed to these and other important areas spelled out in this chapter of our report as soon as possible.

* * * *

Finding 7: There is an inherent conflict of interest in the administration of the indigent defense system by the judicial branch.

Standard 5-1.3 on Professional Independence, of the American Bar Association Standards for Criminal Justice, Providing Defense Services, states that:

> The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not normally be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender and assigned counsel programs.

This standard suggests that the potential conflicts associated with judicial oversight and management of the indigent defense system occur on two levels. First, there is the conflict involved in the overall management of the system by the Judicial Department and the State Court Administrator's Office, both of which are under the ultimate authority of the Chief Justice of the Supreme Court. As one observer questioned, what happens when a case challenging the sufficiency of the compensation rates for assigned counsel is brought before the Oregon Supreme Court? Here, the Court would be required to rule on the sufficiency of a payment system for which it is itself primarily responsible. This represents only one of many circumstances in which the Court could find several of its numerous responsibilities within t

criminal justice system at odds with one another.

Second, there is a conflict in the continuing practice of having local judges involved in establishing local rules regarding the compensation of defense counsel, reviewing (and sometimes cutting) attorneys' fee petitions, approving expense requests, and controlling the choice of defense counsel to be appointed in a given case. These practices run the risk of undermining the professional independence of attorneys and the impartiality of judges, both cornerstones of our adversarial system of justice.

Finally, attorney vouchers should not be arbitrarily cut by judges in the process of review. The courts should be able to expect that attorneys will bill accurately for the amount of time spent on a case, and attorneys should be able to expect that they will get paid for their services rendered. Standard procedures should be established for the case in which a bill appears to be inflated, and a dispute resolution process should be developed to address any billing disputes.

As noted elsewhere in these findings and recommendations, national standards suggest that it is a conflict of interest for the judge to be reviewing and approving attorney fee payments, and that it undermines the professional independence of defense attorneys as well as the neutrality of judges. It also would be administratively more efficient if this task were the responsibility of the central agency which administers the entire system.

Recommendation 16: Policymakers in Oregon should continue to build on recent efforts initiated by the Legislative Assembly, the State Court Administrator's Office, the Oregon State Bar, and the Oregon Criminal Defense Lawyers Association to gather baseline data regarding the operations of the indigent defense system and to assess the effectiveness and efficiency of the system (efforts of which this study is but one part). The next logical step is to engage in a thoughtful review of the ad-

ministration of the indigent defense system. The system should continue to be administered by a central body on the state level. However, because of the inherent conflict represented by the current administration in the Judicial Department, alternative approaches to structuring the central administration of the indigent defense system should be carefully explored. These possible alternatives include establishment of an independent state-level commission to supervise and administer a mixed delivery system and/or creation of a statewide public defender program.

It was not the purpose of this study to conduct an in-depth analysis of the central administrative structure of the system or the relative advantages of the various alternatives. However, our broad experience in the indigent defense field, our knowledge of the historical development of indigent defense management in Oregon, our inevitable exposure during the course of this study to the administrative structure, as well as contacts with numerous persons throughout Oregon concerned about problems with the current system, lead us to make this general recommendation regarding the need for a careful review of the current administration and the available alternatives.

To our knowledge, indigent defense services are administered entirely by a state court administrator's office in only two states--Oregon and Virginia. On the other hand, 16 states have state public defenders; seven have created state-level commissions to oversee essentially mixed delivery systems and at least four more commission models including the state of Washington, are in various stages of planning. Each approach has a number of advantages and drawbacks, but substantial experience exists in either case to serve as a model for the creation of a similar structure in Oregon.

We are not in a position, nor would it be appropriate, to recommend one or another of these approaches at this time. There appears to be considerable support for both alternatives among concerned individuals in Oregon. Many factors will need to be

taken into consideration in determining what type of administrative structure is most appropriate for Oregon, including the particular geographical and demographic characteristics of the state, relative costs, and the political environment, to name a few. However, we can suggest several goals that should be the focus of any attempt to improve the administrative structure of the indigent defense system.

First the system needs to be structured in such a way as to guarantee its independence. The program should not be subject to the charge of undue influence from the judiciary, or to excessive political interference from any other source. The system's independence should be both operational and financial. It is too large a system to be efficiently administered as only one of many responsibilities of the State Court Administrator's Office.

Second, the system must be structured in such a way as to concentrate both responsibility and authority in one agency. As long as the situation exists where the central agency charged with administrative responsibility is, for example, held accountable for the costs of appointed counsel but has somewhat limited authority to exercise control over the factors which affect those costs, limited change or improvement in the efficiency of the system can be realized.

Third, sufficient funds and staff resources must be supplied to the central administrative agency to enable it to carry out its responsibilities. The lack of funds and staff in 1985-1987 is, we believe, one of the primary reasons for the inability of the State Indigent Defense Board to accomplish its mission during its brief tenure. Thus, this early failure should not be construed as a definitive indictment of the concept of administration by a state commission.

Fourth, the structure must allow for the measured implementation of system modifications as part of a long-term planning process. The history of the indigent defense system in Oregon has been one of almost constant change and crisis. This environ-

ment has afforded little opportunity for careful, informed policymaking and long-term planning. Until the time is taken to allow for this critical review and planning process, the system is likely to continue to lurch from one crisis to the next.

* * * *

APPENDIX A

THE COURT SYSTEM IN OREGON

The Court System in Oregon

The Supreme Court is the court of last resort in Oregon. The Court's seven justices are elected to serve six-year terms and elect one of their number to serve as Chief Justice for a six-year term. Under a statute passed in 1981, the Chief Justice is designated as the administrative head of the Judicial Department. The Supreme Court's jurisdiction is defined by Amended Article VII of the Oregon Consitution. It is primarily a court of review, hearing discretionary appeals on petition for review from the Court of Appeals. In addition, the Supreme Court has direct court review of death penalty convictions and reviews the decisions of the Oregon Tax Court. The court may accept original jurisdiction in mandamus and habeas corpus proceedings. The court also has responsibility for admitting attorneys to practice in Oregon and for the discipline of attorneys and judges.

The Court of Appeals has exclusive jurisdiction for all criminal and civil appeals, except appeals from death sentences and appeals from the Tax Court, and for review of state administrative agency actions. The Courts' 10 judges are elected for six-year terms. The Chief Justice of the Supreme Court appoints a chief judge from among the judges of the Court of Appeals.

The Circuit courts are the state trial courts of general jurisdiction in Oregon and have appellate jurisdiction over the county courts, the justice courts and some municipal courts. The circuit courts have adoption and juvenile jurisdiction in all counties except Crook, Gilliam, Harney, Jefferson, Morrow, Sherman and Wheeler, where the county court exercises juvenile jurisdiction. The circuit courts also exercise jurisdiction in probate, guardianship and conservatorship cases in all counties except Gilliam, Grant, Harney, Malheur, Sherman and Wheeler. Circuit judges are elected for a term of six years. There are 87

circuit judges serving the 36 Oregon counties, which are grouped into 19 judicial districts. The Fourth Judicial District, Multnomah County, the largest, has 20 circuit judges. The Lane County district has 10 circuit judges; Marion has seven; Clackamas and Washington districts each have six judges and Josephine/Jackson and Linn/Benton districts each has five judges. The remaining districts have between one and four judges each.

Oregon's district courts are trial courts with jurisdiction limited to $10,000 in civil cases and to misdemeanor criminal cases, including traffic offenses, where conviction is punishable by a fine of up to $2,500, imprisonment of one year or less, or both. District courts also conduct preliminary hearings in felony matters. The district courts have small claims departments which have jurisdiction for recovery of money damages where the amount claimed does not exceed $2,500.

District court judges are elected in an individual county for a term of six years. Fifty-eight district court judges sit in 28 of Oregon's 36 counties. Multnomah County has the greatest number of district court judges, with 14; and Lane County has five. The remaining counties with district courts have between one and four judges each.

County courts, which at one time existed in each of Oregon's 36 counties, now exist in only nine counties, all east of the Cascades. The county courts in Harney, Gilliam, Sherman and Wheeler have jurisdiction in both juvenile and probate matters. Malheur and Grant county courts have probate jurisdiction only; and the courts in Morrow, Crook, and Jefferson have only juvenile jurisdiction.

Justice courts have jurisdiction in misdemeanor cases and non-felonious traffic cases. Municipal courts have jurisdiction over ordinances of incorporated cities and towns and concurrent jurisdiction with the justice courts over non-felonious traffic cases within municipal boundaries.

APPENDIX B

RECENT HISTORY OF INDIGENT DEFENSE SERVICES IN OREGON

Recent History of Indigent Defense Services in Oregon

The assignment of private counsel on a case by case basis has historically been the preferred method of providing counsel for indigent defendants in Oregon. Initially, the courts relied upon the ad hoc appointment of local private attorneys serving on a pro bono basis. But as early as 1935, state law provided for the compensation of private counsel appointed to provide representation in felonies. The original statute stipulated that court appointed counsel:

> "shall by order of the court and subject to the approval of the governing body of the county, be paid fair compensation for representation in the case by the county in which the proceeding is had." (formerly ORS 135.055, 1979)

This statute also established a $30 per hour minimum rate of compensation replacing a minimum flat fee schedule for private assigned counsel. As a matter of practice, however, the Legislative Assembly has funded the indigent defense budget based upon the minimum compensation level and local courts have, therefore, regarded this hourly rate as a maximum, rather than a miminum, figure.

Since the early 1970s the counties have been empowered by statute to establish county public defender programs or to contract with an attorney or group of attorneys to provide representation to the indigent (ORS 151.010).

By the late 1970s a wide range of programs for providing counsel to the indigent existed among the state's 36 counties. A majority of counties continued to use assigned counsel programs, while other switched to public defender programs, largely in the interest of controlling costs. The option of contracting with private attorneys was also gaining in popularity in the counties.

Regardless of the type of program employed, for many counties at that time, the rising cost of providing indigent representation had become a critical concern. The state assumption

of the costs of indigent defense became among the highest priorities of the Oregon Association of Counties in representing the interests of the counties at the state Legislative Assembly.

At the same time, there existed concern at both the state and county levels for improving the functioning of the Judicial Branch. In 1979, the Oregon Commission on the Judicial Branch was established by the Legislative Assembly with a mandate to study and make recommendations for improvement. One of the numerous findings of the Commission was that the counties lacked the financial resources to meet the projected growth in court costs. In 1981, the Commission recommended that the state assume the full cost of the trial court system.

In response to this recommendation, the Oregon Legislative Assembly passed House Bill 3292 in 1981, providing for the state assumption of all trial court costs, including the cost of counsel for indigent defendants, effective January 1, 1983. The bill empowered the State Court Administrator to contract on behalf of the state with private attorneys or groups of attorneys to serve as counsel for the indigent in proceedings requiring the appointment and compensation of counsel. Under this legislation the minimum hourly rate for assigned counsel remained at $30 per hour.

Although the court reform legislation enacted in 1981 enabled significant improvements in judicial administration, many questions persisted concerning the delivery of indigent defense services. There was concern that the portions of HB 3292 which empowered the State Court Administrator to enter into contracts for the provision of defense services ignored the significant question of setting standards for these agreements. There was also concern, both among the private bar and members of defender organizations, that the private bar might be excluded from playing a major role in the representation of indigents if public defender and contract programs continued to proliferate. The costs of providing indigent defense services continued to rise

during the 1983-1985 biennium in spite of attempts by the State Court Administrator's Office to control them. Caseload also continued to rise at a continuous level.

It was largely in response to these persistent and troublesome questions that the Oregon Legislative Assembly created the State Indigent Defense Board (SIDB) in October 1985 (in the midst of the 1985-87 biennium), vesting it with a range of powers and duties concerning the delivery of indigent defense services. The legislation, House Bill 2257, established SIDB as an independent entity within the Judicial Branch consisting of seven volunteer members appointed by the Chief Justice of the Supreme Court, but not subject to the exercise of administrative authority and supervision of the Chief Justice. The bill also established the position of State Indigent Defense Administrator, appointed by the Board and subject to its supervision and direction.

Among the specifically enumerated duties and responsibilities of the Board were the following:

- to conduct a continuing study and evaluation of various methods for the provision of appointed counsel compensated at public expense to represent indigents in both the state and the municipal courts;

- to develop for each judicial district a plan for the provision of counsel for the indigent in proceedings in and appeals from the circuit and district courts;

- to establish standards of eligibility for:

  (a) appointed counsel for the indigent in the state and municipal courts; and

  (b) full-time not-for-profit public defender organizations;

- to establish a schedule of minimum fair compensation for appointed counsel, not less than $30 per hour; and

- to establish standards and procedures for contracting the services for counsel for the in-

digent.

In addition, the SIDB was required: (1) to report biennially to the Chief Justice of the Supreme Court, the Governor and the presiding officers of the Legislative Assembly on its activities; and (2) to submit budget estimates and requests for appropriations for the Office of the State Indigent Defense Administrator.

Among the key duties and responsibilities of the Administrator specifically set forth by House Bill 2257 were:

- to pay the compensation for counsel appointed to represent indigents and expenses required to be paid by the state;
- to develop a system for conducting financial and performance audits of indigent defense contracts; and
- to collect and publish statistical data and other information pertinent to the representation of indigents in the state and municipal courts.

In addition, the Administrator, subject to the approval of the Board, was empowered to contract with attorneys, groups of attorneys or not-for-profit public defender organizations for the provision of indigent defense services where the state was required to pay compensation for that representation. All contracts were required by the Act to conform to the standards of eligibility for attorneys appointed to represent indigent defendants and for not-for-profit public defender organizations established by the Board.

The passage of this legislation was hailed as a substantial step forward in developing a professional management and administrative system for controlling costs of indigent defense and in planning for the future delivery of defense services for the indigent. Notwithstanding the laudable job of the State Court Administrator's Office in attempting to respond to the problems relating to indigent defense, it was widely accepted that the needs of the indigent defense system could not be met adequately

by that Office, which was dealing with a broad range of pressing issues resulting from the state takeover of the court system. It was, thus, felt that transferring the administrative and supervisory responsibility for the indigent defense system to the Board would accomplish the following:

(1) the elimination of any conflict of interest between the administrative body and the indigent defense programs; and

(2) end the frustration caused by the inability of the Judicial Department to devote sufficient resources to the establishment of much needed standards for the delivery of indigent defense services.

In fact, the State Indigent Defense Board was plagued with problems from the outset. Not the least of which was the fact that the permanent funded staffing of the Office of the State Indigent Defense Administrator, included only the Administrator and a part-time secretary and was wholly inadequate to perform the demanding range of responsibilities of the Office. In addition, the Board was charged with the responsibility of managing the costs of a system in which it did not have control over the factors determining those costs, primarily the caseload. Contracts with attorneys and public defender organizations were already in place when the Board was created, and payments to private attorneys appointed on an ad hoc basis continued to be determined by individual trial court judges throughout the state. Further, the indigent defense system had no control over the actions of prosecutors whose charging practices determine the number of cases that enter the criminal justice process and may require defense representation. Other significant factors included the rising prison population and resulting prison overcrowding; inadequate social service levels; and the number of new crimes enacted by the Legislative Assembly.

More importantly, the SIDB inherited a system in January 1986 that was seriously underfunded for the 1985-87 biennium. This fact had been discussed during budget hearings when the

Legislative Assembly appropriated $31.5 million for the 1985-87 biennium and it was predicted that the system would likely run out of money before the conclusion of the two-year period. In April 1986, Chief Justice Edwin J. Peterson characterized the fiscal crisis facing the SIDB as follows:

> The total apropriation for indigent defense attorney fees and other indigent defense costs is $31,575,387. During the first eight months of the biennium, the average monthly expenditure for indigent defense was $1,787,877. If that rate continues through the remainder of the biennium, the total indigent defense costs would be $42,909,048; $11,333,606 over budget.

A number of reasons were advanced to explain the imminent shortfall in the indigent defense budget. Among them were the following:

- increased caseloads requiring the appointment of counsel for the indigent;
- increased case complexity requiring more extensive preparation and investigation of cases by counsel;
- increases in expenses relating to the defense of indigents including transcripts, discovery costs, investigations, interpreters, psychiatric examinations and expert witness fees;
- increases in grand jury, petit jury and witness fees which were included in the overall indigent defense budget;
- relaxed scrutiny of indigent defense costs by some trial courts;
- inadequate procedures for determining true financial eligibility for assigned counsel resulting in the over-appointment of counsel; and
- problems with the provisions for payment of indigent defense contractors.

Perhaps the most significant of these factors was the increased case filings, which generated a greater volume of in-

digent cases than had been planned for in the appropriation for the 1985-87 biennium. The appropriation was based on the criminal case filing experience during 1983 and 1984, which turned out to be an atypical period. For example, from 1983 to 1984, annual circuit court criminal filings increased by only 2.9%; however, filings in this same category increased approximately 9% each year from 1985 to 1986 and from 1986 to 1987.

In 1983-84 substantial cuts were made in funding for local law enforcement and district attorneys' offices. These cuts resulted in reductions in staff, which in turn resulted in fewer arrests for and prosecutions of criminal violations, also reducing the number of cases in which indigent representation was required. When funding was restored in subsequent years, these activities picked up once again, as did the number of indigent cases.

As predicted, the state's indigent defense budget nearly ran dry in January of 1987, six months prior to the end of the biennium. The projected total shortfall at that time was $10 million. SIDB immediately requested an Emergency Board appropriation of $3.4 million to keep the system afloat through February.

The defense system in Oregon was near collapse at this point. Private attorneys who had been receiving indigent appointments were notified that payment would not be guaranteed for cases accepted after December 24, 1986. Contractors were assured of payment only through January 1987. Legislation which proved to be unsuccessful, was introduced by the Speaker of the House that would have mandated all Oregon lawyers to provide approximately 200 hours of pro bono services to indigent defendants every two years.

In January 1987, the Emergency Board provided a $2.7 million emergency appropriation, and in February an additional $5.1 million, intended to allow the SIDB to continue funding the state's indigent defense system through June 30, 1987, the end of the biennium. In the final analysis, the cost of providing indigent

defense during the 1985-87 biennium proved to be more than $43 million, approximately $12 million more than the original appropriation. This figure included $1.2 million worth of verified pro bono services provided by indigent defense attorneys of all types throughout the state to keep the system afloat.

When the Emergency Board was considering these urgent requests for emergency funding for the indigent defense system, the SIDB's budget request of $50 million for the 1987-89 biennium was before the Legislative Assembly. This was the first complete budget submitted by the SIDB and was based upon a number of specific assumptions:

- an average attorney cost of $35 per hour;
- a growth rate for cases of 2% per year from 1986;
- a total projected per county caseload for 1987-89 based on 1986 share of the estimated caseload;
- budgeting for limited attorney expenses in contracts;
- closer attention generally to the method of providing counsel by type of case;
- creating specialized contracts for murder and juvenile cases.

While in retrospect this budget may not seem unreasonable, its submission at the same time that the system was experiencing a fiscal crisis created a widespread perception in the Legislative Assembly that the Board was not doing enough to hold down the cost of indigent defense services. A fiscal analyst with the Legislative Fiscal Office noted at the time that the state "currently has no way of determining what it is paying for or what is driving up costs, because there is no data base that can provide that information." In spite of a number of proposed reforms in the system of administering indigent defense services, the SIDB was criticized by elements in the Legislative Assembly

for failing, during its brief history, to implement any cost cutting plans. Created in part on the basis of unrealistic expectations that it could actually reduce the cost of indigent defense services, the Board was held directly accountable for the funding crisis.

As a result, the Legislative Assembly passed HB 2869 in June of 1987 abolishing the State Indigent Defense Board and returning the responsibility for managing the indigent defense program to the State Court Administrator. The bill was signed into law by the Governor on July 18, 1987. The SCA was directed to wind down the administrative, programmatic and fiscal activities of the SIDB.

The new law established a state court indigent defense account in the general fund appropriated to the State Court Administrator to pay compensation of counsel and other expenses in connection with indigent representation. This account was designed to be separate and independent from other Judicial Department accounts. The SCA was also delegated the responsibility to monitor expenditures from the account and prepare future budget requests for the Legislative Assembly. The Legislative Assembly appropriated a total of $42.5 million for this account for the 1987-89 biennium, but initially authorized the release of only 51% of these funds for fiscal year 1987-88.

Most of the duties and responsibilities formerly assigned to the SIDB were transferred to the State Court Administrator. The new law also attempted to address many of the perceived problems in the management of the system under the Board. In one significant addition, the SCA was directed to establish cost guidelines and standards for the approval and payment of case expenses. Most importantly, SCA was given the authority to establish and oversee a new administrative unit to help manage the indigent defense program. In approving the requested administrative staff and support services, the Legislative Assembly made it clear that "this action is expected to bring about accountability

in program admnistration and provide sufficient resources for the agency to complete its study, and efficiently manage the Indigent Defense Program." Interestingly, it was acknowledged, however, that:

> . . . the Judicial Department would not be held responsible for indigent defense cost increases that resulted from criminal justice system factors over which the Department has no control. These would include case filing increases, increases in the crime rate, law enforcement and prosecution actions, and the effects of caselaw emanating from the federal and state appellate courts.

All contracts which had been in effect on June 30, 1987, for the previous biennium, were extended through July 1987 while responsibility for administering the indigent defense program was being transferred from the State Indigent Defense Board to the Office of the State Court Administrator. Although the SIDB had already begun the process of requesting proposals for contracts for the new biennium, this process was begun anew following the transition of power. In the past all contracts had been for two years, contemporaneous with the state's fiscal biennium. In the first year following the abolition of the SIDB, however, the SCA entered into eleven-month contracts with defense service providers for the period from August 1, 1987 to June 30, 1988, as a result of the Legislative Assembly releasing funds only for the first year of the biennium and explicitly directing that contracts would have a "one-year life with a new 1988-89 Request for Proposal issued after Emergency Board review in March 1988". A number of contractors actually operated for several months during this period with only letters of agreement while negotiations over the final terms of the contracts continued between them and the SCA.

Budget notes attached to the 1987-88 indigent defense budget contained a number of important additional tasks incumbent upon the Office of the State Court Administrator. The SCA was required to make a report on these activities to the Emergency

Board in March 1988 on behalf of the Judicial Department in order to obtain release of the funds for the second year of the biennium.

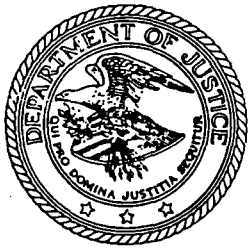
The history of the indigent defense program as it has developed in the present biennium within the SCA is explained in some detail in other portions of this report.

APPENDIX C

SITE PROTOCOL/ISSUES CHECKLIST

THE EMT GROUP, INC.

TECHNICAL ASSISTANCE REPORT



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ADJUDICATION TECHNICAL ASSISTANCE PROJECT
Technical Assistance Assignment No. 123

The Potential Impact of Prosecutorial and Court Practices and Procedures on Indigent Defense Costs in Oregon:

A Preliminary Assessment

April 1989

Consultants:

Hon. Bruce D. Beaudin
Peter Gilchrist
Kim Taylor

Prepared Under BJA Cooperative Agreement No. 87-DD-CX-K061

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ASSIGNMENT DATA SHEET

Technical Assistance No.:	123
Requesting Jurisdiction:	State of Oregon
Requesting Agency:	Supreme Court Justice Improvement Committee
Requesting Official:	F. Douglass Harcleroad
Dates of On-Site Study:	January 22-25, 1989
Consultant(s) Assigned:	Hon. Bruce D. Beaudin, Associate Judge Superior Court of the District of Columbia
	Peter Gilchrist, District Attorney Charlotte, North Carolina
	Kim Taylor, Director District of Columbia Public Defender Service
Central Focus of Study:	Prosecutor Operations

This report was prepared in conjunction with the EMT Adjudication Technical Assistance Project, under a Cooperative Agreement with the Bureau of Justice Assistance of the U.S. Department of Justice.

Organizations undertaking such projects under Federal Government sponsorship are encouraged to express their own judgment freely. Therefore, points of view or opinions stated in this report do not necessarily represent the official position of the Department of Justice. EMT is solely responsible for the factual accuracy of all material presented in this publication.

FOREWORD

Dismayed by the difficulties of providing for regular assessment of problems with the administration of criminal justice, Oregon Supreme Court Chief Justice Edwin Peterson established the Justice Improvement Committee in late 1986, a working group of representatives from the Oregon Criminal Defense Lawyers Association and the Oregon District Attorneys Association whose task is to meet regularly to assess such problems. In November 1987, F. Douglass Harcleroad, then Committee Vice-Chairman and District Attorney for Lane County, requested the Bureau of Justice Assistance-sponsored Adjudication Technical Assistance Project (ATAP) at the EMT Group, Inc., to provide guidance to the Committee in developing its agenda for addressing criminal justice needs, particularly those arising out of the increasing drug caseload in the state.

The ATAP assigned Hon. Bruce D. Beaudin of the District of Columbia Superior Court and former director of the District of Columbia Pretrial Services Agency to attend a Committee meeting in April 1988 to explore with Committee members potential areas of concern. During the course of this meeting, Committee discussions focussed upon the subject of indigent defense costs and the potential impact of district attorneys' charging practices on such costs. Subsequently, the Committee received the endorsement of the Oregon District Attorneys Association, the Oregon Criminal Defense Association, and the Chief Justice to pursue a study of this matter.

At the Committee's request, the ATAP agreed to assemble a consultant team to provide an initial assessment of the issue with the understanding that the Committee would follow-up on areas which could not be addressed within the limited resources available through the ATAP. In addition to Judge Beaudin, the study team was composed of Hon. Peter Gilchrist, presently serving his fourth term as elected District Attorney for Mecklenburg County (Charlotte), North Carolina and an instructor for the National District Attorneys Association, and Ms. Kim Taylor, Director of the District of Columbia Public Defender Service who also serves as faculty for the National Legal Aid and Defender Association. The team conducted a four day site visit January 22 - 25 at which time they met with prosecutors and defense attorneys from eight counties[1] selected by the Committee to be representative of Oregon's judicial processes. The agenda for the site visit was arranged by Mr. Harcleroad and Mr. Ross Shepard, Lane County Public Defender and Committee member, who served jointly as local coordinators for the study. In addition, because the team was based in Eugene, they also met with Judge Maurice Merten and Judge Gregory Foote of the Lane County Circuit Court. A list of those interviewed is provided in Appendix B.

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1. Listed in Appendix B, the counties included Benton, Clackamas, Deschutes, Douglas, Josephine, Lane, Marion, and Multnomah.

I. INTRODUCTION

A. Focus of the Study

For some time there has been concern in Oregon at the state and local levels about the increasing costs of administering justice, particularly in light of ever mounting increases in crime. Recently, the spotlight has again focussed on the issue of providing indigent defense representation. In September 1988, a detailed report prepared by the Spangenberg Group2 concerning the manner and cost of indigent defense representation in the state was submitted to the State Court Administrator who, by law, must petition the legislature for funds to provide state and local indigent defense services.

The present study by the Committee is designed to provide a framework for looking at the relationship between charging and other pre-trial practices of the various district attorney offices and courts in Oregon and indigent defense costs without, of course, in anyway intruding on the local control inherent in each county's approach to criminal prosecution. In keeping with this approach, the Committee identified the following issues for study:

(1) What are the charging practices of district attorneys and how do they affect the costs of the criminal justice system?

(2) How do the negotiation practices of the district attorneys affect the costs of the criminal justice system?

(3) How do indigent defense costs affect charging and negotiating practices of district attorneys?

(4) Are indigent defense contracts entered into after considering the charging practices of the district attorneys?

(5) How do negotiation policies of indigent defense contractors affect the cost of the criminal justice system?

(6) How do court procedures (e.g., appointment of counsel) affect indigent defense and prosecution costs?

Although ATAP's limited resources did not permit each of these issues to be fully explored, the study team reviewed relevant procedure and practice in the eight selected counties with prosecutors and defense attorneys3 and has prepared this report documenting their preliminary assessment. Upon review of this assessment, the Committee should

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2. The Spangenberg Group. Oregon Indigent Defense Systems Study. Draft Findings and Recommendations. September 2, 1988.

3. See Appendix B for a list of the individuals interviewed.

determine whether or not further investigation with the remaining counties in the State might be fruitful in presenting a statewide perspective. The team has also suggested additional information which, if collected regularly by prosecutor and defender offices, might provide a more systematic basis for further addressing these issues.

In preparation for the site visit, the team reviewed the following materials which Mr. Harcleroad provided:

(1) a copy of the Oregon Revised Statutes regarding plea discussions and agreements to which prosecuting attorneys, defense attorneys and trial judges must adhere; and

(2) statewide statistical information relating to District and Circuit Court caseload compiled by the State Court Administrator for 1987 and the first two quarters of 1988.

B. Study Team's Approach

There are 36 counties in Oregon, some rural and some urban. Practices in all 36 jurisdictions vary. As Peter Sandrock, President of the Oregon District Attorneys Association noted in his letter of May 23, 1988 to Chief Justice Peterson proposing this study, ". . . criminal prosecution must remain a matter of local control . . . district attorneys have a responsibility to address unique local crime problems." The challenge, however, which this diversity posed to the study team required them to examine widely diverse practices to see whether some commonality could be identified sufficient to be beneficial to the assessment underway.

Because most of the team's interviews were scheduled in Eugene, with representatives from the majority of the other counties coming to meet with them, they were able to view the prosecutor's office and the court at work in Lane County. While they are aware that things done in Lane County may not be replicated elsewhere, their observations in Lane County served as a basis for comparison with what they learned about practice in other counties through their interviews.

The report which follows documents the team's findings and recommendations.

II. ANALYSIS

The team found that both the prosecution and defense attorneys overall are not only committed to the principal of quality legal representation, but are actually providing such representation within severe financial restraints. In keeping with its charge, however, the team did identify certain prosecutorial charging and negotiation practices and current court procedures which were consistently noted as affecting the task of representation and which, if addressed, might help to further reduce indigent defense costs and allow the criminal justice system to function in a more efficient manner. These are discussed below.

A. Charging Practices

1. Screening

Screening occurs in each of the districts that the team studied and normally consists of a review by an experienced attorney of the police reports. District attorneys normally do not interview either the investigating officer or any witnesses. Limiting review to police reports is done for a variety of reasons. In the rural counties, offenses may be committed miles away from the district attorney and the officers are not available for case review before the first court appearance. Even in the urban counties, the staff available and the work to be done to file a case prior to the first court appearance appear to allow only a screening of reports before filing. Exception are in Lane County and Multnomah County, where cases that are brought to the District Attorneys' Office for direct presentment to the Grand Jury and on occasion screened by means of telephone conversations or personal interviews with investigative officers.

Interviews with victims, witnesses, and officers normally occur only immediately prior to the grand jury presentment. The interviews for Grand Jury presentation therefore are actually brief and frequently cover little more than what is needed for the Grand Jury hearing. Since only five judicial days are allowed after arrest for return of a true bill by the grand jury (or else a probable cause hearing is mandated), time available for witness interviews and case evaluations is by necessity limited. Where the pre-grand jury interviews indicate that there is either insufficient evidence to proceed or that additional information is necessary to evaluate the case, the district attorneys usually withdraw the case from the grand jury.

Consideration should be given by the district attorneys to more extensive case evaluation to permit weak cases to be screened-out or pled to lesser charges and simultaneously to identify early, cases where there is a need to further develop evidence and secure witnesses that will be needed for trial. Better statistical information would

permit an evaluation of whether there is justification to expand the screening process to allow the district attorney to adequately interview the investigators, victims, and witnesses before filing or at least before the Grand Jury presentation.

To permit the district attorneys to do early and extensive screening either prefiling or pre-indictment, more resources may well be required and this issue merits further analysis.

2. Initial Charging Practices[4]

Despite limited staff and other resources, district attorneys in the eight counties studied are able to issue charging documents in an extremely high percentage of cases. However, the study team found that in the vast majority of those cases additional screening by district attorneys could be conducted. As already noted, in many counties, district attorneys candidly discussed their practice of making charging decisions without the benefit of discussion with complaining witnesses or the arresting officer to determine the relative strengths and weaknesses of a given case. Defendants are simply charged with offenses based on a review of incident reports delivered to the prosecutor's office. As a direct consequence of this practice, only an extremely small percentage of cases are being dismissed at this early stage. Once the case is charged, defense attorneys are appointed and cases are prepared that eventually may be found to have little or no merit. In such cases, resources are, therefore, committed to cover defense costs that might have been avoided had the case not entered the system at this initial stage. While no information was readily available to the study team regarding the number of cases that might be disposed of early and with minimal if any expenditure of indigent defense resources, this issue merits further study.

3. Statutory Provisions for Reduction of Charges in Certain Offenses

The Spangenberg study indicates that, between 1982 and 1986 the volume of indigent cases increased by 214% to nearly 140,000 cases. In 1987, the legislature, in an attempt, in part, to lower the number of cases requiring counsel, provided that certain misdemeanors could be reduced to violations. There appears to be some movement by prosecutors toward reducing certain charges but no authoritative data was obtained in this regard.

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4. It was reported by some defense attorneys that in a few counties prosecutors appear reluctant to reduce a charge of aggravated murder, even in weak cases. This issue should be explored further.

4. Use of Diversion Programs

The study team learned that, apart from the diversion program which is authorized by statute for first offender drunk drivers, diversion programs for both first offenders and misdemeanants are rarely, if ever, used. An array of formal diversion programs needs to be established and then funded with necessary staff and resources. Such programs, by design, can divert significant numbers of less serious cases out of the court system, thereby reducing the high volume of cases that can cause costly delays in the district courts. Moreover, these programs have a substantial impact on reducing defense costs, since diversion decisions can be made early in the process before significant attorney hours have been invested in pretrial preparation.

B. Negotiation Practices

1. General Comments

Through its interviews, the team confirmed that district attorneys and defense counsel regularly engage in the practice of negotiating guilty pleas, a cost-efficient method of resolving cases. While the team found that, primarily in misdemeanors, plea offers are relayed to defense counsel close to the time that a case enters the system, these offers are generally regarded by both sides as "preliminary" offers and normally based only on the police reports received by the district attorney's office. While an exceptional job is being done in making early written offers, the district attorneys need more and better information upon which to make the offers. Meaningful plea offers are often not made until relatively late in the process, once the district attorney has had an opportunity to evaluate the case carefully. If these "meaningful" offers could be communicated shortly after a case enters the system, fewer indigent defense dollars would have to be expended.

In the larger counties, the team found that district attorneys, faced with a high volume of cases, are actively seeking innovative methods to resolve cases in a cooperative and cost-efficient manner. One example of this cooperation is the "Arraign-O-Rama" -- or "Let's Make A Deal" courtroom in Lane County5. Briefly, -- and with apologies to the officials of Lane County for our characterization -- the process we witnessed exemplifies a herculean effort by judges, prosecutors, and defense attorneys to process as many cases as possible at minimal cost. Prosecutors offer arrestees a chance to

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5. While it is not our intention to single out any process as "good" or "bad" since such qualitative judgments should more properly be exercised by the local milieu, the "Arraign-O-Rama" Court is indicative of what happens around the state as local officials attempt to make maximum use of existing resources which are most likely inadequate to meet today's needs.

dispose of minor offenses at their first appearances by entering pleas of guilty. Under this program, meaningful plea offers are made at arraignment to defendants who do not assert their right to counsel. Once the defendant requests an attorney, the plea offer is raised. For these guilty plea purposes, charges are reduced to the minimum acceptable providing the defendant agrees to waive counsel and plead guilty. However, as noted, should the defendant request counsel or refuse the plea, the anti will be "upped" and succeeding offers will be less generous.6 Certainly, there is plenty of subtle pressure for the defendant to plead guilty and avoid the risk of more serious charges. At any rate, one of the results of this practice is that many cases are disposed of very early in the process without any indigent defense costs being incurred.

Clearly, the design of this program is to encourage defendants to admit their guilt at an early stage and to reduce the costs of indigent defense by precluding the appointment of counsel. Such a program is also evidence of the substantial cooperative effort of the system to cooperate in its disparate parts so as to permit the processing of criminal cases that could not possibly be otherwise handled with the resources allocated absent such extensive cooperation. Such attempts are, indeed, laudable; however, a program such as "Arraign-O-Rama also poses potential constitutional implications by inappropriately impacting on a defendant's Sixth Amendment right to counsel. Moreover, in the event that a defendant asserts his or her right to counsel, he or she is then faced with a poorer plea offer. The net result may be that the defendant will then opt to take the case to trial. Clearly, in that situation, there is also a potential for increased cost in a category of cases that could and should be resolved short of trial.

2. Early Written Plea Offers

All the District Attorneys' offices appeared to be doing an excellent job of sending early written plea offers to defense counsel on felony cases. Two offices also prepared early plea offers on some misdemeanors. The practice of early written plea offers is an excellent one and many resultant benefits can be seen. However, district attorneys, deputies, and indigent defenders all related numerous instances where inappropriate plea offers were made by the State. While the offers appeared reasonable based upon the police reports alone, follow-up investigation and interviews often revealed case deficiencies which made the plea offers unreasonable. Early and thorough case evaluation by the State will further permit appropriate plea offers to be made for defense consideration.

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6. It is significant that this first offer is based solely on prosecutorial review of an arrest report and prior criminal record and may be one that is even less serious than might otherwise be indicated or even more serious than might be required.

3. Plea Cut-Off Dates

As noted above, prosecutors generally put into writing their formal plea offers based on police arrest reports. While individual prosecutors may call arresting officers on occasion to get more facts, the norm seems to be to make the offer based on a review of the arrest report. Under Uniform Trial Court Rule 7.010 (the 35 day rule)7 the defendant has 35 days to consider and accept or reject the offer. After the 35 days the case is deemed ready for trial, the offer is withdrawn if not accepted, and all plea agreements and negotiations are supposed to be concluded.

The team found, however, that in spite of Rule 7.010 and the 35-day call plea negotiations continue beyond the 35 days until cases are actually called for trial in many counties. While the intent of Rule 7.010 is to force both sides to complete discovery, evaluate their evidence and file all necessary motions early, early resolution seems to be the exception, rather than the practice. In some counties, the 35-day call never occurs and in others it is merely a step in the process where neither side expects to accomplish any of the required tasks. If a hearing were to be set before the judge who will ultimately try or dispose of the case, it might be easier to measure performance by counting the number of cases actually resolved or pled on or shortly after the 35-day call.

We are told that when Rule 7.010 was initially implemented a good deal was accomplished. Defense investigations were completed, and many cases were disposed of within that time. It seems that today, however, the rule is more honored in its breach and, while it is "acknowledged", so is the reality that on trial dates plea offers are reinstituted and a growing number of cases await final disposition by plea until the day of trial. Judges and counsel are forced to reopen the bargaining in order to maintain a decently current docket.

4. Use of Civil Alternatives for Case Resolution

A number of defense attorneys interviewed indicated that, in many counties, the district attorneys oppose the use of civil alternatives for resolving cases. Such alternatives could permit the district attorney to dismiss a case once the defendant had complied with whatever civil sanctions were imposed. For example, some attorneys interviewed reported that complainants sometimes indicate their willingness to accept restitution instead of proceeding with the prosecution; however, this method of case disposition, although cost-efficient, is routinely opposed by district attorneys. The reasons

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7. See Section C(1) below.

for prosecutorial reluctance to use civil alternatives for case dismissal should be explored.

5. Sentence Certainty As Part of the Plea Offer/Agreement

It was also reported that some defendants are reluctant to enter into plea agreements when the sentence under the agreement is uncertain. Although there exists statutory authority to "bind" a judge in plea agreement, attorneys interviewed indicated that it is becoming increasingly difficult to find a judge who is willing to enter into such an arrangement. Certainty of the sentence can be an effective tool for encouraging resolution of cases through guilty pleas, and without such certainty, the potential for resolution of cases short of trial is decreased.

C. Court Procedures

1. The "35-day" Rule

As part of the study, the team conducted preliminary interviews concerning court procedures that might tend to increase indigent defense costs. The primary procedure identified in these interviews was the "35 day" rule. This rule, which, as previously described, is designed to set a deadline by which all plea negotiations are to be concluded, is, as already noted, apparently honored primarily in the breach. Most attorneys indicated that the rule is not viable because the time limits are unreasonable. Although in an attempt to follow the rule, courts generally set hearings on the 35th day to ascertain the status of the case, the parties often require extensions of time before being able to make a determination regarding a viable plea agreement. The team learned that there are numerous cases being scheduled for court appearances for the 35-day call and for pretrial conferences where there is little expectation by the state or the defense that anything will occur.

A possible solution would be for teams of local court officials, perhaps supplemented with outside resources, to devise plans whereby the number of required hearings was reduced but specific expectations were established as to what would be accomplished at each hearing. The net result of the current situation is that there is not only no cost reduction achieved but, in reality, there remains the potential for actually increasing costs because of the necessity for setting additional court hearings.

2. Judicial Involvement in Pretrial Conferences

In some counties, judges set pretrial conferences approximately two weeks before a scheduled trial date. At these hearings, parties indicate if a case will proceed to trial or if it will be resolved short of trial. In the counties where judges take an active role at these hearings, the team found that cases may more often be resolved short of trial.

3. Impact of Judicial Involvement in Other Aspects of the Pre-Trial Process

Many lawyers feel that if judges enter the criminal case process at some date prior to the trial date -- either at the end of the 35-day period or some other set time -- cases would move more quickly just because a judge would look to them for accountability. Judges, too, believe that if they are more active earlier, more cases can be disposed of earlier. By statute (135.432) judges are permitted and encouraged to participate in plea negotiations.8

In Lane and Multnomah Counties, the District Attorney's office screens misdemeanors and presents a written plea offer to the defendant at a very early stage. The public defender in Lane County has an attorney on standby at in-custody arraignments to consult with defendants without formal assignment of the case to the office. If the proposed offer by the state appears reasonable to the standby public defender, these cases are often resolved immediately. This practice seems to be a good one and very cost effective, both to the district attorney and public defender as well as to the court. Further evaluation of this procedure would appear to be in order as it offers promise to all concerned. In Lane County, the presiding judge awards a one-third or a one-half credit to the Public Defender for pleas taken on this basis and thus underwrites the costs for providing the standby public defender.

4. Scheduling of Motion Hearings

During the course of its interviews, the team learned that, in many counties, judges are reluctant to set hearings to resolve motions before the day of trial. In many cases, defense attorneys indicated that even when they report to the court that a motion will be dispositive of the case, the judge will set the hearing on the trial date. This practice certainly potentially prolongs the time that a case remains in the system and might easily be changed in order to reduce costs.

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8. See Appendix C.

D. State Criteria for Allocating Indigent Defense Resources

1. Affect of Indigent Defense Billing Policies on Prosecutor Charging Practices

Since responsibility for paying for indigent representation has been lodged with the State, it falls to the State Court Administrator to prepare the state budget for public defender services. It is our understanding that this budget is based on a case number justification presented by various defender offices. Our rather hurriedly conducted visit led us to question this case method of budgeting; but in any event, it is clear that the number of cases handled -- by plea, trial, or other disposition -- directly affects indigent defense costs. Certainly the time spent on one type of disposition (plea) is vastly different from time spent on another (trial). The desirability of a case-based budget justification is therefore questionable.

The team inquired as to whether the state consolidated appropriate offenses in a single bill of indictment with multiple charges or whether multiple bills of indictment were brought. The issue is important because normally indigent defenders bill based on numbers of cases. All of the district attorneys interviewed were aware that if they did not join related offenses in a single bill of indictment multiple case numbers would be created thereby permitting indigent defense counsel to do the same amount of work, yet "count it" or bill it as multiple cases. The consensus of the team was that, other than trying to join appropriate charges, most of the district attorneys' offices did not consider that the indigent defense billing practices affected their charging or negotiation practices. It was also the consensus of the team, that, generally, the district attorneys attempt to consolidate wherever the law permits joinder. Occasionally, motions are filed by the defense for severance of offenses but this did not seem to be a significant problem. Apparently, proposed legislation will further expand permissible joinder so even this issue may become moot. Thus, consolidation or lack thereof does not appear to contribute significantly to the cost of criminal defense.

2. Affect of District Attorney Charging Practices on Indigent Defense Contracts

The team obtained no information as to whether or not the State Court Administrator considered the local district attorneys' charging practices in the indigent defense contracting process and neither the district attorneys nor the indigent defense representatives interviewed indicated that they were aware of any of the contracts reflecting local district attorneys charging practices. This issue, however, merits further investigation.

An examination of the interaction between prosecutor charging practices and indigent defense costs must also acknowledge the quality and cost of defense representation. There is no need to repeat here what has been set out at length in the Spangenberg study. Suffice it to say that a reexamination of the amounts to be paid to contract attorneys and the value of implementing statewide public defender offices requires an assessment of a number of issues beyond the scope of the present effort.

III. RECOMMENDATIONS

The recommendations which follow address particular areas of improvement identified by the technical assistance team during the course of its study. While a number of these recommendations may require the commitment of additional staff and support resources to implement, their impact on improved justice system operations and more efficient use of existing judicial system resources should make them highly cost beneficial.

A. Early and More Thorough Prosecutorial Screening Should be Undertaken Whenever Possible and District Attorneys Should Institute the Practice of Interviewing Officers in Person Before Issuing Charging Documents.

As noted, a prosecutor's review of police arrest reports generally forms the basis for such decisions as initial charge, initial plea offer, diversion, etc. A face to face (or telephone) consultation with the arresting officer and/or the complaining witness obviously takes more time, yet, just as obviously, leads to better and more accurate information. With that kind of information in hand, a prosecutor would be in a better position to:

- assess diversion potential
- explore civil alternatives to prosecution, e.g., restitution, etc.;
- reduce (or increase) charges;
- employ the use of a violation in lieu of criminal prosecution;
- dismiss nonprosecutable cases; etc.

Adequate resources should be provided to permit prosecutors to perform more complete screening at an earlier stage in the process of a given case. Such screening should result in earlier dismissals. District attorneys should not wait until the eve of trial to evaluate the relative worth of a case because of the inefficiency of this practice.

Early screening is particularly important in capital cases which, because of their complexity, usually require the appointment of co-counsel. If capital cases which are weak can be recognized early, then defense costs can be allayed.

Again, the Spangenberg study at p. 31 alludes to the factors listed above as being worth the costs attendant to early screening.

B. As a Method of Screening Cases, the District Attorneys Might Consider Conducting Preliminary Hearings in Appropriate Cases

The use of preliminary hearings should be considered as one method of screening for appropriate cases. To prepare for a preliminary hearing, district attorneys and defense attorneys necessarily take a careful look at a case and make determinations regarding its

strengths and weaknesses of the case at a relatively early stage in the process. Weak cases can be dismissed by the Court or the District Attorney before significant attorney hours have been invested.

C. **Diversion Programs Should Be Utilized for First Offenders and Misdemeanants.**

Since the automatic diversion provisions of the drunk driving statute have successfully diverted large numbers of cases out of the system, the study team would recommend that the Legislature consider developing additional automatic diversion provisions for first offenders and specific misdemeanor offenses. Adequate staff and resources should also be provided to implement these programs once they are established.

D. **The Use of Early (at first appearance) Written Plea Offers Should be Considered, as Well as an Extended Time Within Which to Exercise the Option To Plead Guilty.**

The team recommends that district attorneys should make more meaningful plea offers earlier in the stage of a case. Preferably, such an offer could be made at arraignment with a reasonable period of time for the defendant to consider the plea and accept it.

In the larger counties where the district courts are dealing with high volumes of cases, innovative plea arrangements may be appropriate. The team would recommend that under the "Arraign O Rama" program, district attorneys should continue to make meaningful plea offers at the time of arraignment; however, the terms of the offers should not worsen if the defendant asserts his right to counsel. Another option which could avoid the constitutional problems of this program, would be to make plea offers that reduce the misdemeanor to a violation. Through that method, a defendant would not need the assistance of counsel since he would not be required to make a decision that could result in a criminal conviction on his record.

Both Lane and Multnomah Counties have experienced much success with the practice of offering early pleas. Obviously, the more cases that are disposed of earlier the less the cost to all. Subject to improving the quality of information available when the offer is made and extending the period of consideration for a short time (24 hours to a week) the practice of providing early written plea offers should result in the disposition of many cases at the earliest possible time.

Our reason for suggesting some extension beyond the date of initial appearance for consideration of the plea offer is to permit informed decision making. While the statute seems to imply that pleas of guilty may be withdrawn rather easily, we were concerned that existing practice permitted some uninformed decisions to be made. It would seem appropriate to permit at least a short time to pass so that a defendant could consult briefly with counsel.

E. **If a Complaining Witness Would be Satisfied With a Civil Alternative for Resolving the Case, Such as Regular Restitution Payments From the Defendant, the District Attorneys' Offices Should Not Adopt a Policy Opposing Such Resolution.**

Disposition of a criminal matter by way of a civil alternative should not be ruled out uniformly for all cases. Clearly, the appropriateness of a civil sanction to resolve a criminal matter would depend upon the nature of the case and the use of such a sanction would, of course, rest solely in the discretion of the district attorney.

F. **Statutory Provisions Enabling Judges to Be Bound in Their Sentencing Determinations Under a Guilty Plea Agreement Should be Utilized.**

Such practices would encourage a greater number of defendants to enter into guilty plea agreements, which will reduce indigent defense costs.

G. **As Long as the Status Quo Exists, to the Extent Possible, Prosecutors Should Continue to Charge Multiple Offenses in One Bill of Indictment Rather Than in Several.**

Prosecutors and defenders agreed that the prosecutors generally consolidate multiple offenses in one bill of indictment (case). When necessary, severance motions are filed. As long as defense budgets are based on cases handled, the fewer the cases the lower the budget. While we believe this system of budgeting costs should be evaluated as the Spangenberg study recommended, under the present system, multiple charges indicted in one bill of indictment is the most cost effective insofar as allocating defense costs.

H. **Uniform Trial Court Rule 7.010 Should Be Revitalized by Permitting (requiring) a Judicial Event Such as a Status Call to Take Place.**

Although interviews indicate that the original intent of Rule 7.010 was good, as time has gone by and caseloads have grown, the 35-day period appears to have become an artificial and meaningless event. The intervention of a judge who can pressure both prosecution and defense to assess their respective cases and to dispose of a case by plea, if appropriate, can inject new life into the rule. Where possible, the judge ultimately responsible for the trial should be the one to conduct such a hearing. If necessary, cases could be referred to a non-trial judge for appropriate negotiation.

I. **A Further Study Should be Conducted to Determine Whether the 35-day Limit Provides a Viable Time Within Which Parties Can Make Realistic Determinations Regarding the Status of a Case.**

Suggestions were made during the course of this study that the rule be extended to 60 days since practice had demonstrated that the 60-day limit was a workable period of time to make such decisions for incarcerated defendants.

J. **Judges Should Consider Instituting Pretrial Conferences at a Time Certain Before the Date of Trial in Order to Determine if a Case will Proceed to Trial or be Resolved by Way of a Plea Agreement.**

The team further recommends that judges become active participants in these hearings.

K. **Dispositive Pretrial Motions Should Be Litigated at a Hearing Before the Scheduled Trial Date.**

This practice will help to reduce the number of cases that linger in the system as well as avoid the need for both prosecutors and defense attorneys to prepare for the trial of cases which will ultimately be disposed of by pre-trial motion.

L. **Prosecutors Should Agree to Establish a Statewide Management Information System With a Minimum List of Data Requirements to Permit Accurate Assessment of Various Screening and Plea Negotiation Practices.**

For many valid reasons, <u>all</u> data contained in prosecutors' offices should not be made public. Without a detailed picture of when, where and how cases are closed, however, it is difficult to determine what works and what doesn't. We believe that it would be of benefit to all prosecutors and to others involved with the criminal justice process in Oregon if the following information were kept (preferably as part of an automated system):

(1) Disposition Information

- (a) rejected - prior to arrest/after arrest
- (b) dismissed - with prejudice/without prejudice
- (c) plea
  - as charged/reduced/or to fewer charges
  - felony/misdemeanor/violation
- (d) Trial
  - felony/misdemeanor
  - guilty as charged/guilty of reduced or less than all charges/not guilty
- (e) Diversion (drug/first offender/etc.)
- (f) Probation without verdict/conditional discharge

(2) Activity Dates (date case opened/date case closed)

(3) Type of Attorney Representation (Public Defender/consortium/Assigned Counsel)

Implementation of this recommendation may require provision of equipment and staff resources in some of the state's prosecutorial offices to maintain an information system such as that proposed in this report. However, the benefits which such a system can provide in terms of caseload analysis and planning far outweigh the costs involved.

M. **Indigent Defense Service Offices Should Also Regularly Gather Information to Permit Assessment of the Potential Relationship Between the Costs of Services Provided and Prosecutorial and Court Procedures.**

Indigent Defense Service Offices should gather information similar to that recommended for the prosecutor offices as well as information regarding the phases of the criminal case process which receive the greatest concentration of resources. Implementation of this recommendation, which may require provision of some additional resources, will provide indigent defense offices with information to permit analysis of their caseload and resource utilization essential for more efficient future planning.

IV. SUMMARY

The recommendations submitted in this report are, in large part, a response to very rapid caseload and population growth which have called into question the efficacy of certain procedures which had heretofore contributed significantly to expeditious case process in Oregon. In light of the current fiscal and other pressures which confront the justice system generally and the provision of indigent defense services particularly, this is an opportune time to take a fresh look at what is working and what may need revamping.

A number of the recommendations submitted are designed to provide more meaningful case information at an earlier stage in the process so that those cases which do not merit full scale judicial system processing are identified as early as possible. Other recommendations focus on improving the plea negotiation process and alternative disposition resolution mechanisms with the overall goal of conserving judicial, prosecutorial and defense resources. Many of these recommendations will require funds to establish necessary programs and procedures and to provide adequate staff support for implementation. These costs, however, are far outweighed by the benefits which can accrue to the Oregon criminal justice process and to the savings in criminal justice system resources that should result. None the least of these benefits will be a reduction in the expenditure of resources for cases which can be disposed of early and routinely so that more resources can be available for those cases which merit substantial prosecutorial and defense effort.

APPENDICES

A. (1) Letter from Peter Sandrock, Jr., President of the Oregon District Attorneys Association to Chief Justice Edwin J. Peterson Describing the Proposed Study, May 23, 1988.

(2) Letter from Chief Justice Peterson to Peter Sandrock, Jr., Supporting the Proposed Study, May 27, 1988.

B. List of Persons Interviewed and Counties Represented During the Site Study

Appendix A

EXECUTIVE COMMITTEE:
PETER F. SANDROCK
President
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OREGON DISTRICT ATTORNEYS ASSOCIATION
JUSTICE BUILDING
SALEM, OREGON 97310
TELEPHONE (503) 378-6347

CAROLYN NORRIS
COORDINATOR

RECEIVED
MAY 26 1988
LANE COUNTY
DIST. ATTORNEY

May 23, 1988

The Honorable Edwin J. Peterson
Chief Justice
The Supreme Court
Salem, OR 97310

Re: Study of District Attorneys' Charging Practices

Dear Chief Justice Peterson:

The Executive Committee of the Oregon District Attorneys Association believes that it would be helpful for the EMT Group to conduct a study of the charging practices of district attorneys.

The Executive Committee also believes that criminal prosecution must remain a matter of local control. As independently elected officials, district attorneys have a responsibility to address unique local crime problems. Consequently their practices and procedures will vary according to the needs and desires of their communities.

Keeping in mind the fundamental importance of local control, the Executive Committee feels the following issues should be studied:

1. What are the charging practices of district attorneys and how do they affect the costs of the criminal justice system?

2. How do the negotiation practices of the district attorneys affect the costs of the criminal justice system?

3. How do indigent defense costs affect charging and negotiating practices of district attorneys?

4. Are indigent defense contracts entered into after considering the charging practices of the district attorneys?

5. How do negotiation policies of indigent defense

contractors affect the cost of the criminal justice system?

6. How do court procedures (e.g., appointment of counsel) affect indigent defense and prosecution costs?

If the ODAA/OCDLA Committee approves, I will ask Doug Harcleroad, as Committee chair, to make arrangements with the EMT Group for the technical assistance to conduct the study.

Very truly yours,

Peter F. Sandrock, Jr.
President

cc: Michael T. Dugan
F. Douglass Harcleroad
Michelle A. Longo
John Potter
Ross M. Shepard

THE SUPREME COURT
Edwin J. Peterson
Chief Justice

Salem, Oregon 97310
Telephone 378-6026

May 27, 1988

RECEIVED
JUN 1 1988
LANE COUNTY
DIST ATTORNEY

Peter F. Sandrock, Jr.
President
Oregon District Attorneys Association
Benton County Courthouse
120 NW Fourth
Corvallis OR 97330

RE: Study of District Attorneys Charging Practices; Your Letter of May 23, 1988

Dear Peter:

I was pleased to receive your letter of May 23, 1988.

Considering the sensitivity of this subject to many district attorneys (see the second paragraph of your letter), this is a courageous (but appropriate) step for your association to take.

I will assist you in every way possible, for the study will impact other parts of the criminal justice system. If there is one thing I have learned about government, it is that no department of government operates in a vacuum. The six areas of inquiry listed in your letter reflect careful consideration of the role of district attorneys in the criminal justice system. Others (such as the Judicial Department, Corrections, Probation, and the Criminal Defense Bar) owe you complete cooperation in this endeavor.

Good luck to all of us.

Sincerely,

Edwin J. Peterson
Chief Justice

EJP:jmg/3988M

cc: Michael T. Dugan
F. Douglass Harcleroad
Michelle A. Longo
John Potter
Ross M. Shepard
William Linden
Kingsley Click

APPENDIX B

List of Persons Interviewed January 11-25, 1989 and Counties Represented

I. Circuit Court Judges

Maurice Merten (Lane)
Gregory Foote (Lane)

II. Prosecutors

F. Douglass Harcleroad (Lane)
Peter Sandrock (Benton)
Jim Hunt (Lane)
Bob Gorham (Lane)
Dale Penn (Marion)
Tom Bostwick (Marion)
Bob Thompson (Josephine)
Jack Banta (Douglas)
Mike Dugan (Deschutes)
Mike Schrunk (Multnomah)
Jim O'Leary (Clackamas)
Johb Bradley (Multnomah)
Laurie Abraham (Multnomah)
Wayne Pearson (Multnomah)
Gayle Brooks (Multnomah)

III. Defenders and Private Attorneys

Dick Smurthwaite (Lane)
Kathy Wood (Benton)
Ross Shephard (Lane)
Jim Shephard (Lane)
Jim Hennings (Multnomah, Clackamas, Washington)
Steve Rich (Josephine)
Bruce Tower (Douglas)
Tom Crabtree (Deschutes, Jefferson and Crook)
H. John Potter (OCDLA)

IV. Counties

Benton
Clackamas
Deschutes
Douglas
Josephine
Lane
Marion
Multnomah

OREGON JUDICIAL DEPARTMENT POLICY STATEMENT			
Volume: 1	Section: 02	Legal Authority: ORS 151.430(5) & (6)	
Chapter: 13	Page 1 of 40	Internal Control Reference:	
CHAPTER TITLE: Indigent Defense Program			Issue Date: 11/8/90
SUBJECT: Indigent Defense Payment Policies and Procedures			Revision No.: 2 Revision Date: 4/16/92
ORIGINATING UNIT: Indigent Defense Services Division		Date 12/14/89	Approved: [signature] Date 4-14-92

PURPOSE: To establish indigent defense payment policies and procedures. These include an attorney fee schedule and case expense guidelines. The schedule and guidelines apply to the indigent defense costs that the State Court Administrator must pay from state funds under ORS 151.450.

TYPE: Mandatory Policy - A policy statement that all personnel of the Judicial Department are required to follow unless the State Court Administrator authorizes specific exceptions in writing.

EFFECTIVE DATE: February 1, 1991, (original and first revision). May 15, 1992, (second revision).

AFFECTED PERSONS IN OJD: All judicial officers and all Judicial Department employes involved in indigent defense.

POLICY:

The State Court Administrator (SCA) adopts these payment policies and procedures pursuant to:

1) ORS 151.430(5), which requires SCA to establish an attorney fee schedule; and

2) ORS 151.430(6), which allows SCA to establish:

   a) cost guidelines for case expenses; and

   b) standards for the approval and payment of compensation and expenses incurred in the defense of indigent persons that SCA is required to pay under ORS 151.450(1) and (2).

SCA has sole discretion to allow exceptions to the attorney fee schedule.

Subject to the procedures required by this policy statement, courts have discretion to allow deviations from the case expense guidelines except for:

1) court reporter services; and

2) out-of-state counsel.

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Exhibit 1 - Indigent Defense Provider's Fee Statement/Certification, Instructions, and Codes

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Exhibit 3 - Final Certification on Reconsideration

1. SUMMARY OF ATTORNEY FEE SCHEDULE AND CASE EXPENSE GUIDELINES

1.1 Summary of Attorney Fee Schedule

A. Noncapital cases:

1) Appointments before July 1, 1990, at $30 per hour.

2) Appointments between July 1, 1990, and May 31, 1991, at $35 per hour.

3) Appointments June 1, 1991, and thereafter at $40 per hour. Section 3.1.A.

B. Capital cases:

1) Appointments before July 1, 1990, at $45 per hour for lead counsel, $30 per hour for co-counsel.

2) Appointments between July 1, 1990, and May 31, 1991, at $50 per hour for lead counsel, $35 per hour for co-counsel.

3) Appointments June 1, 1991, and thereafter at $55 per hour for lead counsel and $40 per hour for co-counsel. Section 3.1.B.

C. Nonresident counsel: As above, unless nonresident counsel's state has higher rate. See "Summary of Case Expense Guidelines" below, Section 5.5.H.

1.2 Summary of Case Expense Guidelines

A. Overhead expenses are not reimbursable absent extraordinary circumstances and preauthorization. Section 5.1.

B. Out-of-pocket expenses are reimbursable. For amounts over $25, receipts and invoices are required. Section 5.2.

C. Extraordinary expenses, which must be preauthorized by written court order, listed in alphabetical order:

1) Court reporting: $2.50 per page for the original transcript, 25¢ per page for each copy. Section 5.5.A.

2) Forensic: $75 per hour, which includes overhead and routine travel. Section 5.5.B.

3) Handwriting analysis: $150 per hour. Section 5.5.C.

4) Interpreters: $25 per hour. Section 5.5.D.

5) Investigators: $25 per hour, some expenses covered. Section 5.5.E.

6) Law clerks, legal assistants, paralegals: $10 per hour. Section 5.5.F.

7) Medical/psychological experts: examination, up to $250; report, $75; testimony, $60 per hour up to $240 total; consultation with counsel, $60 per hour. Section 5.5.G.

8) Nonresident attorney: Section 5.5.H.

9) Polygraph: examination and report, $200. Section 5.5.I.

10) Secretarial: $10 per hour. Section 5.5.J.

11) Travel expenses for providers, excluding nonexpert (lay) witnesses. Section 5.5.K.

2. APPOINTMENT OF COUNSEL FOR INDIGENT PERSONS

Appointment of counsel is subject to ORS 135.050, 135.055, 151.430 to 151.480 and to applicable indigent defense contracts. See, e.g., ORS 135.045. The court otherwise has discretion to appoint counsel from among attorneys qualified to handle the particular case under the qualification standards SCA has adopted.

2.1 Qualification Standards for Appointed Counsel

Pursuant to ORS 151.430(3), SCA has adopted qualification standards for counsel appointed to represent indigent persons at state expense. (Volume 1, Chapter 13, Section 1, OJD Policy Statement.)

2.2 Appointment Agreement

By accepting an appointment to represent an indigent person, counsel agrees to abide by the payment policies and procedures in this policy statement except as expressly provided otherwise in an indigent defense services contract.

SCA has sole discretion to allow exceptions to the attorney fee schedule. Courts have discretion to allow deviation from the expense guidelines only as provided in this policy statement.

Courts have no statutory authority to authorize payment from the indigent defense fund for any exception or deviation from the attorney fee schedule or case expense guidelines except as permitted by these compensation policies and procedures. SCA will otherwise authorize payment for compensation and expenses in the amount(s) that:

1) the court has certified as reasonable and necessary, and

2) SCA determines are properly payable from the Indigent Defense Account.

2.3 Appointment of Counsel

Appointments made under an indigent defense services contract are subject to that contract, pursuant to ORS 151.460. Those appointments are called contract appointments or contract cases.

Appointments made other than pursuant to an indigent defense services contract are called assigned counsel appointments or cases. These appointments are assignments to individual attorneys, not to firms. The individual attorney is held responsible for the case to which he or she is assigned. A contract attorney appointed to cases outside the contract is assigned counsel under this policy statement.

Indigent defense funds will compensate assigned counsel for time spent on a case by attorney associates under the assigned attorney's supervision only to the extent the court has preauthorized this arrangement by written court order.

In requesting preauthorization from the court, the assigned counsel shall describe in detail:

1) the type(s) of legal services the associate would provide; and

2) how the time expended by an associate will reduce the time that assigned counsel will need to expend without increasing the total cost to the state.

Assigned counsel will supervise and have full responsibility for the services performed by an associate. Assigned counsel may not delegate those functions that require the ability and experience for which counsel was assigned, including the handling of evidentiary hearings, trials, or oral arguments.

2.4 Appointment of Co-counsel

A. Circumstances Supporting Appointment

A court has discretion to appoint co-counsel when the court finds that appointment is reasonable and necessary considering both the circumstances of the case and lead counsel's circumstances and needs. Lead counsel must move the court to appoint co-counsel and must file a supporting affidavit that explains why the appointment is reasonable and necessary, including any overall anticipated cost savings.

As a general policy, however, SCA discourages appointing co-counsel except in:

1) capital cases; or

2) complex or lengthy murder or serious felony cases when

   a) qualified lead counsel would not be able to take the case unless co-counsel were appointed, e.g., lead counsel is a sole practitioner and the length or complexity of the case would require lead counsel in effect to close a going practice; or

   b) no qualified lead counsel is available within the area, and appointment of co-counsel would help local counsel obtain experience to qualify as lead counsel for future appointments of this type.

Compensation of co-counsel is limited by the cap on hours set in paragraph 2.4.B. below, subject to subsequent modification by court order as provided below.

B. Caps on Co-counsel Hours

The court order appointing co-counsel should set a limit on the number of co-counsel hours that the court will certify for payment.

Unless the court approves in writing a higher cap, SCA will not pay co-counsel for more than 300 hours in a capital case or more than 150 hours in any other case.

Lead counsel may move the court for an order

1) allowing co-counsel to exceed the applicable cap on hours, and

2) setting a new cap that the court finds reasonable and necessary.

Lead counsel must submit a motion and supporting affidavit specifically stating the compelling circumstances that justify exceeding the cap established by this policy statement.

3. FEE SCHEDULE AND PAYMENT OF ATTORNEY FEES FOR ASSIGNED COUNSEL

3.1 Hourly Attorney Fee Schedule

Hourly rates are determined by the date counsel was appointed, not by when services were rendered.

A. Hourly Fee Schedule--Noncapital Cases

Except in capital cases or as otherwise expressly authorized by the SCA, attorney fees for assigned counsel are limited to the following hourly rates for lead counsel, co-counsel, or associate counsel time.

1) For appointments before July 1, 1990: $30 per hour.

2) For appointments between July 1, 1990, and May 31, 1991: $35 per hour.

3) For appointments June 1, 1991, and thereafter: $40 per hour.

This rate applies to both the remand and trial of juveniles charged with aggravated murder and remanded to adult court because statute prohibits the death penalty in those cases.

B. Hourly Fee Schedule--Capital Cases, Adult Defendants

Attorney fees at trial and on appeal in capital cases involving adult defendants are limited to:

1) For appointments before July 1, 1990:

- $45 per hour for lead counsel.
- $30 per hour for co-counsel and associate counsel, subject to the cap on hours set by this policy statement as amended by court order.

2) For appointments between July 1, 1990, and May 31, 1991:

- $50 per hour for lead counsel.
- $35 per hour for co-counsel and associate counsel, subject to the cap on hours set by this policy statement and as amended by court order.

3) For appointments June 1, 1991, and thereafter:

- $55 per hour for lead counsel.
- $40 per hour for co-counsel and associate counsel, subject to the cap on hours set by this policy statement and as amended by court order.

3.2 Exceptions to Fee Schedule: Request for Increased Hourly Fee or for Interim Payments

A. In General

SCA may allow an exception to increase the hourly attorney fee or for interim payments where:

1) counsel shows compelling circumstances, and

2) SCA finds that no feasible alternative exists.

In no case will SCA allow an exception to increase the hourly attorney fee to more than the rate for lead counsel in capital cases.

B. Compelling Circumstances

Compelling circumstances include, but are not limited to circumstances that

- would impose substantial financial hardship on counsel because of the anticipated length or complexity of the proceedings;
- establish that an increased hourly fee in that case would probably result in overall savings to the indigent defense fund.

Circumstances that are not compelling include:

- the scheduled rate is less than counsel's standard billing rate;

- the case or client is difficult or unpopular unless that fact may cause counsel substantial financial hardship at the scheduled rate;
- counsel has received higher rates in other indigent cases; and
- the court is unable to find qualified counsel at the scheduled rate.

C. Procedure to Request Increased Hourly Fee or Interim Payments

Counsel must submit any request for an increased hourly fee or for interim payments before counsel is appointed or as soon as possible after appointment. SCA will not consider requests for an increased hourly fee first submitted late in the case.

Appointed counsel or counsel considering appointment must submit any request for an increased fee or interim payments to the presiding judge of the court or that judge's designee. The request must document the compelling reasons that warrant an exception to the fee schedule.

The court will review counsel's request. If the court agrees that an exception is warranted, the court will submit the request to the SCA, together with the court's recommendation and any additional facts that the court believes deserve consideration.

When SCA receives the court's recommendation, SCA will promptly review the request. SCA will notify the court by telephone when SCA approves all or part of the request or denies the request. SCA will confirm in writing the decision and the terms of any exception SCA has allowed. In most circumstances, the increased hourly rate will be retroactive to the time of the appointment.

When the nature of the case requires the court to expedite an appointment and a decision on increased fees or interim payments, the court may consult SCA by telephone for tentative approval. The tentative approval is subject to SCA's timely receipt of the written request and recommendation required by this section.

In some cases, the court may need to appoint an attorney to protect the defendant's rights while the court and SCA consider the request for increased fees or interim

payments. Assigned counsel appointed in the interim will be paid at the scheduled rate except when:

1) Interim counsel continues as counsel after SCA approves a request for increased fees or interim payments; and

2) SCA approves the request retroactive to appointment of interim counsel.

3.3 Attorney Fee Guidelines

A. Fee Guidelines by Case Type

Fee "guidelines" are guidelines for determining whether the total requested fee is reasonable for a specific case type. They are based on the number of hours generally assumed reasonable for an "average" case of each type at the hourly rate prescribed by the fee schedule. SCA or, subject to SCA's written approval, the court may adopt local fee guidelines. Counsel may request a payment that exceeds the fee guidelines as provided below.

B. Procedure to Request Payment That Exceeds Fee Guideline Amount

If SCA or a trial court has adopted fee guidelines by case type, counsel may request payment that exceeds the applicable guideline amount as follows. Counsel must submit to the court with the fee statement:

1) detailed billing;

2) supporting documentation;

3) attorney's affidavit specifically stating the basis for requesting payment beyond the guideline amount.

The court may approve payment for hours beyond the guideline amount if the court determines that counsel was reasonably required to commit more hours than the guidelines provide.

3.4 Expense Budget for Certain Cases

To help monitor and control costs and expenses, SCA recommends that the court require assigned counsel to establish an estimated budget for fees and expenses in complex or notorious cases. Counsel and the presiding judge or presiding judge's designee should meet early in the case to outline a budget for fees and other case expenses.

Counsel must request court approval before exceeding the amount for any fee or expense type listed in the budget.

A court-approved budget or amended budget does not negate the requirement that counsel secure preauthorization for extraordinary fees and expenses, pursuant to ORS 135.055 and Section 5.2.C. below.

When requesting payment, counsel must append to the fee and expense statement:

1) a copy of the budget, and

2) a copy of any court order authorizing counsel to exceed the budget.

3.5 Confidentiality of Billing Information

A. General Policy

Statutes effectively prohibit courts from disclosing information on indigent defense costs to the district attorney before the case concludes, at least when appointed counsel requests confidentiality by requesting the records be sealed. See, e.g., ORS 135.055.

It is Judicial Department policy that courts and administrative staff will keep confidential all information on indigent defense costs for a particular case until the case concludes. For purposes of this section, a case concludes when:

1) it is dismissed with prejudice and no appeal is filed;

2) it is dismissed without prejudice and not refiled within one (1) year;

3) the indigent defendant is acquitted;

4) the time for filing a notice of appeal has run and no appeal has been filed;

5) the appellate judgment is final and the case is not remanded for further proceedings from which the indigent person may appeal; or

6) the court unseals the records by written order.

Except as provided in Section 3.5.B, below, the Judicial Department will release confidential information on indigent defense costs before the case concludes only:

1) to appointed counsel or appointed counsel's indigent client on written request; or

2) pursuant to written court order; or

3) to a judge or Judicial Department staff who requires the information to audit and process payment requests, see Section 3.5.B, below; or

4) to SCA, SCA's designee, or Indigent Defense Services Division staff, as needed for statistical, audit, or other lawful purpose.

Each court and SCA division and section shall establish local procedures to ensure that staff follow this policy.

This policy does not prohibit the Judicial Department from disclosing statistical information that cannot be identified to any particular case.

B. Procedure When Billing Information is Sealed or Interim

In capital cases and other complex or notorious cases, where billings are paid on an interim basis (see Section 3.8 below), courts sometimes seal information on indigent defense costs in the case file. This sealed information may include motions, affidavits, court orders, and financial information that support a request for payment by appointed counsel or other providers.

In order for SCA to audit and process "sealed" or interim billings, the court must forward to SCA the supporting documentation. SCA acts as an arm of the court and maintains the information as confidential. To prevent improper disclosure of information, SCA has adopted the following procedures:

1) In cases with interim billings, in capital cases, and in any other case where the court seals information, SCA classifies as confidential all documents and information on indigent defense costs. Only the following people have access:

   - The account clerk processing the payment (in trial level cases).
   - The fiscal analyst processing the payment (in appellate level cases).
   - The supervisor of the Fiscal Services Section who verifies and approves the vouchers for payment.

- Certain designated employes described below who review financial records for statistical or audit purposes.

2) For interim payments and "sealed" payments, only the following Judicial Department employes have authority to review financial records: Deputy SCA Director, Director and Deputy Director of Indigent Defense Services Division, SCA Legal Counsel, SCA Internal Auditor, or their designees.

3) For "sealed" cases, after payment has been approved by the supervisor, the information is again sealed and placed in a locked file cabinet. The keys are maintained in the supervisor's locked desk.

4) During the course of an audit by the Secretary of State's Audit Division, the auditors may need to review confidential information to ensure that the funds have been disbursed lawfully. SCA informs the auditors that the information is confidential and that the court has ordered it sealed.

5) Interim payment information remains confidential until the final billing has been paid. "Sealed" financial information remains sealed until the trial court judge assigned to the case or presiding judge of the judicial district where the case was filed issues a court order authorizing release of the information.

3.6 Billing for Services

A. Trial Court Cases--In General

ORS 135.055(4) requires counsel, on completion of all services, to submit to the court a statement of all reasonable fees and expenses:

1) supported by appropriate receipts or vouchers; and

2) certified by appointed counsel to be true and accurate.

"Completion of services" is defined in Section 3.7, below.

The trial court must review the statement and certify that the hours and expenses are reasonable, necessary, and properly payable out of public funds. ORS 135.055(5), (6)(a).

SCA may request that counsel provide additional information for audit, statistical, or any other pertinent purpose to:

1) ensure the proper use of state funds; or

2) the provision of appointed counsel compensated at state expense. ORS 135.055(6)(b).

SCA will pay only for legal services related to the specific appointment. SCA will not compensate counsel or other providers time spent for preparing payment requests, keeping time records, attending seminars, or otherwise managing one's office and career.

B. Trial Court Cases--Use of Fee Statement/Certification Form

To meet the above statutory requirements and SCA's needs, SCA has developed a Fee Statement/Certification Form. It requests billing and statistical information on one page that replaces a formal petition for payment. It includes the provider's and the court's certifications. Appointed counsel must use this form to request payment. Exhibit 1 is the current form, its instructions, and codes.

As the form's instructions explain, assigned counsel must submit supporting documentation for hours claimed. The supporting documentation must itemize both in-court and out-of-court time:

1) by day, and

2) in tenths of hours.

SCA allows nonattorney providers to bill the court directly for services that the court has preauthorized. Nonattorney providers must use the Fee Statement/ Certification Form when requesting payment.

The attorney or provider who requests payment of expenses must also submit appropriate receipts or vouchers. See Sections 5.1 - 5.2 on Expense Guidelines. Both appointed counsel and nonattorney providers must certify that the information in the Fee Statement is true and accurate.

C. Appellate Court Cases--Billing

Review, payment and processing of billings in indigent appellate cases are subject to ORS 138.500 (inter alia),

the Oregon Rules of Appellate Procedure and policies established by the appellate courts.

The 1989 legislature amended ORS 138.500 to require appellate courts to certify rather than order payment of fees and expenses. SCA and the appellate courts have developed forms and procedures for counsel to use for requesting payment from the indigent defense fund account.

D. Billing for Consulting With Public Defender on Appeal or Postconviction--ORS 138.490

ORS 138.490 authorizes the trial court, not the appellate court, to certify reasonable compensation for appointed trial counsel's time spent when the State Public Defender (SPD) consults or joins trial counsel on an appeal or on a postconviction relief proceeding.

Absent legislation amending that authority, trial counsel should submit to the trial court a separate provider statement and supporting documentation for only these hours spent when the SPD consulted or joined trial counsel. On part 1 of the provider Fee Statement/Certification Form (see Exhibit 1), counsel should list "ORS 138.490" as the "ORS Authority for Appointment" and mark "Appeal" in part 2 of the form.

When determining whether the fee request is reasonable, the trial court or SCA or both may request SPD to confirm:

1) that SPD consulted or joined trial counsel; and

2) the amount of time SPD spent on the consultation or joinder.

3.7 Timely Submission of Payment Requests

A. Trial Courts

SCA adopts the following statewide policy requiring timely submission of payment requests:

1. For all cases in which services are completed on or after March 1, 1991, appointed counsel must submit payment requests to the trial court within thirty (30) days after the completion of all services. For purposes of this policy, services are complete when the court enters in the register of actions:

a) an order allowing or requiring counsel to withdraw; or

b) judgment or when counsel files a timely notice of appeal, whichever is later; or

c) in a juvenile case, an order disposing of

1) a petition or discrete postdispositional matter before the court, such as a review hearing, or when counsel files a timely notice of appeal, whichever is later; or

2) a separate matter terminated before petition where there is a right to appointed counsel at state expense before a petition is filed.

SCA will return requests submitted late to the trial court unless counsel submits to the court a written explanation showing good cause to excuse the delay.

2. For cases completed before March 1, 1991, counsel must submit requests no later than May 15, 1991.

B. Appellate Courts

The time frame for requesting payment of attorney fees and expenses in appellate cases is set in ORS 138.500(3) and ORAP 13.15.

3.8 Interim Billings

As a general policy, the SCA will not pay interim requests for attorney fees. An interim request is any request submitted before appointed counsel has completed all services in the case. See Section 3.7 above for when services are complete. SCA will make interim payments only in:

1) capital cases;

2) noncapital cases when SCA grants an exception to the fee schedule under Section 3.2, above;

3) noncapital appeals to the extent allowed by statute (see, e.g., ORS 138.500(3)) and Oregon Rules of Appellate Procedure when SCA does not grant an exception; and

4) when sentencing is delayed more than 60 days after a finding of guilt or entry of plea.

Trial courts will consider each interim request on its own merits. When approving final payment requests, trial courts will not reduce earlier-approved amounts except to:

1) correct arithmetic or clerical errors; or

2) to prevent fraud.

A. Interim Billing at the Trial Court Level

SCA will pay interim requests for attorney fees and expenses in capital cases at the trial court level. Counsel should submit requests to the trial court not more than once a month. SCA encourages regular monthly or bimonthly requests for budget reasons.

For other interim billing requests, counsel must request an exception to the fee schedule. If SCA allows the exception, counsel must submit interim requests to the trial court for approval. Lead counsel and co-counsel must submit separate billings for interim payment. For each payment request, counsel must submit the Fee Statement/Certification Form required of assigned counsel in other cases.

Each interim request must include a statement that lists each of the following:

1) limits (caps) set by the court on fees, hours, or expenses;

2) description and amounts of preauthorized expenditures;

3) amounts paid and incurred to date for fees and expenses; and

4) amounts remaining within the limits or amounts preauthorized by the court.

The final request for payment also must include a statement of the total time spent and services rendered and the total fees requested in the case.

The trial court will review each request, approve fees and expenses, and certify that the approved hours and expenses are reasonable, necessary, and properly payable from indigent defense funds. The court will then submit the request to SCA for payment. SCA will audit the request to ensure that the fees and expenses are properly payable from indigent defense funds.

In reviewing the final billing, the court and SCA will compare the total accounting of hours and services rendered to the amount already paid. If the final amount certified by the court is less than the amount already paid to counsel for interim requests, the court or SCA will notify counsel to reimburse SCA promptly.

Financial information in capital cases is confidential. See Section 3.5 above.

B. Interim Billings in Capital Cases on Appeal

SCA will pay interim requests for attorney fees in capital cases at the appellate level. SCA will not make interim payments of expenses in capital appeals other than for expenses authorized by ORAP 13.15.

Counsel must submit interim requests for capital appeals directly to SCA, attention of the Indigent Defense Services Division Director, for review, processing, and payment. Interim requests are subject to SCA's audit and approval to ensure that the fees are properly payable from indigent defense funds.

Each interim request must include three copies of the fee statement, affidavit, and supporting documentation. The Supreme Court of Oregon will review the final billing, and all earlier billings when counsel submits the final billing. See Oregon Rules of Appellate Procedure for required format and number of copies. If the final amount approved by the Supreme Court is less than the amount already paid to the attorney for interim requests, the court or SCA will notify counsel to reimburse SCA promptly.

Counsel should submit requests not more than once a month. SCA encourages regular monthly or bimonthly requests for budget reasons. Counsel must submit the same documentation as required for interim payments in capital cases at the trial court level. This documentation is explained in Section 3.8.A. above.

4. BILLING DISPUTE RESOLUTION

4.1 When the Trial Court Disallows Requested Fee or Expense

When a trial court approves less than the amount requested by an indigent defense services provider, the court will mail "first class" to the provider at the address listed on the billing form:

1) a Notice of Disallowance of Requested Fees or Expenses, and

2) a copy of the provider's billing form showing the amount(s) approved by the court.

The notice will describe the reason(s) for the reduction(s) and the right to request reconsideration. A sample notice is provided in Exhibit 2.

The court must mail the notice to the provider within seven calendar days of the court submitting the reduced billing to SCA for payment. Within 21 calendar days of the date of the notice, the provider may request reconsideration by submitting to the trial court a request for reconsideration with the provider's affidavit and documentation explaining the facts and reasons to support the request.

Within 21 calendar days of the date the request is submitted, the court will review the request and issue its final certification. The final certification will state that the court either has granted the motion or has denied the request in whole or in part for the reasons stated in the original Notice of Disallowance or for other reasons, which the court will list in the final certification.

If on reconsideration the court amends its earlier certification, the court will issue a final certification, as shown in Exhibit 3. The final certification will list the amounts approved by the court on reconsideration and will certify to SCA the total amount approved for payment on reconsideration.

The time for requesting reconsideration and for issuing a final certification may be extended for good cause. The time for requesting reconsideration shall also be extended as provided below when SCA reduces a fee or expense request that a court has certified to SCA as reasonable.

4.2 When SCA Disallows Requested Fee or Expense

There is no statutory authority for SCA to either increase or decrease a court's certification of hours, fees, or expenses approved in the payment of attorney fees. SCA can adjust a payment certification only to correct arithmetic or audit errors or to eliminate improper charges not payable out of indigent defense funds or not properly authorized under statute or this policy statement.

SCA may return a payment certification to the trial court for further action when SCA questions the amount or propriety of

the certification. When SCA reduces a payment certification without returning the certification to the court for further action, SCA will send the provider a Notice of Disallowance, similar to that described for use by trial courts, with a brief reason for its action. The provider may supply additional information to SCA within 21 calendar days of the date of the notice where the provider believes that SCA has received incomplete or incorrect information from the trial court. SCA will review the additional information and will refer the matter to the trial court for consideration if SCA determines that SCA has received incomplete or incorrect information from the trial court.

SCA will issue a Notice of Final Action, similar to the court's final certification, in any case not referred back to the trial court for action. If the court amends its certification to reduce the amount originally certified, the court shall provide notice as in Section 4.1 above, and the provider shall have the same right as in Section 4.1 above, to submit a request for reconsideration of that action within 21 days of the date of the notice.

5. CASE EXPENSE GUIDELINES

5.1 In General

Indigent defense funds will pay expenses only for indigent persons who are represented by counsel appointed at state expense, unless a statute or case law expressly provides otherwise. Two statutes that provide otherwise are ORS 40.325 (OEC 604) on interpreters in criminal cases, and ORS 138.500 on fees for transcripts in appellate cases. These statutes do not require the indigent person to have appointed counsel.

Reimbursable expenses must also be both reasonable and necessary to the investigation, preparation, or presentation of the indigent person's case.

A. Guideline Amounts

All guideline amounts are maximum amounts. The guideline amount is not equivalent to a preapproved cost and is not a substitute for preauthorization.

Appointed counsel must obtain needed services by the least expensive means available and within the guideline amount whenever possible, unless the court approves a more expensive means as reasonable and necessary. Counsel must discontinue those services no later than when the case is disposed. Counsel should provide relevant portions of the

guidelines, including amounts and billing procedures, to prospective service providers before incurring any cost for services expected to be paid from indigent defense funds.

Except for services of court reporters and out-of-state counsel, courts may grant a timely deviation from the guidelines based on counsel's showing that compelling circumstances justify a deviation. See Section 5.6 below on requests for deviation.

Subject to SCA's written approval, the court may adopt local guidelines for case expenses in a particular county or judicial district where the court satisfies SCA that:

1) local guidelines will enhance efficient administration of indigent defense funds; and

2) any difference from these guidelines is reasonable.

B. Receipts

In general, the provider must submit with the payment request receipts for expenses over $25. If the provider does not have a receipt, the provider must state on a separate paper:

1) what the expense was for,

2) the amount of the expense and to whom it was paid, and

3) why the provider does not have a receipt.

The provider must sign and date the form and submit it with the payment request. The provider must keep reasonable underlying records in case the court or SCA requires further documentation.

C. Uniform Application

To provide uniform and consistent application of this policy, SCA recommends that only the presiding judge or his or her designee approve requests for preauthorization and payment of extraordinary expenses.

5.2 Types of Expenses

General expense categories include overhead expenses, out-of-pocket expenses, and extraordinary expenses.

A. Overhead

Overhead, including services performed by an employe or an independent contractor, is not reimbursable, except by contract with SCA or in limited, extraordinary circumstances with the court's preauthorization.

Overhead includes, but is not limited to:

- counsel travel, including parking, to and from court for appearances within the county where counsel's office is located or within 60 miles of counsel's office, whichever is less;
- secretarial services;
- timekeeping and bill preparation;
- word processing;
- rent and utilities;
- office equipment and supplies;
- library materials;
- computerized legal research installation and monthly access fees;
- law clerk and paraprofessional services.

Absent a contract, SCA will pay for overhead expenses as extraordinary expenses only if:

1) for appointed counsel, the court finds that

   a) the case will require counsel to incur duplicative overhead expenses, where for example the court grants a change of venue and counsel requires support services at the new venue while maintaining similar services at his or her home office; or

   b) the expense will be outweighed by savings in attorney fees, such as for attorney work done by a law clerk;

2) for nonattorney providers, the court finds that the provider's services are reasonable and necessary and that the standard rate for such services does not include certain overhead expenses;

3) for all providers, the court preauthorizes the expense as an extraordinary expense within this policy statement.

B. Out-of-Pocket Expenses for Assigned Counsel

SCA will reimburse counsel for actual out-of-pocket costs without the court's preauthorization for the following items within the limits described below.

1. Discovery

SCA will pay the custodian's actual cost of copying discovery, but not more than a reputable private vendor would charge for making copies. SCA will not pay premiums charged by other agencies to recoup overhead or other costs of maintaining the materials to be copied. Nor will SCA pay premiums for expedited copies where appointed counsel reasonably could have avoided the need to expedite copies.

2. Telephone Calls

- long-distance telephone calls;
- local collect calls from indigent clients in jail, prison, hospital, or other similar institution.

3. Copying

- in-house: actual cost, not to exceed $.05/page;
- by outside vendor other than state court: actual cost, not to exceed $.10/page;
- by state court: actual cost, not to exceed $.25/page plus necessary certification cost.

4. Travel

$.21 per mile for necessary travel:

a) other than travel for court appearances (see "Overhead"); or

b) for providers other than attorneys and investigators, outside the normal course of business travel for the office location or provider's type of work.

5. Postage

- first-class mail;
- express mail, only if counsel shows that express mail was reasonable and necessary and could not have avoided the extra expense by better planning;
- messenger service other than for routine filings, only if counsel shows it was reasonable and necessary or that it was less expensive than first-class mail would have been.

6. Computerized Legal Research

Only actual on-line usage and only to the extent counsel shows in supporting documents that the cost, including attorney fees, is less than the cost of the same research done manually.

7. Service of Process

ORS 21.410(1)(a) provides that no fee shall be charged to the state by any process server for civil cases in which the party requesting service has counsel appointed at state expense. In criminal proceedings, counsel should use the sheriff's office (many do not charge service fees) as much as possible.

8. Other Out-of-Pocket

SCA will pay out-of-pocket expenses similar to the above or in excess of the limits stated above with proper documentation and approval required by ORS 135.055 that show the expenses to be both reasonable and necessary and properly payable from indigent defense funds. Counsel should submit a written explanation with any request for payment of out-of-pocket expenses not listed above or in excess of the limits stated above, unless the court has preauthorized those expenses by written court order.

C. Extraordinary Expenses

Except for expenses included in a contract for legal services, SCA will reimburse counsel or other providers for extraordinary indigent defense expenses only if:

1) The court approved the expense in advance by court order, see, e.g., ORS 135.055; and either

2) The expense is within the guidelines; or

3) The court or SCA has properly approved a deviation from the guideline amount under Section 5.6, below.

Extraordinary expenses include, but are not limited to:

- expert witness fees and expenses (lay witness fees and expenses are set by statute and are not extraordinary expenses);
- investigation;
- psychiatric and medical examinations and evaluations;
- interpreter services;
- extended travel;
- audio and video tapes, including tapes of calls to 911 and police dispatchers;
- records from police files on internal affairs.

Extraordinary expenses may also include law clerk, legal assistant, or paralegal time that has been preauthorized as an expense that can be incurred outside of overhead costs.

5.3 Preauthorization Required for Extraordinary Expenses

A. In General

SCA will reimburse or advance extraordinary expenses only if the court has preauthorized the expense in a written court order:

1) within the guideline amounts listed below, or

2) in excess of guideline amounts when:

a) appointed counsel shows compelling circumstances that justify deviating from guideline amounts, and

b) the expense is other than for travel and court reporter services.

All court orders preauthorizing extraordinary expenses must list for each type of expense both:

1) the maximum amount preauthorized, including all provider expenses not included in the provider's unit rate; and

2) the applicable billing rate (by hour, page, or other unit). The applicable billing rate includes all expenses of the service provider unless the order expressly

   a) provides otherwise, and

   b) specifies the expense(s) not included in the provider's unit rate.

SCA will not pay for extraordinary expenses that exceed the preauthorized maximum amount.

B. Advances

SCA will advance preauthorized extraordinary expenses only when the court finds an advance reasonable and necessary, such as for expert witness retainers and travel expenses. To request SCA to advance funds, counsel should:

1) follow the procedures in Section 5.4, below; and

2) specify in a cover letter the date by which counsel needs the funds. SCA requires several weeks' lead time to avoid paying the Executive Department extra fees for expedited warrants (government drafts).

C. Late Orders (Postauthorization) and Orders Nunc Pro Tunc

Under limited circumstances, SCA will pay extraordinary expenses when

1) the court signed the preauthorization order after the expense was incurred, but dated the order nunc pro tunc to an earlier date; or

2) the order explains what exigent circumstances existed requiring counsel to incur the expense before requesting preauthorization or before the court could act on the request.

An order nunc pro tunc must

1) show that the original order preauthorizing the expense was timely; and either

2) state why it was not timely entered; or

3) identify the error(s) being corrected in the original order.

5.4 Procedures To Request Payment

A. Case Expenses, Generally

For advances and for reimbursement of expenses incurred or already paid by counsel and not yet reimbursed, counsel must submit payment requests with the request for attorney fees. See Sections 3.6 and 3.7, above.

Nonattorney providers may submit payment requests:

1) through counsel, or

2) for most expenses, directly to the court by using the Fee Statement/Certification form (FSC form) attached as Exhibit 1.

SCA allows nonattorney providers to bill directly for preauthorized extraordinary expenses such as for court-reporting services, investigation, expert witness, medical and psychiatric evaluations, and interpreter services. SCA does not allow direct billing from nonattorney providers for advances or for services that would normally be included in overhead but that the court preauthorized as extraordinary expenses, e.g., secretarial, word-processing, law clerk.

Nonattorney providers who may bill directly may also bill for their services before counsel completes all services. Nonattorney providers should submit their requests for payment no later than 60 days after completing their services and must use the standard FSC form, discussed below.

B. Use of Fee Statement/Certification Form By Nonattorney Providers

To request payment, all indigent defense providers, both attorney and nonattorney providers, must submit the Fee Statement/Certification form (FSC form) with supporting documentation. The only exceptions are:

1) lay witnesses, whose fees and expenses are paid by submission of a certificate of attendance;

2) district attorney or other government offices billing the court directly for discovery costs; and

The FSC form allows SCA to track the expenses with the relevant case and to process payment through the automated payment system.

1. **Services at the Request of Court-Appointed Counsel**

   If a court reporter or other provider provides services at the request of court-appointed counsel, the provider should obtain from the attorney:

   a) a copy of the order preauthorizing the services; and

   b) a copy of the FSC form with as much information completed in Sections 1 and 2 as is then known.

   At a minimum, counsel should provide to the nonattorney provider an FSC form with the following information to identify the expense tc the proper appointment:

   - the case name and number(s);
   - the indigent person's name if different from the case name;
   - appointed counsel's name and bar number;
   - date counsel was appointed;
   - case type (appointment type) code;
   - ORS number for the "highest charge" in criminal and delinquency cases;
   - expense type code.

   The provider must:

   - fill in the provider's name, address and tax identification number, service rate (if applicable), and requested amount;
   - sign the certification statement;
   - attach to the FSC a copy of the court order (obtained from the attorney) that preauthorized the expense;

- attach the provider's detailed invoice that describes the services provided and specifies the date(s) of service.

2. **Services Ordered on the Court's Own Motion**

If the provider provides services at the court's request on the court's own motion (or at request of an indigent person without counsel), the provider must obtain from the court an FSC form and a copy of the court's order preauthorizing the services.

Using the court order, the provider should be able to fill in the following:

- the case name;
- the case number(s);
- expense type (list is available from the court).

The provider must also complete the FSC and attach the supporting documents as described in Section 5.4.B.1., above.

For processing payment through the automated payment system, the court may need additional information that the provider does not possess and the court has in its files, such as appointment type, ORS for highest charge, and in some cases, name of indigent person. The court is responsible for obtaining that information from its records in order to process timely payment.

5.5 Specific Guidelines for Extraordinary Expenses

These are guidelines, only, for most expenses. See Section 5.6, below, on how to request deviation from these guidelines. SCA will update these guidelines periodically to reflect changes in provider rates.

A. Court Reporting Services

1. **Rate**

For transcripts or other reporting services requested by indigent persons, SCA will pay no more than $2.50 per page for the original transcript and no more than $0.25 per page for each copy.

These rates apply regardless of whether:

- the transcript is for appeal or other purposes;
- the court reporter is an official court reporter or "unofficial" court reporter as defined in the Oregon Judicial Department Policy Statement on Court Reporters, Volume 4, Chapter 3, Section 1 (revised and signed by the State Court Administrator on December 29, 1986), as revised from time to time.

2. No Appearance or Other Fees

Except as provided below, SCA will not pay any additional fees, such as:

- costs incurred attending depositions;
- appearance fees;
- routine travel expenses;
- reviewing notes, or similar tasks related to taking testimony or preparing transcripts.

SCA will pay additional fees only if before the expense is incurred, the court:

a) recommended to SCA that SCA grant a deviation based on specified compelling circumstances; and

b) SCA granted a deviation from the guideline.

3. Number of Originals/Copies

Except for transcripts for cases on appeal, SCA will pay for one original but no copies when the indigent person with appointed counsel is the first person to request transcription.

When another party or the court is the first to request transcription and the indigent person requests a copy, indigent defense funds will pay for one copy only.

In an appeal where an indigent appellant/petitioner who qualifies for a state-paid transcript has requested a transcript, SCA will pay for the original transcript and two (2) copies.

B. Forensic Investigation

SCA will pay up to $75 per hour for forensic investigation, including but not limited to:

- out-of-court testing and examination (of blood, bullets, hair, etc.);
- testimony in court.

The hourly fee includes all overhead expenses, including secretarial services and routine travel within 60 miles of the provider's office.

Counsel should consult first with the state crime lab and the state medical examiner to determine whether counsel requires extensive independent forensic services.

C. Handwriting Analysis

Handwriting analysis is not to exceed $150 per hour.

D. Interpreters

Not to exceed $25 per hour.

E. Investigation, General

Not to exceed $25 per hour. This includes all overhead expenses, including secretarial services and routine travel.

SCA will pay for investigative services only:

1) when the court has determined before the expense is incurred that investigation is reasonable and necessary and that an outside investigator would be the least expensive means; and

2) when counsel is unable to make a decision with respect to case disposition or otherwise is unable to proceed without that investigation.

All requests for and orders approving investigative services must include a conservative, projected maximum amount and number of hours. If the court finds that the case may require extensive investigation, the court should approve investigation in conservative increments.

SCA will reimburse the following out-of-pocket expenses for investigators:

1) Actual cost of long-distance telephone expenses, with detailed documentation; and

2) The actual cost of copying documents, with detailed documentation and within the limits stated in Section 5.2.B., above. However, SCA will not pay to duplicate discovery material provided to counsel; investigators should use counsel's materials.

F. Law Clerks, Legal Assistants, Paralegals

When the court makes the findings required in Section 5.2.A., SCA will reimburse counsel for paraprofessional services as extraordinary expenses

1) not to exceed $10 per hour; and

2) only for legal research and writing, investigation, and client interviewing.

Paraprofessionals include law clerks, legal assistants, paralegals, and trial assistants.

When preauthorizing the expense, the court should set an initial cap on paraprofessional hours, not to exceed 100 hours even in the most serious cases. Counsel may move the court to increase the authorized hours as for co-counsel's hours. See Section 2.4, above.

Counsel may request payment only as a case expense listed separately from attorney fees and must submit the following supporting documents:

1) time records listing the service dates, time expended, and tasks performed on the case by the paraprofessional on each date listed; and

2) counsel's statement and the paraprofessional's statement certifying that:

   a) the time records are accurate, and

   b) counsel paid the paraprofessional the amount counsel now requests as reimbursement.

G. Medical Experts

1. Medical Experts--Fees (psychiatrists, physicians, psychologists)

- **Examination: not to exceed $250.**

- Report: not to exceed $75.

- Consultation with counsel: not to exceed $60 per hour.

- Testimony: not to exceed $60 per hour and $240 total. The trial court and counsel should accommodate these witnesses, whenever possible, by taking testimony out of order.

2. **Standby Fees--Medical Experts**

SCA will pay standby fees for medical experts only when the court or opposing counsel is responsible for incurring the standby expense. For example, the trial court refuses to take testimony out of order or grants opposing counsel's belated request for a continuance over appointed counsel's objection after the expert is on standby.

3. **Missed Medical or Psychological Appointments**

The party, counsel, or court responsible for the missed appointment is responsible to pay for it.

SCA will pay for a missed appointment only:

a) when an indigent person with appointed counsel is responsible for missing an appointment because of illness, injury, lack of capacity, or other good cause that

   1) prevented the timely cancellation of the appointment; and

   2) is not attributable to another party, to counsel, or to the court; or

b) when the indigent person requesting the appointment was personally responsible for the missed appointment and cannot show good cause; however, SCA will not pay for a second or later appointment for the same purpose.

The person seeking payment from indigent defense funds has the burden to establish that the indigent person was responsible for the missed appointment.

H. Nonresident Attorneys

Not less than $30 per hour or the minimum indigent defense hourly rate of the state in which the attorney resides, whichever is more.

I. Polygraph

Examination and report: not to exceed a total of $200.

Courts should authorize polygraph services sparingly and only when the service is necessary to an adequate trial defense or negotiated disposition.

Courts should not authorize, and SCA will not pay, polygraph expenses for testing the truthfulness of communications between an indigent client and his or her appointed counsel.

J. Secretarial

When the court makes the findings required in Section 5.2.A., SCA will reimburse counsel for secretarial services as extraordinary expenses, not to exceed $10 per hour.

K. Travel, Meals, and Lodging

(The following information does not apply to lay witnesses, whose per diem and mileage rates are set by statute.)

1. Preauthorization

Travel, meals, and lodging are extraordinary expenses except for minor travel defined as out-of-pocket expenses involving limited mileage reimbursement. See Sections 5.2.B. and 5.5.E. The court must review and approve more substantial proposed travel <u>before</u> the expenses are incurred.

2. Travel Time

SCA will reimburse providers (attorney and nonattorney) for travel time when the provider could not reasonably spend the time working on the case. If the provider works or could reasonably work on the case while traveling, the SCA will pay only for the time spent working.

SCA will not pay for the provider's time spent commuting

1) to the provider's office, or

2) for counsel, to the courthouse in the same county as counsel's office.

3. Advances

See Section 5.3.B. on Advances; in general.

4. Reimbursement Schedule

SCA will reimburse travel expenses up to the scheduled limits provided below. The reimbursement amounts for meals include gratuities and do not include alcoholic beverages, which are not reimbursable. Reimbursement is limited to actual costs or the schedule, whichever is less.

The person requesting reimbursement must submit receipts with the Fee Statement/Certification Form.

SCA will not advance or reimburse the cost of redeemable tickets for travel on common carriers. If a provider takes advantage of low, nonrefundable fares, the provider should also obtain cancellation insurance. Additional costs incurred because the provider failed to obtain cancellation insurance are not reimbursable.

The current limits are as follows:

a. Automobile Mileage

$0.21 per mile for preauthorized travel that is not included in overhead or out-of-pocket costs as defined in Sections 5.2.A. and B., above.

If a private vehicle is used for a trip involving out-of-state travel, SCA will pay the lesser of mileage or the lowest cost of a regular-fare, round-trip coach airline ticket between the travel destination and airport nearest the provider's office or lay witness' home.

b. Meal Expenses

The following amounts include gratuities and sales tax where applicable:

1) **In-State Travel**

	Not to Exceed
Breakfast	$ 5.50
Lunch	$ 6.75
Dinner	$13.00
Daily Maximum	$25.25

2) **Out-of-State Travel**

	Not to Exceed
Breakfast	$ 5.50
Lunch	$ 6.75
Dinner	$15.00
Daily Maximum	$27.25

c. **Lodging Expenses**

1) **In-State Lodging**

Not to exceed $40 per night, plus applicable taxes, in all but the following high-rate areas which have been identified as high-rate areas where the maximum is $50 plus taxes:

- Coos County
- Clatsop County
- Curry County
- Jackson County
- Multnomah County
- Tillamook County
- Josephine County
- Klamath County
- Lincoln County

2) **Out-of-State Lodging**

Not to exceed $55 per night, plus applicable taxes.

5.6 Requests for Deviation from Specific Case Expense Guidelines

A. Timely Preauthorization Required

Only SCA may grant a deviation from the expense guidelines for court reporting services and for nonresident attorneys. Counsel may request a deviation for these expenses only:

1) before the expenses are incurred; and

2) in the same manner as requesting an exception to the attorney fee schedule. See Section 3.2, above.

Courts must recommend the deviation to SCA before SCA will approve payment above the guideline amount.

Where counsel requests other expenses that exceed the guideline rate(s), courts may grant deviation from the expenses guidelines only when:

1) the court finds the expense is reasonable and necessary; and

2) counsel requests the deviation in writing before incurring the expense or explains what exigent circumstances existed requiring counsel to incur the expense before requesting the preauthorization or deviation (see Section 5.3.C., above); and

3) the request specifies the circumstances that compel increased expenses, such as the inability to find any local competent provider to render the service within the guideline amount; and

4) the court issues a written order authorizing the expense at the higher rate before the expense is incurred or issues a proper late order or order nunc pro tunc under Section 5.3.C., above.

The court will retain in the case file documents that support deviation from the guidelines.

Where SCA or the court approves a deviation from the expense guidelines, the provider must attach to the FSC form a copy of the court order that preauthorized the expense and deviation. See Section 5.4, above, on payment requests. The court must forward a copy of the order to SCA when submitting the FSC form for final payment.

B. Guideline Rate Absent Timely Preauthorization

SCA will reduce to the guideline rate any request that exceeds the guideline rate without the required preauthorization described above.

For example, investigator submits an FSC form requesting $99 with an order preauthorizing up to $100 for investigative fees, but not specifying an hourly rate. The FSC and supporting documents show that investigator spent three (3) hours on the case. SCA will reduce the request to $75 ($25/hour x 3 hours), because the order did not specify that the court had approved a deviation from the guideline rate of $25 per hour.

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4-14-92

EXHIBIT 1

IN THE _____ COURT OF THE STATE OF OREGON FOR _____ COUNTY
INDIGENT DEFENSE PROVIDER'S FEE STATEMENT/CERTIFICATION

NAME _____ CASE NUMBER _____

APPEARANCE NO. _____

PREVIOUS CASE NO. _____

1. APPOINTMENT INFORMATION: P___ D___# __

Name/Side of Indigent_____ I___ Vendor No. _____ Tax I.D. No. _____

Birth Date ___/___/___ Contractor Code _____ Credit Code ___

Name of Appointed Counsel: _____ Name of Provider: _____

OSB Number _____ Date Appointed _____ Mailing Address: _____

ORS Authority for Appointment _____ _____

Withdrawal Date _____ Reason _____ _____

2. CASE INFORMATION:

Appointment Type _____

ORS _____ Charge Date _____

ORS _____ Charge Date _____ Number of Incidents _____ Trial _____

ORS _____ Charge Date _____ Number of Charges _____ Appeal _____

Date case/proceeding disposed _____ Type of Disposition _____ Trial Hours _____

DEFENSE COSTS:

A. Attorney Time	Hours Worked by .10 Hours	Rate	Amount Requested	Court-Approved Amount
In-Court (ATIC)	_____	$_____	$_____	$_____
Out-of-Court (ATOC)	_____	$_____	$_____	$_____
SUBTOTAL TIME/FEES	_____	$_____	$_____	$_____

B. Case Expenses	ORS				
_____	_____	_____	_____	$_____	$_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
SUBTOTAL CASE EXPENSES				$_____	$_____
C. TOTAL FEES AND EXPENSES (A plus B)				$_____	$_____

I certify that the information above is true. I have not received and will not accept direct or indirect compensation for these services other than is approved by the court or authorized by contract under ORS 151.460.

ate _____, 19____ _____
Signature of Indigent Defense Provider

...n the basis of the sworn statement of financial eligibility on file with the court and it appearing to the court that the person for whom counsel was appointed is indigent, the court certifies that payment of $ _____ is reasonable and necessary and is properly payable out of State Indigent Defense Funds.

Dated _____, 19____ _____ _____

INSTRUCTIONS FOR FEE STATEMENT/CERTIFICATION FORM

You must submit this form to the court to request payment, including advances, for fees or expenses to be paid from indigent defense funds, in criminal, juvenile and mental commitment cases. You may obtain a list of "Appointment Type," "Disposition Type," and "Expense" codes from the court. The Oregon Indigent Defense Payment Policies and Procedures (IDPPP) are available from the appointing court and include the attorney fee schedule and case expense guidelines. Local courts may have additional local rules.

Caption

"Name" is the case name under which the case was filed. If there was more than one charging instrument (e.g., sequential UTCs) for a single incident, list only the "Case Number" of the most serious charge. Otherwise, submit a separate form for each charging instrument. The DA may elect to use permissive joinder to charge more than one incident/transaction involving the same type charge which are "connected together or constitut[e] parts of a common scheme or plan" (ORS 132.560(1)(b)). Submit one report for the one case number, but be certain to list the "Number of Incidents" under "Case Information." Under "Case Number," list the "Appearance Number," i.e., the number of times counsel has been appointed on this case number, if known. For example, counsel was appointed on the original charge and a subsequent PV. The PV disposition report should list "2" for "Appearance No." List the "Previous Case Number" (if any), e.g., district court case number for felony arraigned in district court, if different from subsequently assigned circuit court case number for same case.

Section 1: Appointment Information

"Name . . . of Indigent" is the name of the person you represent, or for whom you provided services, i.e., if you represent a parent in a juvenile dependency hearing, the case name is IN RE: CHILD'S NAME and the indigent name is PARENT'S NAME. "Side of Indigent" refers to "P" (plaintiff), "D" (defendant), or "I" (impartial=witness). If you mark "D": list "1" if your client is not a codefendant or is the first codefendant listed on the charging instrument; list 2, 3, etc., if your client is named second, third, etc., as a codefendant in the charging instrument. If you withdrew from the case, list the "Withdrawal Date" and the appropriate three-letter withdrawal code for "Reason." Ask the court clerk for your vendor number if you do not know it.

Section 2: Case Information

For "Appointment Type," list the code that best describes the most serious charge involved in the case. List the ORS or ordinance number(s) and "Charge Date" for the first three most serious charges. List the total "Number of Incidents" and total "Number of Charges." State the date the case was "disposed." For "Type of Disposition," list the code that best describes the disposition of the most serious charge. Withdrawal is a "disposition" for purposes of this form; use the disposition code "CHNG" for all withdrawals. Check "Trial" or "Appeal."

Section 3: Defense Costs

A. Attorney Time

Attorneys must list their total in-court and out-of-court time separately by .10 (tenths) of hours. Noncontract attorneys must list the applicable hourly rate as provided in the Indigent Defense Fee Schedule. Any rate above the scheduled rate must have been preapproved by the State Court Administrator (SCA). Multiply hours times the hourly rate and put totals in the "amount requested" columns. The court will complete the "amount approved" columns.

B. Case Expenses

All providers seeking reimbursement for expenses must complete this section. For each type of expense, use one line for the total you claim for that type. Use the expense code that best describes the expense.

For each listed expense, provide the ORS citation that expressly authorizes the state to pay that expense from indigent defense funds. THE COURT MUST PREAUTHORIZE EXTRAORDINARY EXPENSES. A nunc pro tunc "preauthorization" will be honored ONLY in limited circumstances. See IDPPP for details. Note that ORS 135.055 authorizes only certain expenses in criminal cases. Other statutes authorize expenses in other cases or authorize certain types of expenses not listed in ORS 135.055. You may obtain a table of applicable statutes from the trial court. If you have more than five types of expenses, list the additional expenses on a separate page. Use the same columns as used on the form and note that expenses are continued on a separate page. Attach supporting receipts or vouchers and certification as required by ORS 135.055, together with a copy of the motion and order preauthorizing the expense(s) and any court order approving deviation from the expense guidelines established in IDPPP or by local courts. You need not submit a copy of the motion if the order has enough details for the SCA to verify that the expense is authorized by statute or case law and the extraordinary expense was preauthorized.

If the expense is billed at an hourly rate, list the number of hours by .10 hours and the rate per hour. For any expense billed at a rate other than by hours (such as by cost per page) list the rate. Fill in the amount requested for each type of expense and the subtotal amount requested (including amounts listed on any additional pages). INCLUDE EXPENSES FOR WHICH THE COURT HAS ADVANCED PAYMENT. The court will complete the amount approved, which will include any amounts advanced.

C. Total Fees and Expenses

Add the subtotals "amount requested" columns for attorney fees and case expenses. The court will complete the "amount approved" columns.

D. Certification

Date and sign the certification for the Indigent Defense Provider (just below Section 3.C.). Law clerks or other paraprofessionals must provide an additional certification, as must an attorney who seeks reimbursement for fees paid to paraprofessionals. See the IDPPP for details. The court will complete the remainder of the form.

CODES FOR USE WITH INDIGENT DEFENSE
FEE STATEMENT/CERTIFICATION FORM

CODE A. APPOINTMENT TYPE

1. CRIMINAL

CMUR	CAPITAL MURDER
MURD	MURDER
AFEL	CLASS A FELONY
AHOM	CLASS A FELONY HOMICIDE (manslaughter I)
BFEL	CLASS B FELONY
BHOM	CLASS B FELONY HOMICIDE (manslaughter II)
CFEL	CLASS C FELONY (nontraffic)
CHOM	CLASS C FELONY HOMICIDE (criminally negligent homicide)
TFEL	TRAFFIC FELONIES
UFEL	UNCLASSIFIED FELONY
	MISDEMEANOR (nontraffic):
MISS	STATE OFFENSE
MISM	MUNICIPAL ORDINANCE OFFENSE
MISU	UNCLASSIFIED
	DUII:
DUIS	STATE OFFENSE
DUIM	MUNICIPAL ORDINANCE OFFENSE
	DWS MISDEMEANOR:
DWSS	STATE OFFENSE
DWSM	MUNICIPAL ORDINANCE OFFENSE
	OTHER TRAFFIC MISDEMEANOR:
OTMS	STATE OFFENSE
OTMM	MUNICIPAL ORDINANCE OFFENSE
EXTR	EXTRADITION
EXHC	EXTRADITION WITH HABEAS CORPUS ATTACHED

2. PROBATION VIOLATION (PV charged within 90 days or after 90 days of sentence on underlying charge):

	Felony PV
FPV0	- 0-90 days
FPV1	- more than 90 days
FPV2	- other than counsel who handled original charge
	DUII PV
DPV0	- 0-90 days
DPV1	- more than 90 days
DPV2	- other than counsel who handled original charge
	Misdemeanor PV (state offense)
MPV0	- 0-90 days
MPV1	- more than 90 days
MPV2	- other than counsel who handled original charge

CODE A. APPOINTMENT TYPE (continued)

2. PROBATION VIOLATION (continued)

Misdemeanor PV (municipal ordinance)

OPV0 - 0-90 days
OPV1 - more than 90 days
OPV2 - other than counsel who handled original charge

3. SHOW CAUSE DIVERSION

SCDV SHOW CAUSE DIVERSION (report when show cause hearing is first event on appointment)

4. OTHER CIVIL

CVHC HABEAS CORPUS
CVPC POSTCONVICTION

5. CONTEMPT

FAPA VIOLATION OF FAMILY ABUSE PREVENTION ACT RESTRAINING ORDER
SUPP VIOLATION OF SUPPORT ORDER/JUDGMENT IN DOMESTIC RELATIONS OR JUVENILE PROCEEDING TO PAY SUIT MONEY, ATTORNEY FEES, SPOUSAL SUPPORT
CONT OTHER CONTEMPT

6. MENTAL HEALTH PROCEEDINGS

MHMI MENTALLY ILL (ORS Ch. 426)
MHMR MENTALLY RETARDED (ORS Ch. 427)

7. JUVENILE

JHOM HOMICIDE

DELINQUENCY:

JUDF FELONY
JUDM MISDEMEANOR
JUDO OTHER (includes status offenses, infractions, violations)

DEPENDENCY:

JDEP APPOINTED FOR PARENT/GUARDIAN
JDEC APPOINTED FOR CHILD

TERMINATION OF PARENTAL RIGHTS:

JUTP APPOINTED FOR PARENT/GUARDIAN
JUTC APPOINTED FOR CHILD

CODE A. APPOINTMENT TYPE (continued)

7. JUVENILE (continued)

PROBATION (PV charged within 90 or after 90 days of disposition of underlying charge)

JPV0 - 0-90 days
JPV1 - more than 90 days
JPV2 - other

JUMM MOTION TO MODIFY (postdisposition)
JURM REMAND
JUEM EMANCIPATION

POSTDISPOSITIONAL PROCEEDING (e.g., review hearings):

JPDP APPOINTED FOR PARENT/GUARDIAN
JPDC APPOINTED FOR CHILD

8. OTHER

MWIT MATERIAL WITNESS
OTHR OTHER (if use, please explain)

CODE B. DISPOSITION TYPE

1. ANY CASE TYPE

(a) Withdrawals (ALL withdrawals are the DISPOSITION "CHNG"), the REASONS for withdrawal are:

CON	WITHDREW FOR CONFLICT OF INTEREST
CLN	WITHDREW AT CLIENT REQUEST
CFT	WITHDREW WHEN CLIENT FAILED TO APPEAR
LOS	WITHDREW WHEN LOST CONTACT WITH CLIENT (other than CFT)
PER	WITHDREW FOR PERSONAL REASONS
RET	RETAINED COUNSEL
INL	CLIENT FOUND FINANCIALLY INELIGIBLE AFTER VERIFICATION

(b) Other

OTHR	"OTHR" FOR ANY DISPOSITION OTHER THAN THOSE LISTED BELOW

(c) Dismissed

DSM	DISMISSED

2. CRIMINAL

ACQC	ACQUITTED--COURT TRIAL
ACQJ	ACQUITTED--JURY TRIAL
CNVC	CONVICTED OF HIGHEST CHARGE--COURT TRIAL
CNVJ	CONVICTED OF HIGHEST CHARGE--JURY TRIAL
INSA	GUILTY BUT INSANE
PLGY	PLEA TO HIGHEST CHARGE
PLLC	PLEA TO LESSER CHARGE
CLCC	CONVICTED OF LESSER CHARGE - COURT TRIAL
CLCJ	CONVICTED OF LESSER CHARGE - JURY TRIAL
CONS	CONSOLIDATED FOR PLEA (use for all cases dismissed as part of plea bargain where cases arise out of separate incidents)
DIVR	DIVERSION
WTBN	BENCH WARRANT
DSCC	CIVIL COMPROMISE
MSTR	MISTRIAL
EXTR	EXTRADITED
WAIV	WAIVED EXTRADITION

CODE B. DISPOSITION TYPE (continued)

3. PROBATION VIOLATION

REVK	REVOKED
CNTD	CONTINUED
TERM	TERMINATED

4. CONTEMPT

USE CRIMINAL DISPOSITIONS

5. HABEAS CORPUS AND POSTCONVICTION:

GRNT	WRIT/PETITION GRANTED
DENY	WRIT/PETITION DENIED
OTHR	OTHER

6. MENTAL HEALTH PROCEEDINGS

COM	COMMITTED
RCOM	RECOMMITTED
COND	CONDITIONAL RELEASE
OTPA	OTHER POSTADJUDICATIVE, POSTCOMMITMENT, OR POSTCONDITIONAL RELEASE (including revocation; not including recommitment)
OTHR	OTHER

7. JUVENILE

JUDP	JURISDICTION FOUND/DISPOSITION ORDERED
JUNF	JURISDICTION NOT FOUND
DSM	DISMISSED (other than for jurisdiction not found)
PRT	PARENTAL RIGHTS TERMINATED
RMND	REMANDED
REVK	REVOKED (for probation)
CNTD	CONTINUED (for probation/motion to modify)
MOD	MODIFIED DISPOSITION (for motion to modify)
EMAN	EMANCIPATED
OTPA	OTHER POSTADJUDICATIVE (other than for PV)

CODE C. EXPENSE TYPE - EXPENSES ON COURT'S OWN MOTION, AT APPOINTED COUNSEL'S REQUEST OR UNDER ORS 40.325

1. DISCOVERY AND OUT-OF-POCKET EXPENSES

DISC	DISCOVERY FEES PAID TO DISTRICT ATTORNEY
COPYV	COPIES PAID TO ANOTHER VENDOR
COPYA	COPIES PAID TO REIMBURSE APPOINTED COUNSEL
TELE	LONG-DISTANCE TELEPHONE CALLS
POST	POSTAGE
SERV	SERVICE FEES
OTHRA	OTHER OUT-OF-POCKET EXPENSE (please identify)

2. INVESTIGATION-RELATED EXPENSES

INVF	INVESTIGATOR FEES, OUT OF COURT (with rate/hour)
OTHRI	INVESTIGATOR EXPENSES (per diem/other)
INVIC	INVESTIGATOR IN-COURT TESTIMONY
POLY	POLYGRAPH
RECO	SCENE RECONSTRUCTIONS
PHOT	PHOTOGRAPHERS
EXHI	EXHIBITS
TRAVI	TRAVEL

3. EXPERT WITNESS/CONSULTANT

FORIC	FORENSIC IN-COURT TESTIMONY
FOREX	FORENSIC EXAMINATION
LABS	FORENSIC LAB FEES
OTHRF	OTHER FORENSIC EXPENSES (e.g., per diem)
TRAVF	TRAVEL FORENSIC
PSYIC	PSYCHIATRIST OR PSYCHOLOGIST IN-COURT TESTIMONY
PSYCE	OTHER PSYCHIATRIC/PSYCHOLOGIST EXPENSES (e.g., per diem, mileage)
EXWI	OTHER EXPERT IN-COURT TESTIMONY (with rate/hour)
EXWO	OTHER EXPERT OUT-OF-COURT (other than medical or psych evaluation)
EXWE	OTHER EXPERT EXPENSES (e.g., per diem)
TRAVE	EXPERT WITNESS TRAVEL
MEDA	MEDICAL ANALYSIS/EVALUATION

4. PSYCHIATRIC/PSYCHOLOGICAL EXAMS ON INDIGENT DEFENDANT'S MOTION

PSPCD	PRETRIAL COMPETENCY
PSIND	INSANITY/DIMINISHED RESPONSIBILITY
PSDOD	DANGEROUS OFFENDER REBUTTAL
PSSDD	SEXUALLY DANGEROUS OFFENDER REBUTTAL
PSPSD	PSI REBUTTAL
PSOTD	OTHER (includes civil commitment exams)

CODE C. EXPENSE TYPE (continued)

5. PSYCHIATRIC/PSYCHOLOGICAL EXAMS ON COURT'S OWN MOTION

PSDOC	PSYCHIATRIC EXAMINATION--DANGEROUS OFFENDER--COURT
PSPCC	PRETRIAL COMPETENCY
PSINC	INSANITY/DIMINISHED RESPONSIBILITY
PSSDC	SEXUALLY DANGEROUS OFFENDER
PSPSC	PSI
PSOTC	OTHER (includes civil commitment exams)
PSPCX	PSYCHIATRIC EXAMINATION--COMPETENCY--COURT

6. OTHER DEFENSE EXPENSES

SECR	SECRETARIAL FEES IF PREAUTHORIZED AS EXTRAORDINARY EXPENSE (with rate/hour)
PARA	PARALEGAL/LAW CLERK FEES IF PREAUTHORIZED AS AN EXTRAORDINARY EXPENSE (with rate/hour)
APPL	APPAREL FOR INDIGENT PERSON'S COURT APPEARANCE
COMP	COMPUTER RESEARCH
TRAV	TRAVEL (e.g., per diem, mileage when preauthorized for attorney or staff)
OTHRD	OTHER EXPENSES FOR DEFENDANT (other than witness expenses)
VIEW	JURY VIEWS (when granted on defense motion)
CALR	COMPUTER-ASSISTED LEGAL RESEARCH (Westlaw, Lexis) IF PREAUTHORIZED AS AN EXTRAORDINARY EXPENSE

7. LAY WITNESSES

LWPD	PER DIEM
LWMI	MILEAGE
LWEX	OTHER EXPENSES PREAPPROVED BY COURT
OTHRW	OUT-OF-STATE MATERIAL WITNESS EXPENSES

8. TRANSCRIPTS (WITH RATE/PAGE)

TRAND	ON INDIGENT DEFENDANT'S MOTION
TRANC	ON COURT'S OWN MOTION
TRANX	TRANSCRIPTS--COURT'S OWN MOTION--PRO SE DEFENDANT
TAPE	DUPLICATION OF AUDIO TAPE OF COURT PROCEEDINGS

9. INTERPRETERS (WITH RATE/HOUR)

INTRC	APPOINTED ON COURT'S OWN MOTION FOR DEFENDANT
INTRA	APPOINTED ON APPOINTED COUNSEL'S MOTION
INTRX	APPOINTED ON COURT'S OWN MOTION--TC BUDGET

ASC:NJMC:sh/D1S89130.F
11-2-90

EXHIBIT 2

IN THE CIRCUIT/DISTRICT COURT OF THE STATE OF OREGON
FOR COUNTY

NOTICE OF DISALLOWANCE OF REQUESTED FEES OR EXPENSES

Case Name:
Case Number:
Client:

Under ORS 135.055(6), the court has certified as reasonable less than the amount requested for court-appointed fees or expenses in this case. See the attached provider statement.

The court has reduced _____ attorney fees/_____ expenses because:

Fee/Expense Code(s)	Reason (Explain below as needed, and whenever more than one code is used per reason.)
_____	. exceeds guideline or amount reasonably expected in cases of this type at the following stage(s):
_____	. Pretrial
_____	. Trial/Plea
_____	. Post-trial/Plea
_____	. exceeds guideline amounts
_____	. without preauthorization
_____	. without sufficient documentation for an exception
_____	. lacks sufficient supporting documentaion
_____	. exceeds preauthorized amount(s)
_____	. was billed at improper rate (see OJD Payment Policy)
_____	. payment from indigent defense fund is not authorized by statute or constitution
_____	. was billed beyond statutory or policy deadlines
_____	. other (explain) _____

Explanation: _____

The court has requested the Office of the State Court Administrator to issue a warrant in the amount certified as follows:

In-Court Fees _____
Out-of-Ct Fees _____
Total Fees _____
Expenses _____
Total _____

WITHIN 21 CALENDAR DAYS OF THIS NOTICE, YOU MAY REQUEST RECONSIDERATION BY SUBMITTING AN AFFIDAVIT AND ADDITIONAL DOCUMENTATION EXPLAINING THE FACTS AND REASONS SUPPORTING THE REQUEST TO:

_____ _____
Date Judge/Authorized Designee

QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT INDIGENT PERSONS AT STATE EXPENSE

Effective August 1, 1990

Including Amendments Received Through January 23, 1999

Research Note

Use WESTLAW ® *to find cases citing a standard. In addition, use* WESTLAW *to search for specific terms or to update a standard; see the OR-RULES and OR-ORDERS Scope Screens for further information.*

Amendments to these rules are published, as received, in the Pacific Reporter 2d *and* Oregon Cases *advance sheets.*

Table of Standards

Introduction.*

Standard

1.1 Objective.

2.1 Attorney Case Loads.

3.1 Qualifications to Serve as Appointed Counsel for Indigent Persons by Case Type.

- A. Misdemeanor Cases and Misdemeanor Probation Violation Proceedings.
- B. Lesser Felony Cases; Felony Probation Violation Proceedings; Contempt Proceedings in Trial Courts.
- C. Major Felony Cases.
- D. Murder Cases in Trial Courts.
- E. Capital Murder Cases in Trial Courts.
- F. Civil Commitment Proceedings Under ORS Chapters 426 and 427 in Trial Courts.
- G. Juvenile Cases, Including Delinquency, Remand Hearings, Neglect, Abuse, Other Dependency Cases, Status Offenses and Termination of Parental Rights.
- H. Appeals Other Than in Murder and Capital Murder Cases.
- I. Appeals in Murder and Capital Murder Cases.
- J. Postconviction Proceedings in Murder and Capital Murder Cases.
- K. Postconviction Proceedings in Other Cases.
- L. Habeas Corpus Proceedings.

4.1 Qualification Certificate and Court Lists.

- A. Certificate.
- B. Filing.
- C. Supporting Documentation.
- D. Court Lists.
- E. Suspension From Court List.

EXHIBITS

Exhibit

- A. Certificate of Attorney Qualification.
- B. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.
- C. Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases (Chapters 1-4 of OSB Task Force Report adopted by the Board of Governors September 25, 1996, remainder of report (generally, appendices and annotations) not reproduced).

* Suggested title added by Publisher.

INTRODUCTION*

The State Court Administrator adopts the following standards pursuant to ORS 151.430(3), effective August 1, 1990 and first revised February 1, 1998.

[Adopted effective August 1, 1990; amended February 1, 1998.]

* Suggested title added by Publisher.

STANDARD 1.1 OBJECTIVE

The objective in promulgating qualification standards for counsel appointed by the state courts to represent indigent persons at state expense is to ensure that competent and adequate legal representation is afforded to all indigent persons entitled to court-appointed counsel by state or federal constitution or statute.

[Adopted effective August 1, 1990.]

Related Standards

American Bar Association, *Standards for Criminal Justice*, 5–1.1.

National Legal Aid and Defender Association, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases*, Standard 6.1.

STANDARD 2.1 ATTORNEY CASE LOADS

Attorneys appointed to represent indigent persons at state expense must provide each client the time and effort necessary to ensure competent and adequate representation. Neither defender organizations nor assigned counsel should accept work loads that, by reason of their excessive size or complexity, interfere with rendering competent and adequate representation or lead to the breach of professional obligations.

[Adopted effective August 1, 1990.]

Related Standards

American Bar Association, *Standards for Criminal Justice*, 4–1.2, 5–4.3.

National Legal Aid and Defender Association, *Standards for Defender Services*, Standard IV–I.

National Legal Aid and Defender Association, *Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts*, Guideline III–6.

National Legal Aid and Defender Association, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases*, Standard 6.1.

State of Arizona v. Smith, 140 Ariz. 355, 681 P2d 1374 (1984).

STANDARD 3.1 QUALIFICATIONS TO SERVE AS APPOINTED COUNSEL FOR INDIGENT PERSONS BY CASE TYPE

Subject to the provisions of Standard 4.1, the appointing authority shall appoint only those attorneys who:

1. Are members of the Oregon State Bar or are attorneys of the highest court of record in any other state or country who will appear under ORS 9.241; *and*

2. Either:

a. Meet the qualifications specified below for the applicable case type; *or*

b. Possess significant experience and skill equivalent to or exceeding the qualifications specified below, and who demonstrate to the appointing authority's satisfaction that the attorney will provide competent and adequate representation; *and*

3. Have adequate legal research access and adequate facilities to ensure reasonable and timely personal and telephonic contact between attorney and client and between the court and attorney.

a. Adequate facilities include sufficient support staff or answering service/machine for receiving messages and notifying clients of court dates.

b. Adequate legal research access includes the attorney's office is located convenient to a law library of sufficient size or the attorney has "on–line" or other electronic access to ensure the attorney has ready access to legal references and research material; and

4. Have reviewed and are familiar with the Oregon State Bar's Indigent Defense Task Force Report, "Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases" (Approved by the Board of Governors September 25, 1996), Exhibit C to this policy statement.

These standards establish and specify qualifications for each of the following case types:

A. Misdemeanor cases and misdemeanor probation violation proceedings in trial courts.

B. Lesser felonies (all Class C felonies other than homicides and drug cases), felony probation violation proceedings, and contempt proceedings in trial courts.

C. Major felonies (all A and B felonies, all drug felonies, and all homicides other than murder and capital murder cases) in trial courts.

D. Murder cases in trial courts.

E. Capital murder cases other than in postconviction proceedings in trial courts.

F. Civil commitment proceedings in trial courts.

G. Juvenile proceedings in trial courts.

H. Appeals other than in murder and capital murder cases.

I. Appeals in murder and capital murder cases.

J. Postconviction proceedings in murder and capital murder cases.

K. Postconviction proceedings in other cases.

L. Habeas corpus proceedings.

A. Misdemeanor Cases and Misdemeanor Probation Violation Proceedings. An attorney or certified law student is qualified for appointment to misdemeanor cases and misdemeanor probation violation proceedings if he or she:

1. Has reviewed and is familiar with the ABA Standards for Criminal Justice (2d ed.), Chapters 4, 5, 10 through 15, and 20 through 22; the Code of Professional Responsibility; the Criminal and Evidence Codes of Oregon, as set forth in ORS Chapters 40, 131–169, 471, and 475; the Uniform Trial Court Rules; and Oregon State Bar, *Criminal Law* (1986); *and*

2. Satisfies one or more of the following:

a. Has been certified under the Oregon Supreme Court Rules on Law Student Appearances to represent clients on behalf of a public defender office, a district attorney office, or a private attorney office in criminal cases; has undertaken such representation for at least six months; and can present a letter from the student's immediate supervisor certifying the student's knowledge of applicable criminal procedure and sentencing alternatives; or

b. Has observed five complete trials of criminal cases that were tried and submitted to a jury; or

c. Has served as counsel or co-counsel in at least two criminal cases that have been tried and submitted to a jury; or

d. Has served as co-counsel in at least five criminal cases. Such service shall have included attendance at all court appearances and all client interviews in each case; or

e. Has served as a judicial clerk for a court that regularly hears criminal cases; *or*

3. In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.

B. Minor Felony Cases; Felony Probation Violation Proceedings; Contempt Proceedings. Lesser felony cases include all Class C felonies other than homicides and drug cases.

An attorney is qualified for appointment to lesser felony cases, felony probation violation proceedings, and contempt proceedings if he or she:

1. Meets the qualifications specified in Section A; and

2. Has continued to meet the qualifications in Section A for at least nine months; and

3. Has served as counsel or as co-counsel and has handled a significant portion of the trial in two criminal cases that have been submitted to a jury; and

4. In at least one felony trial submitted to a jury, has associated on a pro bono or paid basis as co-counsel with an attorney who has previously tried felony cases and is otherwise qualified to try felony cases under these standards; *and*

5. On request, can present an additional showing of expertise and competence in the area of criminal trial practice by submitting at least three letters of reference from other criminal trial lawyers or judges the attorney has appeared before on criminal cases. The letters must explain why the attorney has special experience and competence to handle felony cases involving potential incarceration of up to five years; *or*

6. In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.

C. Major Felony Cases. Major felony cases include all A and B felonies, all drug felonies, and all homicides other than murder and capital murder cases.

An attorney is qualified for appointment to major felony cases if he or she:

1. Meets the qualifications specified in Section B; and

2. Has continued to meet the qualifications in Section B for nine months and has had nine months of lesser felony trial experience in a public defender or a district attorney office or in private practice; *and*

3. On request, can present evidence of additional expertise and competence in the area of criminal trial practice by submitting at least five letters of reference from other criminal trial lawyers or judges that the attorney has appeared before on criminal cases. The letters must explain why the attorney has special experience and competence to handle felony cases involving potential incarceration of 20 years; *or*

4. In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.

D. Murder Cases.

1. *Lead Counsel.* An attorney is qualified for appointment as lead counsel in murder cases, not including capital murder, if he or she:

a. Meets the qualifications specified in Section C; and

b. Has been trying major felony cases for the past three years; and

c. Has demonstrated to persons with knowledge of his or her practice a high level of learning, scholarship, training, experience, and ability to provide competent and vigorous representation to defendants charged with a crime for which the most serious penalties can be imposed, including handling cases involving codefendants, a significant number of witnesses, and cases involving suppression issues, psychiatric issues and scientific evidence; and

d. Has acted as lead counsel or co-counsel in a significant number of major felonies tried to a jury, which should include at least one homicide case that was tried to a jury and went to a final verdict; *and*

e. On request, can demonstrate the above by:

1) A written statement by the attorney explaining why the attorney believes that he or she has the qualifications required to handle a murder case; and

2) Certification from those with knowledge of the attorney's practice, indicating that they believe that the attorney should be allowed to defend murder cases and explaining why the attorney has the qualities required. Certification must include at least five letters from at least two of the following three groups:

a) Judges before whom the attorney has appeared;

b) Defense attorneys who are recognized and respected by the local bar as experienced criminal trial lawyers and who have knowledge of the attorney's practice; and

c) District attorneys or deputies against whom or with whom the attorney has tried cases; *or*

f. In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.

2. *Co-counsel.* Co-counsel in murder cases must meet the qualifications in subparagraphs 1.a, b, c, and e of this section or must possess significant equivalent experience under Standard 3.1.2.b.

E. Capital Murder Cases.

1. *Lead Counsel.* An attorney is qualified for appointment as lead counsel in capital murder cases if he or she:

a. Meets the qualifications specified in Section C; and

b. Has been trying major felony cases for the past five years; and

c. Has demonstrated to persons with knowledge of his or her practice a high level of learning, scholarship, training, experience, and ability to provide competent and vigorous representation to defendants charged with a crime for which the death penalty can be imposed, including handling cases involving codefendants, a significant number of witnesses, and cases involving suppression issues, psychiatric issues and scientific evidence; and

d. Has acted as lead counsel or co-counsel in a significant number of major felonies tried to a jury, which should include at least one homicide case that was tried to a jury and went to a final verdict. Lead counsel in capital cases must have acted as counsel or co-counsel in at least one murder case that was tried to a jury and went to a final verdict; and

e. For appointment as lead or co-counsel in a capital case, has completed, within one year of the appointment, a legal training or education program on capital cases; and

f. On request, can demonstrate the above by:

1) A written statement by the attorney explaining why the attorney believes that he or she has the qualifications required to handle a capital murder case; and

2) Certification from those with knowledge of the attorney's practice, indicating that they believe that the attorney should be allowed to defend capital murder cases and explaining why the attorney has the qualities required. Certification must include at least five letters from at least two of the following three groups:

a) Judges before whom the attorney has appeared;

b) Defense attorneys who are recognized and respected by the local bar as experienced criminal trial lawyers and who have knowledge of the attorney's practice; or

c) District attorneys or deputies against whom or with whom the attorney has tried cases; and

g. Has demonstrated the necessary proficiency and commitment that exemplify the quality of representation appropriate to capital cases.

2. *Co-counsel.* Co-counsel in capital murder cases must meet the qualifications in subparagraphs 1.a, b, c, e, f, and g of this section or must possess significant equivalent experience under Standard 3.1.2.b.

3. *Alternate Procedures.* The appointing authority also may appoint as lead or co-counsel an attorney with extensive criminal trial experience or extensive civil litigation experience, if the attorney clearly demonstrates to the appointing authority that the attorney can and will provide competent representation to the capitally charged indigent defendant. Attorneys appointed under this paragraph must meet one or more of the following qualifications:

a. Experience in the trial of death penalty cases that does not meet the levels detailed in paragraphs *A or B* above;

b. Specialized postgraduate training in the defense of persons accused of capital crimes;

c. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys to ensure that they will provide competent representation.

4. *Limited Case Load.* An attorney shall not handle more than two capital cases at the same time without prior authorization from the State Court Administrator.

Related Standards

National Legal Aid and Defender Association, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases*, Standard 5.1.I.

American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 5.1.I.

F. Civil Commitment Proceedings Under ORS Chapters 426 and 427. An attorney is qualified for appointment in civil commitment proceedings under ORS Chapters 426 and 427 if he or she:

1. Meets the qualifications specified in Section B; and

2. Has experience handling psychiatric or psychological evidence and psychiatric or psychological experts; and

3. Has knowledge of available alternatives to institutional commitment; and

4. Has knowledge of the statutes, case law, standards, and procedures relating to the involuntary commitment of the mentally ill and mentally retarded; *or*

5. In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.

G. Juvenile Cases, Including Delinquency, Remand Hearings, Neglect, Abuse, Other Dependency Cases, Status Offenses and Termination of Parental Rights. An attorney is qualified for appointment to juvenile cases, under ORS Chapter 419, if he or she:

1. For all cases, has knowledge of juvenile justice statutes, case law, standards, and procedures; has observed at least one contested juvenile court case; is generally familiar with services available to children and parents in the juvenile system; and has reviewed and is familiar with the following materials:

a. *Oregon Revised Statutes*, Chapter 419, Oregon Juvenile Code.

b. *Oregon Revised Statutes*, Chapter 417, Interstate Compact on Juveniles and the Community Juvenile Services Act.

c. *Oregon Revised Statutes*, Chapter 418, Child Welfare Services and Reporting of Child Abuse.

d. *Oregon Revised Statutes*, Chapter 420, Juvenile Training Schools and Youth Care Centers.

e. Oregon State Bar, *Juvenile Law* (1984, Supp. 1988).

f. Pub.L. 96-272, Adoption Assistance and Child Welfare Act of 1980.

g. Pub.L. 95-608, Indian Child Welfare Act of 1978, 25 USC §§ 1901–1963 (1982).

h. Education of the Handicapped Act of 1975, 20 USC §§ 1400–1485 (1982, Supp.1987).

i. Pub.L. 93–112, Title V, § 504, Rehabilitation Act of 1973, as amended, 29 USC § 794 (1982).

2. For juvenile delinquency cases, meets the qualifications for the equivalent adult crimes specified in Sections A, B, C, and D;

3. For status offense cases, meets the qualifications specified in Section A;

4. For abuse and neglect cases and dependency cases, meets the qualifications specified in Section B;

5. For remand cases, meets the qualifications specified in Section C. Where the underlying offense is equivalent to adult murder or capital murder, the attorney must meet the qualifications specified in Sections D and E, respectively;

6. For termination of parental rights cases, meets the qualifications specified in Section C, or has had equivalent experience, civil or criminal, involving complicated child-custody issues; *or*

7. In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.;

For purposes of this section, a court trial in a delinquency case is equivalent to a jury trial under Sections A, B, and C.

H. Appeals Other Than in Murder and Capital Murder Cases. An attorney is qualified for appointment in appeals other than in murder and capital murder cases if he or she:

1. Has reviewed and is familiar with:

a. ORS 138.005–138.680 in the case of appeals of criminal cases;

b. Oregon State Bar, *Criminal Law* (1986) in the case of appeals of criminal cases;

c. ORS 419.561 and 19.005–19.220 in the case of appeals of juvenile cases;

d. In the case of appeals of juvenile cases, Oregon State Bar, *Juvenile Law*, Chapter 30 (1984, Supp.1988);

e. The Oregon Rules of Appellate Procedure; and

f. Oregon State Bar, *Appeal and Review* (1977, *Supps.*1983, 1986); *and*

2. Meets at least one of the following criteria:

a. Has experience as appellate counsel, either in practice or under the Student Appearance Rule commensurate with the seriousness of the underlying case; or

b. Has served as co-counsel in at least one appellate case under the supervision of an attorney eligible for appointment to appellate cases under this standard; or

c. Has observed oral argument and reviewed the appellate record in at least five appellate cases, at

least one of which was an appeal from conviction of a major felony or murder; or

d. Has significant experience in motion practice and arguments in state circuit or district court or federal district court; or

e. By any other evidence that shows experience, education, and skill in appellate advocacy; *or*

3. In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.

I. Appeals in Murder and Capital Murder Cases. An attorney is qualified for appointment in appeals in murder and capital murder cases if he or she:

1. Meets the qualifications specified in Section H; and

2. For appointment as lead counsel, is an experienced and active trial or appellate lawyer with at least three years experience in criminal defense; and

3. Has demonstrated the necessary proficiency and commitment that exemplify the quality of representation appropriate to:

a. Capital murder cases if the appeal is in a capital case; or

b. Other murder cases, if the appeal is in a noncapital murder case; and

4. Has demonstrated proficiency in appellate advocacy in felony defense; and

5. For lead counsel in capital murder appeals, within one year of the appointment has attended and completed a legal training or educational program on defending capital cases. A substantial portion of the program must have been directly relevant to appeals in capital cases; and

6. For co-counsel in capital murder appeals and for lead or co-counsel in other murder cases, has attended and completed a legal training or education program on appellate advocacy in criminal cases within two years of the appointment.

7. *Alternate Procedure for Appointment in Capital Cases.* The appointing authority also may appoint as lead or co-counsel an attorney with extensive criminal trial or appellate experience, or both, or extensive civil litigation or appellate experience, or both, if the attorney clearly demonstrates to the appointing authority that the attorney can and will provide competent representation to the capitally charged indigent defendant. Attorneys appointed under this paragraph shall meet one or more of the following qualifications:

a. Experience in the trial or appeal, or both, of death penalty cases that does not meet the levels detailed in paragraphs A or B above;

b. Specialized postgraduate training in the defense of persons accused of capital crimes;

c. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys to ensure that they will provide competent representation.

Related Standards

National Legal Aid and Defender Association, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases*, Standard 5.1.II.

American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 5.1.II.

J. Postconviction Proceedings in Murder and Capital Murder Cases. An attorney is qualified for appointment in postconviction proceedings in murder and capital cases if he or she:

1. Meets the qualifications specified in Section D; and

2. For appointment as lead counsel, has prior experience as postconviction counsel in at least three major felony cases; and

3. For capital cases, meets the qualifications specified in Section I for co-counsel in capital appeals. If more than one attorney is appointed, only one of the attorneys must meet the qualifications specified in Section I.

4. *Alternate Procedure in Capital Cases.* The appointing authority also may appoint as lead and co-counsel an attorney with extensive criminal trial, appellate, or postconviction experience or extensive civil litigation or appellate experience, or both, if the attorney clearly demonstrates that the attorney can and will provide competent representation to the capitally charged indigent defendant. Attorneys appointed under this paragraph shall meet one or more of the following qualifications:

a. Experience in trial, appeal, or postconviction representation in death penalty cases that does not meet the levels detailed in paragraph A above;

b. Specialized postgraduate training in the defense of persons accused of capital crimes;

c. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys to ensure that they will provide competent representation.

Related Standards

National Legal Aid and Defender Association, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases*, Standard 5.1.III.

American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 5.1.III.

K. Postconviction Proceedings in Other Cases. An attorney is qualified for appointment in postconviction proceedings in cases other than murder and capital murder if he or she:

1. Meets the qualifications for appointment to an original proceeding involving the highest charge in the postconviction proceeding; *or*

2. In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.

L. Habeas Corpus Proceedings. An attorney is qualified for appointment in habeas corpus proceedings if he or she:

1. Meets the qualifications specified in Section B; *or*

2. In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.

[Adopted effective August 1, 1990; amended February 1, 1998.]

STANDARD 4.1 QUALIFICATION CERTIFICATE AND COURT LISTS

A. Certificate. Effective September 1, 1990, in order to receive an appointment to represent an indigent person at state expense, an attorney must have filed a certificate of qualification that shows for which types of cases the attorney meets the qualification standards. The certificate must be in the form set out in Exhibit A to these standards.

B. Filing.

1. *Contract Attorneys.* Unless expressly agreed otherwise by contract with the SCA, contract attorneys must file their certificates of qualification with the Indigent Defense Services Division of the State Court Administrator and the relevant court(s) and thereafter as necessary to ensure that SCA and the court(s) have current information for each attorney who performs services under the contract.

2. *Assigned Counsel (for all Noncontract Appointments).* Assigned counsel must file his or her certificate annually by September 1 with:

a. the circuit and district court presiding judges, and

b. the trial court administrator or clerk of each county where the attorney will accept appointments.

Attorneys who are qualified for and will accept appeals must file a copy of their certificate with the appellate courts' Case Records Office, Supreme Court Building, 1163 State Street, Salem, Oregon 97310.

C. Supporting Documentation. An attorney must submit supporting documentation with the certification:

1. On request of the court, Indigent Defense Services Division, or SCA; or

2. When the attorney seeks to qualify for appointments based on equivalent experience.

D. Court Lists.

1. *Maintaining List.* Each court will review the qualification certificates and will request supporting documentation if the court is unfamiliar with the attorney or questions the certificate. The court will notify SCA of any questions or concerns it has regarding a contract attorney's qualifications. On the basis of the court's review and of any applicable contracts, the court will prepare a list of attorneys who are qualified for appointment to represent indigent persons at state expense. The court will keep two lists:

a. Contract attorneys, and

b. Assigned counsel, including contract attorneys who wish to take cases outside the contract.

The court will keep each list by case type and, within each case type, alphabetically by attorney name. The list will include the attorneys' names, bar numbers, vendor numbers (if known), and contract code, if any.

2. *Updating List.* The court will update the list monthly with a supplemental list of any changes. The court will revise the list annually to incorporate any changes.

3. *Providing Copy to State Court Administrator.* The court will send to SCA:

a. A copy of the list, annually, not later than October 1;

b. A copy of the monthly supplements, on request;

c. Any changes in the list of attorneys eligible for capital or other murder cases, as soon as those changes occur; and

d. A copy of any supporting documentation submitted to establish experience equivalent to that specified in these standards for a particular case type. The court will also send to SCA a letter explaining why the court believes the experience is or is not sufficient to substitute for the specified criteria in these standards.

E. Suspension From Court List. If SCA or the court learns of facts that call into question an attorney's ability to provide adequate assistance of counsel even though the attorney meets the minimum qualification criteria, SCA and the court each shall have authority to suspend the attorney from the appointment list for any or all case types until SCA is satisfied that the attorney is able to provide adequate assistance of counsel. If a court learns of such facts or allegations, the court must inform SCA as soon as

possible of all allegations and facts and of any action that the court takes. SCA will notify the court when SCA suspends any attorney from the court's appointment list.

EXHIBITS

EXHIBIT A. CERTIFICATE OF ATTORNEY QUALIFICATION

CERTIFICATE OF ATTORNEY QUALIFICATION
(Contractors must submit one for each attorney)

NAME_____
BAR NUMBER_____ VENDOR NUMBER_____
CONTRACTOR CODE_____
(if applicable)

Years Experience in:

Criminal Law_____ Civil Commitment Law_____
Juvenile Law_____ Practice of Law_____

I certify that I have reviewed the Qualification Standards for Court-Appointed Counsel to Represent Indigent Persons at State Expense, and that I meet the requirements of those standards for the following types of cases:

A.	Misdemeanor	___yes ___no	I.	Murder Appeals:	
				Lead	___yes ___no
B.	Lesser Felony	___yes ___no		Co-Counsel	___yes ___no
C.	Major Felony	___yes ___no	J.	Capital Appeals:	
D.	Murder:			Lead	___yes ___no
	Lead	___yes ___no		Co-Counsel	___yes ___no
	Co-Counsel	___yes ___no	K.	Murder Postconviction:	
E.	Capital Murder:			Lead	___yes ___no
	Lead	___yes ___no		Co-Counsel	___yes ___no
	Co-Counsel	___yes ___no	L.	Capital Murder Postconviction:	
F.	Civil Commitment	___yes ___no		Lead	___yes ___no
				Co-Counsel	___yes ___no
G.	Juvenile	___yes ___no	M.	Other Postconviction	___yes ___no
H.	Other Appeals	___yes ___no	N.	Habeas	___yes ___no

_____ Letters of reference or of certification of qualification are attached.

I submit the following additional evidence or information of my qualifications in support of my certificate:

_____
SIGNATURE
DATE

[Adopted effective August 1, 1990.]

EXHIBIT B. AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES

February, 1989

The American Bar Association recommends adoption of these Guidelines, subject to such exceptions may be appropriate in the military, by entities providing counsel in death penalty cases.

GUIDELINE 5.1 ATTORNEY ELIGIBILITY

The appointing authority should distribute assignments in capital cases to attorneys who qualify under either of the alternative procedures detailed below in paragraphs I. TRIAL, II. APPEAL, and III. POST-CONVICTION.

I. Trial.

A. Lead trial counsel assignments should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and

ii. are experienced and active trial practitioners with at least five years litigation experience in the field of criminal defense; and

iii. have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials; and

iv. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

v. are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and

vi. have attended and successfully completed, within one year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and

vii. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Trial co-counsel assignments should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and

ii. who qualify as lead counsel under paragraph (A) of this Guideline or meet the following requirements:

a. are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and

b. have prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, at least two of which were trials in which the charge was murder or aggravated murder; or alternatively, of the three jury trials, at least one was a murder or aggravated murder trial and one was a felony jury trial; and

c. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

d. have completed within one year of their appointment at least one training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and

e. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial experience or extensive civil litigation experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in the trial of death penalty cases which does not meet the levels detailed in paragraphs A or B above;

ii. Specialized post-graduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

II. Appeal.

A. Lead appellate counsel assignments should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice: and

ii. are experienced and active trial or appellate practitioners with at least three years experience in the field of criminal defense; and

iii. have prior experience within the last three years as lead counsel or co-counsel in the appeal of at least one case where a sentence of death was imposed, as well as prior experience within the last three years as lead counsel in the appeal of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of murder or aggravated murder conviction; or alternatively, have prior experience within the last three years as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at

least two of which were appeals of a murder or aggravated murder conviction; and

iv. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

v. have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the appeal of cases in which a sentence of death was imposed; and

vi. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Appellate co-counsel assignments may be distributed to attorneys who have less experience than attorneys who qualify as lead appellate counsel. At a minimum, however, appellate co-counsel candidates must demonstrate to the satisfaction of the appointing authority that they:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and

ii. have demonstrated adequate proficiency in appellate advocacy in the field of felony defense; and

iii. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

iv. have attended and successfully completed within two years of their appointment a training or educational program on criminal appellate advocacy.

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial and/or appellate experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in the trial and/or appeal of death penalty cases which does not meet the levels detailed in paragraphs A or B above;

ii. Specialized post-graduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

III. Postconviction. Assignments to represent indigents in postconviction proceedings in capital cases should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and

ii. are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and

iii. have prior experience as counsel in no fewer than five jury or bench trials of serious and complex cases which were tried to completion, as well as prior experience as postconviction counsel in at least three cases in state or federal court. In addition, of the five jury or bench trials which were tried to completion, the attorney should have been counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the five trials, at least one was a murder or aggravated murder trial and an additional three were felony jury trials; and

iv. are familiar with the practice and procedure of the appropriate courts of the jurisdiction; and

v. have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the postconviction phase of a criminal case, or alternatively, a program which focused on the trial of cases in which the death penalty is sought; and

vi. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

In addition to the experience level detailed above, it is desirable that at least one of the two postconviction counsel *also* possesses appellate experience at the level described in 11.B. above (relating to appellate co-counsel).

B.* Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial, appellate and/or postconviction experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in trial, appeal and/or postconviction representation in death penalty cases which does not meet the levels detailed in paragraph A above;

ii. Specialized post-graduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

* Pub. Note: There is no "A." in the original.

Commentary

Eligibility requirements for capital counsel are aimed at providing highly qualified and dedicated attorneys to defendants who face the most serious of consequences—death. Consequently, the appointing authority should adopt eligibility standards which reflect at least seven essential quality control criteria necessary for the selection of able counsel at all levels in capital cases:

i. license or permission to practice in the jurisdiction;

ii. general background in criminal defense work;

iii. demonstrated experience in felony practice at the appropriate level (trial, appeals, postconviction);

iv. demonstrated experience in death penalty litigation;

v. familiarity with the requisite court system(s);

vi. significant and continuous training in death penalty litigation; and

vii. demonstrated proficiency and commitment to quality representation.

Additionally, eligibility standards should require trial counsel to have demonstrated experience with expert witnesses and evidence. Drafters of local eligibility standards are encouraged to consider additional criteria which will enhance the quality of representation provided. *See* Guideline 11.1 et seq. and accompanying commentary. Once the standards have been developed, the objective of effective representation requires consistent and continuous application of the quality control criteria in order to ensure that defendants facing the prospect of death are not receiving inadequate representation.

The importance of distributing assignments to experienced attorneys possessing a substantial background in criminal defense practice has been previously noted. *See* commentaries to Guidelines 1.1, 2.1, and to the performance Guidelines in section 11. As in all criminal cases, it is elemental that assigned counsel be familiar with the practice and procedure of the courts where the client's case will be heard.[1]

As discussed in Guidelines 1.1, 11.4.1, 11.7.2 and 11.8, verdicts and sentencing decisions in capital cases often turn upon the submission by both the prosecution and defense of evidence from expert witnesses. Eligible trial attorneys should therefore be adept at using expert evidence to the advantage of the client, and at cross-examining prosecution witnesses.

All assigned counsel should be required to receive relevant training on a periodic basis in order to enhance their advocacy skills; the changing nature of capital jurisprudence[2] requires capital counsel to keep abreast of constantly changing legal developments relating to death penalty matters. At all levels of capital representation, counsel should have the necessary skill and knowledge to provide quality representation.

This Guideline recognizes that fulfillment of the experiential criteria or its equivalent is a necessary, but not a sufficient, prerequisite for attorney eligibility. There may be instances where an attorney's background objectively satisfies the experiential criteria, but his or her past performance did not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case. Such an attorney should be excluded from the roster list. Consequently, before placing an attorney's name on a roster list, the appointing authority should make an initial determination regarding the attorney's ability to satisfy the experiential criteria. The appointing authority should then make a second determination that the attorney's past performance exemplifies the quality of representation appropriate to capital cases, utilizing the Guidelines established by the authority pursuant to Guideline 11.1. The application of this two-pronged eligibility test will help prevent the mechanical assignment of cases to experientially qualified attorneys who have not demonstrated the requisite skill, dedication, or commitment necessary for capital cases.

This Guideline acknowledges that there are many attorneys who do not possess the experiential criteria detailed in the Guideline, but who should receive appointments because they will provide competent representation at trial, appeal and/or postconviction. Such attorneys may have criminal law experience which does not meet the experiential criteria, may have attended training in death penalty defense representation or may have substantial experience in civil practice. These attorneys should receive appointments if the appointing authority is satisfied the defendant or inmate will be provided with the same quality of representation as clients represented by attorneys who met the experiential criteria. Attorneys who are appointed under the "Alternate Procedures" clauses of this Guideline obviously have an obligation to consult with other attorneys who are expert in death penalty defense, to attend specialized training and to do whatever else is necessary to allow them to provide competent representation to their clients.

Where the appointment of counsel is to a defender office, the appointing authority may permit both lead and co-counsel to be designated by the office, but should determine that these Guidelines are being used in making that designation.

The resources and experience of an office as a whole may be considered as one factor in determining the qualification of the individual attorneys within that office, but cannot substitute for the personal qualifications of the individual attorneys actually handling death penalty cases. For example, the resources and experience of the office might justify allowing an otherwise qualified attorney within that office to act as lead counsel after somewhat less than five years of personal litigation experience (Guideline 5.1.1.A(ii)) but could not justify allowing an attorney within that office to act as death penalty counsel after only minimal personal criminal litigation experience.

FOOTNOTES:

1. *ABA Standards*, Providing Defense Services, Standard 5-2.2 commentary.

2. *See* e.g., the quote of a capital postconviction attorney describing death penalty jurisprudence as "unintelligible," "inconsistent and at times, irrational" as well as "evolving ... constantly chang(ing)." American Bar Association, Standing Committee on Legal Aid and Indigent Defendants, Bar Information Program (prepared by The Spangenberg Group), *Time & Expense Analysis in Postconviction Death Penalty Cases* (February, 1987) p. 22, quoted in part in Criminal Justice Newsletter, Vol. 18, # 10, p. 4 (May 15, 1987).

EXHIBIT C. INDIGENT DEFENSE TASK FORCE REPORT

Principles and Standards for Counsel In Criminal, Delinquency, Dependency and Civil Commitment Cases

Contents

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PRINCIPLES. General Principles for Counsel In Criminal, Delinquency, Dependency And Civil Commitment Cases

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence (sic).

Article I, Section 11 of the Oregon Constitution

In all criminal prosecutions, the accused shall have the right ... to be heard by himself and counsel.

Fourteenth Amendment to the United States Constitution

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Principles

PRINCIPLE 1

The paramount obligation of counsel is to provide quality representation and diligent advocacy for the client at all stages of the representation.

PRINCIPLE 2

To provide quality representation and diligent advocacy, counsel must preserve, protect and promote the client's rights and interests.

PRINCIPLE 3

To ensure the preservation, protection and promotion of the client's rights and interests, counsel must:

1. be proficient in the applicable substantive and procedural law;

2. abide by the Code of Professional Responsibility and the rules of the court;

3. acquire and maintain appropriate experience, skills and training;

4. devote adequate time and resources to the case;

5. engage in the preparation necessary for quality representation;

6. endeavor to establish and maintain a relationship of trust and open communication with the client;

7. keep the client informed and seek the lawful objectives of the client; and

8. make accommodations where necessary due to a client's special circumstances, such as youth, mental or physical disability, or foreign language barrier.

PRINCIPLE 4

To promote the interests of clients and society at large, counsel must actively seek improvement in the administration of justice, including the provision of adequate resources.

PERFORMANCE STANDARDS

CHAPTER 1. GENERAL STANDARDS FOR REPRESENTATION IN *ALL* CRIMINAL, DELINQUENCY, DEPENDENCY AND CIVIL COMMITMENT CASES

STANDARD 1.1. Prerequisites For Representation

Counsel shall only accept an appointment or retainer if counsel is able to provide quality representation and diligent advocacy for the client.

Implementation

1. Counsel should be proficient in applicable substantive and procedural law and stay current with changes in constitutional, statutory, evidentiary law and local or statewide court rules.

2. Counsel should have appropriate experience, skills and training.

a. Counsel should obtain formal and informal training in the relevant areas of practice and should consult with others in the field, including non-attorneys.

b. Less experienced counsel should observe and when possible serve as co-counsel to more experienced attorneys. More experienced counsel should mentor less experienced attorneys.

3. Counsel should have adequate time and resources.

a. Counsel should not accept caseloads that by reason of excessive size and/or complexity interfere with the provision of quality representation.

b. Counsel should have access to sufficient support services and physical resources to allow for quality representation.

4. Counsel appointed by a court to represent a client at government expense shall meet and certify compliance with the "Qualification Standards for Court-Appointed Counsel to Represent Indigent Persons at State Expense", promulgated by the State Court Administrator.

STANDARD 1.2. General Duties And Responsibilities Of Counsel To Clients; Avoiding Conflict Of Interests

Upon being retained or appointed by the court, counsel should contact the client as soon as practicable AND maintain regular contact thereafter. Counsel should endeavor to establish a relationship of trust and open communication with the client

and should diligently advocate the client's position within the bounds of the law and the Rules of Professional Responsibility.

Implementation

1. As soon as practicable after being retained or appointed, counsel should contact the client and conduct an initial client interview.

2. Counsel should ensure that barriers to communication with the client, such as differences in language or literacy, are overcome. Counsel should make accommodations where necessary due to a client's special circumstances, such as youth, mental or physical disability, or foreign language barrier, including assuring that counsel has sufficient additional time and resources to make those accommodations.

3. Counsel should maintain regular contact with the client and should keep the client informed of the progress of the case, including:

a. the importance of maintaining contact with counsel and the need to notify counsel of any change of address;

b. the names and contact information regarding counsel and staff assisting with the case; and

c. any court dates and significant developments in the case.

4. Counsel should not delegate tasks to others if to do so would compromise the effectiveness of the representation. Counsel should not delegate non-ministerial and non-routine court appearances to other counsel without the consent of the client.

5. Counsel should be alert to all potential and actual conflicts of interest. If counsel identifies an actual conflict of interest, counsel should immediately request permission from the court to withdraw and substitution of qualified counsel. If counsel identifies a potential or likely conflict of interest, counsel should fully disclose the conflict to all affected clients and, if appropriate, obtain informed consent to proceed on behalf of those clients.

6. Counsel should preserve client confidences and secrets and should not knowingly disclose confidential information obtained during the course of representation, unless authorized to do so by the client or the court or as otherwise permitted by law or the Rules of Professional Responsibility.

STANDARD 1.3. Role Of Counsel

Counsel should seek the lawful objectives of the client and should not substitute counsel's judgment for that of the client in those case decisions that are the responsibility of the client.

Implementation

1. Counsel is ordinarily bound by the client's definition of his or her interests and should not substitute counsel's judgment for that of the client regarding the objectives of the representation.

2. Counsel should advise the client regarding the probable success and consequences of adopting any posture in the proceedings and give the client the information necessary to make an informed decision. Counsel should consult with the client regarding the assertion or waiver of any right or position of the client.

3. Counsel should consult with the client as to the strategy and means by which the client's objectives are to be pursued and exercise his or her professional judgment concerning technical and legal tactical issues involved in the representation.

STANDARD 1.4. Initial Client Interview

Counsel should conduct a client interview as soon as practicable after being retained or appointed by the court, in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the

client with information concerning counsel's representation and the case proceedings.

Implementation

1. To the extent possible, counsel should prepare for an initial interview with the client by reviewing petitions and/or charging documents, police and other investigative agency reports, and the reports of pretrial detention agencies, where applicable.

2. Counsel should conduct the initial interview with the client as soon as practicable and sufficiently before any court proceeding so as to be prepared for that proceeding. In instances where the client is detained or in custody, counsel should make every effort to conduct an initial interview within 48 hours of acceptance of a retainer or court appointment.

3. At the initial interview, counsel should obtain the following types of information from the client:

a. the facts surrounding the allegations against or affecting the client;

b. any possible witnesses who should be located;

c. any evidence of improper conduct by police or other investigative agencies, juvenile or mental health departments or the prosecution which may affect the client's rights;

d. any evidence that should be preserved; and

e. evidence of the client's competence to stand trial and/or mental state at the time of the offense.

4. Counsel should convey the following types of information to the client:

a. the nature of the allegations, what the state must prove, and the likely and maximum potential consequences;

b. the role of counsel and the defense function;

c. an explanation of the attorney–client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;

d. a general procedural overview of the likely progression of the case;

e. the procedures that will be followed in setting the conditions of pretrial release, if applicable to the type of proceeding and the particular client;

f. an explanation of the type of information that will likely be requested in any interview that may be conducted by pretrial release, juvenile court counselors, children's services personnel, or civil commitment investigators or doctors and what information the client should and should not provide;

g. how and when counsel can be reached;

h. when counsel will see the client next;

i. realistic answers, where possible, to the client's most urgent questions; and

j. what arrangements will be made or attempted for the satisfaction of the client's most pressing needs; e.g., medical or mental health attention, contact with family or employers.

STANDARD 1.5. Theory Of The Case

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case.

Implementation

1. Counsel should develop an overall theory of the case that encompasses the best interests of the client and the realities of the client's situation in order to assist counsel in evaluating choices throughout the course of the representation.

2. Counsel should allow the case theory to focus the investigation and trial preparation of the case, seeking out and developing the facts and evidence that the

theory makes material, but counsel should not become a "prisoner" of his or her theory.

PERFORMANCE STANDARDS

CHAPTER 2. SPECIFIC STANDARDS FOR REPRESENTATION IN *CRIMINAL* AND *JUVENILE DELINQUENCY* CASES

This chapter pertains to representation in both adult *criminal* and *juvenile delinquency* cases. The two types of proceedings are grouped together in one chapter because they have many similarities. Any differences in representation are indicated where appropriate. This grouping recognizes that counsel must employ the same general standards of practice in providing representation to youth in juvenile delinquency proceedings and to adult defendants in criminal cases, with special accommodation for the needs of juvenile clients. Efforts have been made to use generic terms that apply to both types of proceedings to the extent possible. For example, the term "disposition" refers to sentences in adult criminal cases and to juvenile dispositions, and the term "admission" includes guilty and nolo contendere pleas in criminal proceedings and admissions to allegation(s) in juvenile delinquency petitions. "Admission agreements" include plea agreements and agreements to admit jurisdiction in delinquency cases.

STANDARD 2.1. Prerequisites For Representation

Counsel should be proficient in applicable substantive and procedural law and should have appropriate experience, skill and training for the type of representation required.

Implementation

1. In addition to meeting the requirements for experience and training in Standard 1.1, *supra*, counsel should have at least fifteen (15) hours of mandatory continuing legal education training each year, at least ten (10) of which should relate to the practice of criminal defense or juvenile law.

2. Counsel for juveniles should develop a basic knowledge of child development and adequate communication skills to communicate effectively with child clients.

3. Counsel should visit at least two correctional, juvenile or treatment facilities.

STANDARD 2.2. General Duties And Responsibilities Of Counsel; Avoiding Conflicts Of Interest

In adult criminal and juvenile delinquency matters, counsel or counsel associated in practice should avoid representing two or more clients who have been jointly charged or whose cases have been consolidated.

Implementation

1. Counsel should follow Standard 1.2 Implementation 5 with regard to potential and actual conflicts of interest. In both adult criminal and juvenile delinquency matters, counsel and counsel associated in practice should avoid representing two or more clients who have been jointly charged or whose cases have been consolidated for trial or hearing.

STANDARD 2.3. Role Of Counsel

Counsel should seek the lawful objectives of the client and should not substitute counsel's judgment for that of the client in those case decisions that are the responsibility of the client.

Implementation

1. Counsel should follow Standard 1.3, Implementations 1 and 2.

2. Decisions as to whether to enter an admission, accept diversion or other pretrial early disposition, testify, or waive any right with respect to jurisdiction, trial, or waiver, are ultimately for the client to determine.

3. In juvenile delinquency and status offense proceedings as in adult criminal matters, counsel is ordinarily bound by the client's definition of his or her interests and should not substitute counsel's judgment for that of the client regarding the objectives of the representation. See Standard 3.3, *infra*.

STANDARD 2.4. Obligations Of Counsel Regarding Pretrial Release

When a client is in custody, counsel should explore with the client the pretrial release of the client under the conditions most favorable to the client and attempt to secure that release.

Implementation

1. Counsel should obtain information regarding the client's ties to family, the community, immigration status, school or employment records, physical and mental health, participation in community programs, past criminal and delinquency record, the ability of the client, relatives or third parties to meet any financial conditions of release and the names of individuals or other sources that counsel can contact to verify the information provided by the client.

2. Counsel should present to the appropriate judicial officer information about the client's circumstances and the legal criteria supporting release. Where appropriate, counsel should make a proposal concerning conditions of release that are least restrictive with regard to the client. Counsel should arrange for contact with or the appearance of parents, spouse, relatives of other per sons who may take custody of the client or provide third party surety.

3. Counsel for juveniles should seek to have a minister, teacher, relative or other mentor come to the detention hearing to offer to provide extra guidance and positive activities for the youth during release. Counsel for juveniles should be aware of the alternatives to secure detention, including group homes, residential treatment, drug and alcohol treatment facilities, house arrest or other non-secure community based alternatives.

4. If a juvenile client is released, counsel should assure that the client's needs for safety and right to receive treatment are met by agencies responsible for the client's care.

5. Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under available procedures.

6. If the court sets conditions of release, counsel should explain to the client and any third party the conditions of release and potential consequences of violating such conditions. If the court sets as a condition of release that security be posted, counsel should explain to the client and any third party the available options, procedures, and risks in posting security.

7. Where the client is unable to obtain pretrial release, counsel should inform the court and the jail or juvenile detention facility personnel about any medical, psychiatric, or security needs of the client. Juvenile clients in detention or shelter care should be advised of the right to have the placement decision reviewed every ten days, and counsel should seek review if requested by the client.

STANDARD 2.5. Initial Court Appearances

Counsel should preserve all of the client's constitutional and statutory rights at initial court appearances.

Implementation

Counsel should:

1. Promptly advise the client of and take action to preserve all constitutional and statutory rights of the client, including the right to remain silent, to file motions challenging the charging instrument, and to enter a plea of not guilty or deny the allegations contained in a delinquency petition and to request a jury trial, where failure to do so may result in the client being precluded from later obtaining such rights.

2. Request a timely preliminary hearing, if it is provided for under the rules of the court, unless there is a sound tactical reason not to do so.

3. If a preliminary hearing is held, review the allegations, marshall the evidence, and prepare to challenge the state's evidence and arguments.

4. Review probable cause documents and any probable cause arguments, and, if no probable cause is established or other grounds for dismissal exist, ask the court to dismiss the charges.

5. Ensure that bail has been set, seek reductions in bail if appropriate, and initiate alternative release options.

STANDARD 2.6. Independent Investigation

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

Implementation

Counsel should:

1. Obtain and examine all charging documents, pleadings and discovery.

2. Research and review the relevant statutes and caselaw to identify:

a. the elements of the charged offense(s);

b. any defects in the charging instrument, such as statute of limitations or double jeopardy; and

c. the available defenses, ordinary and affirmative, and whether notice of any defense is required and any specific timelines for giving such notice.

3. Conduct an in-depth interview with the client covering:

a. the events giving rise to the allegation(s);

b. the existence of witnesses or other potential sources of information;

c. any evidence of improper conduct by police or other investigative agencies, juvenile or mental health departments or the prosecution which may affect the client's rights; and

d. information relevant to pretrial/prehearing release and possible disposition.

4. Attempt to have all potential witnesses (adverse, neutral and favorable) located, interviewed, and, if appropriate, subpoenaed by an investigator or other appropriately trained person. If counsel conducts a witness interview, counsel should do so in the presence of a third person who is available to appear as a witness at trial or hearing.

5. Request and secure discovery including:

a. potential exculpatory information;

b. names and addresses of all prosecution witnesses, their prior statements, and criminal records;

c. oral and written statements by the client and details of the circumstances under which the statements were made;

d. the client's prior delinquency and/or criminal record and evidence of other misconduct that the prosecutor may intend to use against the client;

e. books, papers, documents, photographs, audio and videotapes, computer discs, tangible objects, buildings or other materials relevant to the case;

f. statements and reports of experts, including data and documents upon which they are based;

g. reports of and underlying data for relevant physical or mental examinations, scientific tests, experiments and comparisons;

h. statements of co-defendants;

i. inspection of physical evidence; and

j. reports or notes of searches or seizures and the circumstances of any searches or seizures.

6. When appropriate, request the opportunity to inspect the District Attorney's file, if the procedure in the local jurisdiction so provides.

7. Request and secure other information relevant to the case, including:

a. law enforcement notes (field notes);

b. client, victim or witness records, such as school, mental health, drug and alcohol and criminal records, with appropriate releases;

c. 911 tapes, interofficer radio transmissions and dispatch reports; and

d. internal affairs files and investigation records.

8. Inspect the scene of the alleged offense under circumstances similar to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).

9. Be familiar with and where appropriate obtain the assistance of experts and other professionals to provide consultation and testimony regarding issues in the case, evaluations of clients and others, and testing of physical evidence.

STANDARD 2.7. Pretrial Motions; Hearings Regarding Ability To Aid And Assist And Waiver Of Juvenile Court Jurisdiction

Counsel should research, prepare, file and argue appropriate pretrial motions whenever there is reason to believe the client is entitled to relief. Counsel should be prepared to provide quality representation and advocacy for the client at any hearings regarding the client's ability to aid and assist and waiver of juvenile court jurisdiction.

Implementation

1. Counsel should research, prepare, file and argue pretrial motions and notices if appropriate to address issues such as:

a. Constitutionality of relevant statute(s);

b. Defects in the charging process or instrument;

c. Severance of charges and/or co-defendants for trial;

d. *Brady v. Maryland* motions;

e. Motions to compel discovery;

f. Motions for sanctions because of discovery violations;

g. Violations of federal and state constitutional and statutory provisions, including but not limited to:

i. illegal searches and/or seizures;

ii. statements obtained in violation of the client's right to counsel or privilege against self-incrimination;

iii. unreliable identification evidence;

iv. speedy trial; and

v. double jeopardy.

h. Motions or requests for extraordinary expenses, such as:

i. interpreters;

ii. experts for psychological evaluation for the purpose of aid and assist, diminished capacity, guilty but insane, waiver or disposition; and

iii. forensic services.

i. Matters of trial evidence which may be appropriately litigated by means of a motion in limine.

j. Notices of affirmative defenses.

k. Motions to dismiss based on civil compromise, "best interests of the youth", "in the furtherance of justice" and "general equitable powers of the court".

2. Counsel should take the following steps with regard to seeking a determination of the client's ability to aid and assist:

a. Whenever counsel has a good faith doubt as to the client's ability to aid and assist in the proceedings, counsel should fully advise the client concerning the consequences of a determination that the client is unable to aid and assist and should move for an evaluation of the client, if the client so agrees. If the client opposes such an evaluation, counsel should inform the court that counsel has a good faith doubt of the client's ability to aid and assist in the matter, but should not divulge the client's confidences and secrets.

b. If the client agrees, counsel should obtain an independent evaluation of the client or should advocate that evaluators appointed by the court are qualified by training and experience to testify concerning the client's ability to aid and assist. If the client and prosecutor concur, counsel may stipulate that the client is unable to aid and assist counsel in the proceedings.

c. At the hearing to determine whether the client is able to aid and assist, counsel should protect and exercise the client's constitutional and statutory rights, including cross-examining the state's witnesses, calling witnesses on behalf of the client such as independent experts, and making appropriate evidentiary objections.

d. Counsel may elect to relate to the court personal observations of and conversations with the client to the extent that counsel does not disclose client confidences and secrets. Counsel may respond to inquiries about the attorney-client relationship and the client's ability to communicate effectively with counsel to the extent that such responses do not disclose the client's confidences and secrets.

e. If an adult client is found to be unable to aid and assist, counsel should advocate for the least restrictive level of supervision and the least intrusive treatment. If a juvenile client is found to be unable to aid and assist in a juvenile court proceeding, counsel should seek to resolve the delinquency matter by having the petition converted to a dependency petition. An appropriate disposition should be sought as in a dependency case. (See Standard 3.10, *infra.*)

f. If the client is found able to aid and assist, counsel should recognize a continuing obligation during the course of the proceedings to raise good faith concerns about the client's ability to aid and assist.

3. Counsel should do the following with regard to opposing waiver of juvenile court jurisdiction in juvenile proceedings:

a. Counsel should investigate and become knowledgeable about the consequences of waiver of juvenile court jurisdiction in the particular client's case and should thoroughly explain the consequences to the client.

b. If the client decides to oppose waiver of the juvenile court's jurisdiction, counsel should be fully prepared to present evidence and argument against the waiver, including that the client is still a child, would benefit from services in the juvenile system, has not had sufficient opportunity to be rehabilitated, would likely

be harmed in the adult system and that the community could be adequately protected from the youth during treatment as a juvenile.

c. At the waiver hearing, counsel should address all the requirements of ORS 419C349. To make an "amenability" argument, counsel should at a minimum:

i. describe the youth's background, including attachment to family and positive statements from individuals who believe the youth has potential;

ii. show that the youth was not thinking as an adult at the time of the offense;

iii. describe the youth's moral development and remorse;

iv. document successful juvenile interventions that have been used for similar youth; and

v. describe how the youth's delinquent behavior could change if services met his or her needs.

d. If juvenile court jurisdiction is waived, counsel should make effort to have the client released pending trial or held in a juvenile facility. If the client is transferred to an adult facility, counsel should advocate for measures that will protect the client and provide age appropriate services including mental health and educational or special education services.

STANDARD 2.8. Pretrial Negotiations And Admission Agreements

Counsel should:

1. with the consent of the client explore diversion and other informal and formal admission or disposition agreements with regard to the allegations;

2. fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;

3. keep the client fully informed of the progress of the negotiations;

4. convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers;

5. continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and

6. not enter into any admission or disposition agreement on behalf of the client without the client's authorization.

Implementation

1. Counsel should be fully aware, and ensure the client is fully aware, of:

a. rights the client will waive by entering into a pretrial admission or disposition agreement;

b. conditions and limits of the agreement;

c. nature of the admission hearing and the role the client will play in the hearing, including answering questions of the judge and in many instances, providing a statement concerning the offense;

d. deferred sentences, conditional discharges and diversion agreements;

e. the likely disposition, including what is required by the sentencing guidelines and the effect of the admission agreement on the client's criminal history;

f. possible and likely sentence enhancements, and probation or post-incarceration supervision consequences;

g. available drug rehabilitation programs, psychiatric treatment, and health care;

h. incarceration including any mandatory minimum requirements and maximum terms;

i. the possible and likely place and manner of confinement;

j. credit for pretrial detention;

k. the effect of good-time credits on the client's release date and how those credits are earned and calculated;

l. self-surrender to place of custody;

m. eligibility for correctional programs, work release and conditional leaves;

n. probation or suspension of sentence and permissible conditions of probation;

o. restitution, fines, assessments and court costs;

p. if applicable, parole or post-prison supervision eligibility, applicable ranges, and likely post-prison supervision conditions;

q. asset forfeiture;

r. collateral consequences of conviction, e.g. deportation, civil disabilities, and enhanced sentences for future convictions;

s. restrictions on, loss of, or other potential consequences affecting the client's driver's or professional license; and

t. possibility of later expungement and sealing of records.

2. In conducting negotiations, counsel should be familiar with the various types of admissions or pretrial dispositions that may be agreed to, including a plea of guilty, a plea of nolo contendere, a conditional plea of guilty, a plea in which the defendant is not required to personally acknowledge his or her guilt (Alford plea), and an admission to juvenile court jurisdiction.

3. The decision to enter an admission rests solely with the client and the client's decision must be knowing, voluntary and intelligent.

4. When the client enters an admission, counsel should make sure the full content and conditions of the admission agreement are placed on the record before the court.

5. If the client is in custody or may be taken into custody after entry of the admission, counsel should seek release pending formal disposition.

STANDARD 2.9. Trial

Counsel should be prepared to provide quality representation and advocacy for the client at any court or jury trial.

Implementation

1. Preparation for Trial

a. In an adult criminal case, counsel should discuss with the client the relevant strategic considerations of waiving a jury trial in favor of a bench trial or plea;

b. Counsel should have the following materials available at the time of trial:

i. copies of all relevant documents filed in the case;

ii. relevant documents prepared by investigators;

iii. voir dire questions;

iv. outline or draft of opening statement;

v. cross-examination plans for all possible prosecution witnesses;

vi. direct examination plans for all prospective witnesses for the client;

vii. copies of subpoenas;

viii. prior statements of all the prosecution's witnesses (e.g., transcripts, police reports);

ix. prior statements of all the client's witnesses;

x. reports from experts;

xi. a list of exhibits, and the witnesses through whom they will be introduced;

xii. originals and copies of all documentary exhibits;

xiii. proposed jury instructions with supporting authority;

xiv. copies of all relevant statutes and cases;

xv. evidence codes and relevant statutes and/or compilations of evidence rules and criminal or juvenile law most likely to be relevant to the case;

xvi. outline or draft of closing arguments.

c. Counsel should decide whether to file a motion in limine to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the client) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.

d. Throughout the trial process, counsel should ensure all legal issues are preserved and an adequate record is made for appellate review. Counsel should assure that all proceedings are on the record.

e. Counsel should be prepared to make all appropriate evidentiary objections and offers of proof, and should vigorously contest the state's evidence through objections and cross-examination of state's witnesses.

f. Counsel should advise the client and the client's witnesses as to suitable courtroom dress, decorum, and demeanor, and should counsel the client and witnesses concerning timeliness and sobriety issues. If the client or the client's witness is incarcerated, counsel should ensure that the client or witness does not appear before the jury in jail clothing.

g. Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a court order to have the client available for conferences.

h. Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon disposition if there is a finding of guilt or in a juvenile proceeding that the youth is within the jurisdiction of the court.

2. Jury Selection in Adult Criminal Cases

a. Counsel should be familiar with the procedures by which a jury venire is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.

b. Counsel should develop voir dire questions in advance of trial.

c. Counsel should tailor voir dire questions to the specific case Among the purposes voir dire questions should be designed to serve are the following:

i. to elicit information about the attitudes of individual jurors, which will inform counsel about peremptory challenges and challenges for cause;

ii. to convey to the panel certain legal principles which are critical to the case;

iii. to preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;

iv. to present the client and the client's case in a favorable light, without prematurely disclosing information about the case to the prosecutor; and

v. to establish a relationship with the jury.

d. Counsel should be familiar with the law concerning mandatory and discretionary voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.

e. Counsel should be familiar with the law concerning challenges for cause and peremptory challenges.

f. If the voir dire questions may elicit sensitive answers, counsel should request that questioning be conducted outside the presence of the remaining jurors.

g. In a group voir dire, counsel should avoid asking questions which may elicit responses which are likely to prejudice other prospective jurors.

h. Counsel should challenge for cause all persons about whom a legitimate argument can be made for actual prejudice or bias if it is likely to benefit the client.

3. Opening Statements

a. Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.

b. Counsel's objective in making an opening statement may include the following:

i. provide an overview of the defense case;

ii. identify the weaknesses of the prosecution's case;

iii. emphasize the prosecution's burden of proof;

iv. summarize the testimony of witnesses and their roles in relationship to the entire case;

v. describe the exhibits which will be introduced and the role of each in relationship to the entire case;

vi. clarify the juror's responsibilities; and

vii. state the ultimate inferences which counsel wishes the jury to draw.

c. Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.

d. Whenever the prosecution oversteps the bounds of a proper opening statement, counsel should object, request a mistrial, or seek cautionary instructions, unless tactical considerations weigh against any such objections or requests.

4. Proof

a. Counsel should anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.

b. Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.

c. In preparing for cross-examination, counsel should:

i. be prepared to question witnesses as to the existence of prior statements which they may have made or adopted;

ii. consider the need to integrate cross-examination, the theory of the defense and closing argument;

iii. consider whether cross-examination of each individual witness is likely to generate helpful information;

iv. anticipate those witnesses the prosecution might call in its case-in-chief and in rebuttal;

v. consider a cross-examination plan for each of the anticipated witnesses;

vi. be alert to inconsistencies or variations in a witness testimony;

vii. review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;

viii. review relevant statutes and local police regulations for possible use in cross-examining police witnesses;

ix. be alert to issues relating to witness credibility, including but not limited to background, bias and motive for testifying.

d. Counsel should be aware of the applicable law concerning competency of witnesses and admission of expert testimony in order to raise appropriate objections.

e. Before beginning cross-examination, counsel should ascertain whether the prosecution has provided copies of all prior statements. If counsel does not receive prior statements of prosecution witnesses until the prosecution has com-

pleted direct examination, counsel should, at a minimum, request adequate time to review these documents before commencing cross-examination.

f. At the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of acquittal on each count charged. Counsel should request, when necessary, that the court immediately rule on the motion in order that counsel may make an informed decision whether to present a defense.

g. Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case and instead relying on the prosecution's failure to meet its constitutional burden.

h. Counsel should discuss with the client all of the considerations relevant to the client's decision to testify.

I. Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

j. In preparing for presentation of a defense case, counsel should:

i. develop a plan for direct examination of each potential defense witness;

ii. determine the order of witnesses;

iii. consider the possible use of character witnesses; and

iv. consider the need for expert witnesses.

k. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecution.

l. Counsel should prepare all witnesses for direct and possible cross-examination. Counsel should also advise witnesses of suitable courtroom dress and demeanor.

m. Counsel should conduct redirect examination as appropriate.

n. At the close of the defense case, counsel should renew the motion for judgment of acquittal (or directed verdict) on each charged count.

5. Closing Argument

a. In developing closing argument, counsel should review the proceedings to determine:

i. what aspects can best be used in support of the defense, for example:

(a) weaknesses in the prosecution's case; and

(b) favorable inferences to be drawn from the evidence.

ii. what to incorporate into the argument, for example:

(a) helpful testimony from direct and cross-examinations;

(b) verbatim instructions drawn from the jury charge; and

(c) responses to anticipated prosecution arguments;

iii. what the possible effects of the defense arguments are on the prosecution's rebuttal argument.

b. Whenever the prosecution exceeds the scope of permissible argument, counsel should object, request a mistrial, or seek cautionary instructions unless tactical considerations suggest otherwise.

c. Where appropriate, counsel should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense.

d. Counsel should object to and argue against improper instructions proposed by the prosecution.

e. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record.

f. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

g. If the court proposes giving supplemental instructions to the jury, counsel should request that the judge state the proposed instructions to counsel before they are delivered to the jury and, if appropriate, take all steps necessary to preserve the record.

STANDARD 2.10. Sentencing Or Disposition

Counsel should:

1. be knowledgeable in disposition provisions and alternatives;

2. ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the disposition to be imposed;

3. ensure all reasonably available mitigating and favorable information is presented to the court.

4. in delinquency cases and in adult criminal cases as appropriate, be prepared to present a disposition plan on behalf of the client, as well as to respond to inaccurate or unfavorable information presented by other parties.

5. in delinquency cases, advocate for or develop dispositional resources that will aid the client in obtaining the least restrictive disposition, and obtain all appropriate orders to protect the youth's rights and interests.

Implementation

1. Counsel should be fully aware, and make sure the client is fully aware of:

a. sentencing guideline structure, if applicable, or the maximum, mandatory, minimum and likely sentence or disposition, including likely jail, detention or prison time, or training school commitment;

b. the statutory and philosophical differences in juvenile court disposition and adult sentencing. The global focus of juvenile court dispositions include planning to meet the youth's educational, emotional and physical needs while protecting the public from future offenses;

c. imprisonment or incarceration, including any mandatory minimum requirements and maximum terms;

d. restitution, fines, unitary assessments and court costs;

e. possible and likely sentence enhancements, and probation, parole, or post-prison supervision consequences;

f. asset forfeiture;

g. deferred sentences, conditional discharges, informal disposition, or conditional postponement and diversion agreements;

h. probation or suspension of sentence and permissible conditions of probation;

i. possibility of later expungement and sealing of records;

j. the possible and likely place and manner of confinement;

k. credit for pretrial detention;

L. the effect of good-time credits on the client's release date and how those credits are earned and calculated;

m. if applicable, parole or post-prison supervision eligibility and applicable release ranges;

n. self-surrender to place of custody;

o. likely post-prison or training school supervision conditions;

p. eligibility for correctional programs, work release and conditional leaves;

q. available drug rehabilitation programs, psychiatric treatment, and health care;

r. collateral consequences of conviction, e.g. deportation, civil disabilities, sex offender registration, DNA and AIDS testing, and enhanced sentences for future convictions;

s. restrictions on, loss of, or other potential consequences affecting the client's driver's or professional license;

t. the purpose of the interview for the Pre-Sentence Investigation (PSI) or the interview of the juvenile court counselor for disposition, including that the client's attitude may be a critical factor in obtaining a favorable recommendation for sentencing or disposition and that clients who appear cooperative, concerned, remorseful, and responsible will fare better;

u. the juvenile court's very broad discretion in ordering dispositions that may range from fines, restitutions, community service or unsupervised probation (bench probation), in which the youth is placed at home, to closely supervised probation at home, placement in a group home in the community, placement in a highly structured residential treatment program, placement in a staff secure or locked program, commitment to a locked psychiatric hospital, or commitment to a locked juvenile institution (training school).

2. Counsel should be familiar with the sentencing and dispositional hearing procedures, including:

a. effect that plea negotiations may have upon the sentencing discretion of the court;

b. procedural operation of any sentencing guideline system;

c. effect of a judicial recommendation against deportation;

d. access to the presentence or dispositional report by counsel, the client, and others;

e. availability of assessments such as psychiatric, psychological, educational or neurological evaluations to both the PSI investigator or juvenile court counselor and client's counsel in preparing sentencing or dispositional recommendations;

f. prosecution's practice in preparing sentencing or dispositional recommendations;

g. use of a sentencing or dispositional memorandum by counsel;

h. opportunity to challenge information presented to the court for sentencing or dispositional purposes;

i. availability of an evidentiary hearing to challenge information and the applicable rules of evidence and burdens of proof at such a hearing;

j. disposition alternatives available to the juvenile court and the various agencies that serve youth and families that can provide treatment, placement and other dispositional services that may be required, such as anger management counseling, individual therapy, and sex offender treatment;

k. that the youth's parents may be court ordered to participate in the youth's counseling or attend counseling or drug or alcohol treatment themselves, as well as being required to pay support for the youth while in out-of-home care or incarceration;

L. participation that victims and prosecution or client's witnesses may have in the sentencing or dispositional proceedings;

m. witnesses that may be called by counsel, such as family members, teachers, ministers or others who have worked with the client;

n. the admissibility of other evidence, such as letters of support, education or medical records, or evidence of participation in community or church activities.

3. Counsel should:

a. inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences thereof;

b. maintain regular contact with the client prior to the sentencing hearing and keep the client informed of the steps being taken in preparation for sentencing;

c. obtain from the client information such as the client's background and personal history, prior criminal record, employment history and skills, education, medical history and condition, financial status, and sources through which the information can be corroborated;

d. determine with the client whether to obtain an independent psychiatric, psychological, educational or neurological or other evaluation for sentencing or dispositional purposes;

e. if the client is being evaluated, whether by the state or at counsel's request, counsel should call or write the evaluator in advance to provide favorable background information for the evaluator's use and to request that the evaluator address the client's emotional, educational and other needs as well as alternative dispositions that will best meet those needs and society's needs for protection;

f. ensure that the client who is being evaluated understands the process, is not frightened, and is encouraged to cooperate;

g. prepare the client to be interviewed for a presentence or dispositional report;

h. inform the client of the client's right to address the court at sentencing or disposition and inform the client of the possible consequences that admission of guilt may have upon an appeal, retrial or trial on other offenses;

i. ensure that the client has adequate time to examine the presentence report or dispositional report;

j. inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;

k. collect documents and affidavits to support the client's position, prepare witnesses to testify at the sentencing or disposition and request the opportunity to present tangible and testimonial evidence.

4. Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or dispositional report. In addition, counsel should:

a. provide to the official preparing the report relevant information favorable to the client, including the client's version of the offense;

b. take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;

c. request permission to see copies of the report prior to transmittal to the court to be sure that the information challenged has actually been removed from the report.

5. Counsel should determine whether the prosecution will advocate that a particular type or length of sentence or disposition be imposed.

6. If a written sentencing or disposition memorandum is submitted by the prosecution, counsel should verify that the information presented is accurate; if the memorandum contains erroneous or misleading information, counsel should take appropriate steps to correct the information unless there is a sound strategic reason for not doing so.

7. When the court has found evidence sufficient to support jurisdiction in a delinquency case, counsel should, when appropriate, ask the court not to exercise jurisdiction and move to dismiss the petition on the ground that jurisdiction is not in the best interests of the youth or society.

8. Counsel should prepare and present to the court a sentencing or disposition memorandum where there is a strategic reason for doing so.

9. Counsel should be prepared at the sentencing or disposition proceeding to take the steps necessary to advocate fully for the requested sentencing or disposition and to protect the client's interest.

10. Counsel in delinquency cases should be prepared to present evidence on the reasonableness or unreasonableness of OVA or SOSCF's efforts and alternative efforts that could have been made, and where appropriate request a "no reasonable efforts" finding by the court.

11. In the event facts will be disputed at sentencing or disposition, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the defendant, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.

12. Where information favorable to the client will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses.

13. Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, permission for the client to surrender directly to the place of confinement, credit for time served, good time credits, and against the deportation of the defendant.

14. Where appropriate, counsel should prepare the client to personally address the court.

STANDARD 2.11. Post–disposition Procedures

Counsel should be familiar with the procedures available to the client after disposition.

Implementation

1. Counsel should be familiar with the procedures to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.

2. Counsel should inform the client of his or her right to appeal the judgment and/or the sentence or disposition of the court and the action that must be taken to perfect an appeal. In circumstances where the client wants to file an appeal but is unable to do so without the assistance of counsel, the attorney should file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the client's right to appeal.

3. Where a client indicates a desire to appeal the judgment and/or sentence or disposition of the court, counsel should inform the client of any right that may exist to be released pending the disposition of the appeal.

4. Where a custodial sentence has been imposed, counsel should consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement.

5. Counsel should inform the client of procedures available for requesting a discretionary review of or reduction in the sentence imposed by the trial court, including any time limitations that apply to such a request.

6. Counsel should inform the client of any procedures available for requesting that the record of conviction be expunged or sealed.

PERFORMANCE STANDARDS

CHAPTER 3. SPECIFIC STANDARDS FOR REPRESENTATION IN *JUVENILE DEPENDENCY* CASES

This Chapter pertains to representation of children and parents in juvenile dependency cases. These cases are primarily civil in nature and procedure, but are often referred to as "quasi-criminal" because of the significance of the rights and deprivations involved. At stake for children is their liberty, their right to membership in their family of origin and their right to be safe, healthy and protected. At stake for parents is their right to raise their children as they think best without state interference, and ultimately, the absolute and final termination of their parental rights.

Practice in juvenile dependency cases is unique and challenging, requiring continual training to assure the best legal representation of clients. Juvenile dependency cases may be as different and varied as the children and families involved in them. These training and practice standards are intended to help attorneys better meet the needs of their clients in juvenile dependency cases, and to improve the level of practice in these cases. The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings. These Standards recognize the importance of independent representation for children in juvenile dependency cases, and advocate for counsel to represent the child's articulated position in all but the exceptional case.

STANDARD 3.1. Prerequisites For Representation

Counsel should be proficient in applicable substantive and procedural juvenile law and should have appropriate experience, skill and training for the type of representation required.

Implementation

1. Every dependency case is different and varied approaches may be required in the legal representation of a child or parent. Effective legal practice in dependency cases requires a wide variety of skills unique to this practice.

2. In addition to meeting the requirements for experience and training contained in Standard 1.1, *supra*, counsel for children, parents or guardians in dependency cases should:

a. meet the requirements of the QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT INDIGENT PERSONS AT STATE EXPENSE, Oregon Judicial Department (1990), Standard 3.1 G, which provides, *inter alia*, that an attorney is qualified for appointment to juvenile cases, under ORS Chapter 419, if he or she:

i. For all cases, has knowledge of juvenile justice statutes, case law, standards, and procedures; has observed at least one contested juvenile court case; is generally familiar with services available to children and parents in the juvenile system; and has reviewed and is familiar with the following materials:

1) *Oregon Revised Statutes*, Chapter 419, Oregon Juvenile Code.

2) *Oregon Revised Statutes*, Chapter 417, Interstate Compact on Juveniles and the Community Juvenile Services Act.

3) *Oregon Revised Statutes*, Chapter 418, Child Welfare Services and Reporting of Child Abuse.

4) *Oregon Revised Statutes*, Chapter 420, Juvenile Training Schools and Youth Care Centers.

5) Oregon State Bar, *Juvenile Law* (1984, Supp. 1988).

6) Pub. L. 96-272, Adoption Assistance and Child Welfare Act of 1980.

7) Pub. L. 95–608, Indian Child Welfare Act of 1978; 25 USC secs. 1901–1963 (1982).

8) Education of the Handicapped Act of 1975, 20 USC secs. 1400–1485 (1982, Supp. 1987).

9) Pub. L. 93–112, Title V, sec 504, Rehabilitation Act of 1975, 20 USC sec. 794 (1982).

b. be familiar with:

i. the causes and available treatment for child abuse and neglect;

ii. the child welfare and family preservation services available through State Offices for Services to Children and Families (formerly Children's Services Division (CSD) referred to hereinafter as SOSCF) and available in the community and the problems they are designed to address;

iii. the basic structure and functioning of SOSCF and the juvenile court, including court procedures, the functioning of the Citizen Review Boards (hereinafter referred to as CRB) and Court Appointed Special Advocates (hereinafter referred to as CASA) programs.

c. Counsel new to dependency cases are encouraged to work with a mentor for the first three months and at a minimum should observe or co–counsel each type of dependency hearing from shelter care through review of permanent plan prior to accepting appointments.

d. In termination of parental rights cases, counsel for children or parents must meet the standards for dependency cases and have handled dependency cases for a minimum of six months as a full–time juvenile defender or must have handled at least 25 juvenile dependency cases that have gone past the jurisdictional phase.

3. Counsel should develop a basic knowledge of child development and adequate communication skills to communicate with child clients and witnesses.

a. Interviewing techniques should be age appropriate and take into consideration the type of abuse the child is alleged to have suffered.

b. Communicating with a child client, especially with regard to legal matters, may require efforts beyond those normally required for effective communications with adult clients. Counsel for children should therefore be especially sensitive to the child's stage of development, including:

i. cognitive, emotional and social growth stages;

ii. level of education;

iii. cultural context; and

iv. degree of language acquisition.

c. Knowledge of the basic stages of child development will help counsel develop sensitivity and age–appropriate communication skills.

d. As with any client, counsel may advise the child client about their position in the case, but counsel should recognize that the child client may be more susceptible to intimidation and manipulation, and should ensure that the client's ultimate decision actually reflects the child's actual desires.

4. Counsel for children, parents or guardians in dependency cases should also visit at least two of the following:

a. a shelter home or facility;

b. a foster home;

c. a group home;

d. a residential treatment facility;

e. the Oregon State Hospital Child or Adolescent Psychiatric Ward; or

f. an outpatient treatment facility for children.

5. All attorneys representing children, parents or guardians in dependency cases should average at least 15 hours of Continuing Legal Education (CLE) each year, at least 8 hours of which should relate to the practice of juvenile law.

a. Counsel are encouraged to seek training in the subject areas listed in Implementation 2, 3 and 4 *supra*.

b. Counsel are also encouraged to seek training in the following areas:

i. substance abuse and resources for substance abusing families;

ii. cultural and ethnic differences as they relate to child rearing;

iii. government benefits available in dependency cases, such as Social Security payments including non-needy relative grants, AFDC and AFDC-FC, Adoption Assistance Programs, and crime victims programs;

iv. Independent Living Programs;

v. emancipation laws and programs;

vi. Family Preservation Services;

vii. resources for the diagnosis and treatment of sexual abuse, physical abuse, and emotional abuse;

viii. patterns of child growth as related to neglect;

ix. resources for the treatment and recognition of non-organic failure to thrive;

x. Educational, mental health and other resources for special needs children;

xi. the use and appropriateness of psychotropic drugs for children;

xii. domestic violence, its effect on children and appropriate resources;

xiii. immigration law issues in juvenile court;

xiv. transitional aspects of placement and the child's return home;

xv. the importance of placing siblings together when appropriate;

xvi. the appropriateness of various types of placement;

xvii. the efforts that should be made to ensure a smooth, timely transition;

xviii. the effect of the placement on visitation by parents, siblings and other relatives;

xix. the effect of the placement on the service needs of the child;

xx. the transracial, transcultural and language aspects of the placement;

xxi. risk assessment prior to reunification;

xxii. the basics of case planning;

xxiii. accessing private insurance for services;

xxiv. consolidated cases in the family court;

xxv. the Indian Child Welfare Act, Native American families and appropriate resources;

xxvi. the Uniform Child Custody Jurisdiction Act (UCCJA);

xxvii. the Parental Kidnapping Protection Act;

xxviii. the Interstate Compact for the Placement of Children;

xxvix. the Interstate Compact on Juveniles;

xxx. guardianships;

xxxi. adoption placement preferences.

STANDARD 3.2. General Duties And Responsibilities Of Counsel To Client; Avoiding Conflict Of Interests

Counsel or counsel associated in practice should not represent two or more clients who are parties to the same or consolidated juvenile dependency cases unless it is clear there is no conflict of interest between the parties. Counsel should act in a professional manner in zealously advocating the client's position.

Implementation

1. Counsel should comply with Standard 1.2, Implementation 5, *supra*. Counsel should be especially cautious when accepting representation of more than one parent, guardian or child. Counsel should avoid representing both parents in

dependency cases and should never represent both parents in cases that involve allegations of sexual, physical or emotional abuse, or when the interests of the parents may be adverse. Counsel should avoid representing multiple siblings when their interests may be adverse and should never represent siblings where it is alleged that one sibling has physically or sexually abused another sibling. Child clients may not be capable of consenting to multiple representation even after full disclosure.

2. Counsel should preserve the attorney–client privilege and not disclose, without the client's permission or as otherwise provided by law, confidential information. Counsel should try to avoid publicity connected with the case. Counsel should be cognizant of the emotional nature of these cases, the confidential nature of the proceedings and the privacy needs of the client.

3. Counsel should initiate and answer all correspondence and telephone calls which are necessary to the effective representation of the client.

4. Counsel should avoid ex parte communication regarding pending cases with the judicial officer before whom the case is pending.

5. Counsel should maintain professional decorum when appearing before the juvenile court. Counsel should identify for the record any person who is present in the courtroom on behalf of a client.

6. Counsel may not contact represented parties without the consent of their counsel.

STANDARD 3.3. Role Of Counsel

It is the duty of counsel to determine whether a child client is capable of considered judgment. If counsel determines that the child is not capable of considered judgment, counsel should advocate what is in the client's best interests.

When representing parents and children capable of considered judgment, counsel should seek the lawful objectives of the client and should not substitute counsel's judgment in those case decisions that are the responsibility of the client.

Implementation

1. In determining whether a child is capable of considered judgment, counsel should consider:

a. the child's chronological and intellectual age;

b. the child's developmental stage;

c. the child's sophistication and experience;

d. whether the child is articulating a position concerning the issues of the case; and

e. the presence of undue influence.

2. Whether a child is capable of considered judgment and able to contribute to a determination of their position in the case depends on the context and circumstances at the time the position must be determined. A child may be able to determine some positions in the case but not others.

3. Ideally, a guardian ad litem should be appointed in every case in which the child is incapable of considered judgment. These standards suggest, but do not require such appointments because of the expense associated with such appointments and the long-term practice in Oregon courts of not appointing guardians ad litem in juvenile court cases.

a. Where a guardian ad litem has been appointed, primary responsibility for determination of the posture of the case rests with the guardian ad litem and the child.

b. Where a guardian ad litem has not been appointed, counsel should consider asking that one be appointed and consideration should be given to appointment of an appropriately trained CASA or other qualified volunteer as guardian ad litem.

4. When representing parents and children capable of considered judgment, decisions that are ultimately the client's to make include whether to:

a. admit the allegations of the petition;

b. agree to jurisdiction, wardship and temporary commitment to SOSCF;

c. accept a conditional postponement; or

d. agree to specific services or placements.

5. Counsel should advise the client concerning the probable success and consequences of adopting any posture in the proceedings. It is the duty of counsel to give the client the information necessary to make an informed decision, including advice and guidance, but to not overbear the will of the client. Counsel may not advocate a position contrary to the client's expressed position.

6. When representing parents and children capable of considered judgment, counsel is bound by and should advocate for the client's definition of his or her interests, and may not substitute counsel's judgment for the client's, nor ignore the client's wishes because they are perceived not to be in the best interests of the child.

7. If the client is not capable of considered judgment and a guardian ad litem has not been appointed, counsel should inquire thoroughly into all circumstances that a careful and competent person in the child's position should consider in determining the child's best interests with respect to the proceeding. After consultation with the child, the parents (where their interests do not appear to conflict with the child's), and any other family members or interested persons, such as the caseworker or child's therapist, counsel shall advocate what counsel determines to be the best interests of the child.

8. Where there is a conflict between what counsel has determined would be in the best interests of a child who is not capable of considered judgment, and the child's stated desires, counsel must to the greatest extent possible resolve the conflict by working with the young client, although this sensitive issue cannot always be avoided or completely resolved. If unable to resolve the conflict, counsel should communicate the child's wishes to the court but advocate for what counsel determines to be the best interests of the child.

9. Unless inconsistent with the client's interests, counsel should cooperate with other parties to the case.

STANDARD 3.4. Obligations Of Counsel Regarding Pre-trial Placement

When a child has been removed from the parent's home and placed in shelter care, counsel should advocate for the placement order and other temporary orders the client desires, unless the client is a child incapable of considered judgment, in which case, counsel should advocate for the placement order and other temporary orders that are in the best interests of the child.

Implementation

1. Counsel should be familiar with statutory and case law that requires SOSCF to make reasonable efforts to prevent removal of a child and that removal is only allowed in cases of imminent danger.

2. Counsel should be familiar with the types of placements available to children and placement issues including:

a. the necessity of placement;

b. alternatives to placement;

c. relative placement;

d. the impact of removal and placement on the child;

e. the importance of placing sibling together when appropriate;

f. the appropriateness of the placement;

g. efforts that can be made to ensure a smooth transition to a new placement;

h. the effect of the placement on visitation;

i. the effect of the placement on service needs of the child or family; and

j. the transracial, transcultural and language aspects of the placement.

3. At the shelter care hearing, counsel should:

a. obtain copies of all relevant documents;

b. take time to talk to the client, asking for a recess or continuance if necessary;

c. assist the client in exercising his or her right to an evidentiary hearing to demonstrate to the court that the child can be returned home without further danger of suffering physical injury or emotional harm, endangering or harming others, or not remaining within the reach of the court process prior to adjudication;

d. where appropriate, present facts and arguments regarding:

i. jurisdictional sufficiency of the petition;

ii. adequacy of notice provided to parties, particularly if they are not present;

iii. the necessity of shelter care;

iv. why continuation of the child in the home would be contrary to the child's welfare or why it is in the best interest and for the welfare of the child that the child be removed from home or continued in care;

v. whether reasonable efforts were made to prevent removal;

vi. whether reasonable and available services can prevent or eliminate the need to separate the family;

vii. whether the placement proposed by SOSCF is the least disruptive and most family–like setting that meets the needs of the child;

viii. the possibility of placement with appropriate non–custodial parents and relatives;

ix. a plan for release of the child prior to the jurisdictional hearing;

x. if the child remains in shelter care, arrangements for visits and alternatives to shelter care to be explored such as relative placement, intensive in–home services and mediation.

e. propose return to parents or placement that is the least restrictive with regard to the client.

4. If a child is returned to parents or placed in shelter care or other state placement, counsel for the child should assure that the child's needs for safety and right to receive treatment are met by the child's caretakers or agencies responsible for the child's care. Counsel should inform the Court, SOSCF and the caretakers for the child about any medical, psychiatric, or security needs of the client.

5. Counsel should request any temporary orders which the client desires or, if representing a child not capable of considered judgment, which are in the best interests of the child, including:

a. temporary restraining orders including orders expelling an allegedly abusive parent from the home;

b. orders governing future conduct of the parties, i.e. remaining clean and sober while the child is present, etc.;

c. orders for any services agreed upon prior to adjudication;

d. visitation orders that are reasonable and flexible and take into consideration the parties' work and counseling schedules and available transportation and that specify the terms and conditions of visitation;

e. orders for the parent(s) to pay child support if appropriate;

f. orders for SOSCF to investigate relatives and friends of the family as potential placements, or to place sibling groups together; and

g. Orders for the agency to provide appropriate treatment for the child.

6. Counsel should inform the client of the possibility for rehearing of the shelter care order or appeal from a shelter care order of a referee to a judge and the possibility of pursuing a *writ of habeas corpus*.

7. If the court sets conditions of the child's placement, counsel should explain to the client and any third party the conditions and potential consequences of violating such conditions. Counsel should seek review of shelter care decisions every ten days or as appropriate and advise clients or any third parties of changes in conditions for pre–trial placement that would be likely to get the Court to agree with the client's plan.

8. Counsel should ask the court to inquire of parties concerning the paternity of the child and the applicability of the Indian Child Welfare Act (ICWA) or the Uniform Child Custody Jurisdiction Act (UCCJA).

STANDARD 3.5. Initial Client Interview And Client Contact

Establishing and maintaining a relationship with the client is the foundation of the attorney–client relationship. Counsel should conduct an initial interview of the client within 72 hours and maintain regular contact with the client throughout the case.

Implementation

1. Counsel should comply with Standard 1.2, Implementations 1, 2 and 3, and Standard 1.3, *supra*, and in addition, upon being retained or appointed, counsel should make an initial contact with the client or the client's caretaker within 24 hours and, where appropriate conduct an initial interview within 72 hours. At the initial interview, counsel should explain to the client in age appropriate language:

a. juvenile court and SOSCF procedures;

b. the client's rights;

c. the role and responsibilities of the attorney;

d. the role of each player in the system;

e. alternatives and options available to the client;

f. the consequences of selecting one option over another.

2. Counsel should give the client time to ask questions and consider the alternatives. Counsel should obtain information from the client about:

a. the client's prior contacts with SOSCF;

b. the client's knowledge about the allegations of the petition;

c. the accuracy of information provided by the state supporting the petition;

d. alternative or additional allegations that should be added to the petition;

e. services provided prior to removal or intervention;

f. reasons for removal or intervention;

g. services the client feels would have avoided the need for removal;

h. alternatives to removal including relative placements, in–home services or removal of the perpetrator;

i. current efforts to reunify the family;

j. family history including identity of prior caretakers of the child;

k. services needed by the child, parents or guardians;

L. the client's concerns about placement;

m. the client's long and short-term goals;

n. current visitation and the client's desires concerning visitation;

o. whether the client wishes to attend the hearing and if the client is a child, whether the client wishes to address the court outside the presence of the other parties;

p. the applicability of the Indian Child Welfare Act and relevant other cultural, religious, social and sexual preference issues; and

q. any other relevant information.

3. Counsel representing a child should gather information from the child and the child's caretakers, caseworker and therapist, if any, to assist in determining whether the child is capable of considered judgment.

4. All child clients should, at a minimum, be personally contacted by counsel and/or counsel's trained and qualified staff to determine the client's wishes, if possible, and to assess the client's well-being. It is important for counsel or counsel's staff to observe the child, the child's interactions with others in the home or foster home, and to assess the severity of the injuries and the child's general health and condition. Children four years of age or old enough to communicate should be personally interviewed in private by counsel. Interviews of children should occur away from court.

5. Counsel should have contact with clients:

a. prior to court hearings and CRB reviews;

b. whenever notified that the child's placement is changed; or

c. when counsel is apprised of emergencies or significant events impacting the child.

6. For younger children, counsel, personally or through their staff, are encouraged to have regular face-to-face contact with the client in the child's home or foster home every three months or as needed. Older children should be contacted by phone, in their homes, at school or at the attorney's office with a similar frequency.

7. Counsel should confer with their clients as often as necessary after the initial interview to ascertain all relevant facts and otherwise necessary information. After counsel is fully informed on the facts and the law, counsel should advise the client concerning all aspects of the case.

STANDARD 3.6. Independent Investigation

Counsel should conduct a thorough, continuing and independent review and investigation of the case, including obtaining information, research and discovery in order to prepare the case for trial. Counsel should not rely solely on the report of the caseworker.

Implementation

1. Counsel should, where appropriate, conduct an in-depth interview with the client covering:

a. the events giving rise to the allegations in the petition;

b. the existence of witnesses or other potential sources of information; and

c. information about the child's current placement, condition and needs.

2. Counsel should be familiar with, and where appropriate, obtain the assistance of, local juvenile and mental health experts who can provide attorneys with consultation, evaluation of their clients or other parties, including parent-child interaction assessments, and testimony on issues in the case.

3. Counsel should have potential witnesses, including adverse witnesses interviewed, and where appropriate subpoenaed by an investigator or other appropriately trained person. If counsel conducts a witness interview, counsel should do so in the

presence of a third person who can be available to appear as a witness at trial. Potential witnesses may include:

a. school personnel;

b. neighbors;

c. relatives;

d. caseworkers;

e. foster parents and other caretakers;

f. mental health professionals;

g. physicians; and

h. law enforcement personnel.

4. Counsel should confer with the attorneys for the other parties, and request permission to interview their clients with them present. When possible, counsel should interview parents and children in their home. Where appropriate, counsel or counsel's trained and qualified staff should observe visitations between parent and child.

5. When necessary, counsel should conduct or participate in depositions of witnesses.

6. Counsel should obtain information from representatives of other agencies with whom the family has been involved, either through SOSCF referral or on the family's own initiative, such as:

a. Community Health Nurses;

b. school personnel;

c. homemaker services;

d. family counselors;

e. parenting instructors;

f. drug or alcohol counselors;

g. neighbors;

h. ministers, priests, church members, etc.;

i. baby-sitters; and

j. other persons who have had significant contact with the child or family and may have relevant information.

7. Counsel should comply with discovery statutes and use the same to obtain names and addresses of witnesses, witness statements, results of evaluations or other information relevant to the case. Counsel should obtain and examine all available discovery and other relevant information, including:

a. the petition and juvenile court legal and social files;

b. information that is obtained through requests for discovery;

c. information from the SOSCF caseworker and from reviewing agency records for information about:

i. services provided by the agency in the past;

ii. visitation arrangements;

iii. the plan for reunification; and

iv. current and planned services.

8. Counsel should obtain records concerning the family from other relevant sources such as:

a. schools;

b. hospitals and other medical records sources;

c. law enforcement agencies;

d. treatment agencies, including mental health and drug and alcohol treatment agencies; and

e. psychiatrists, psychologists, therapists and counselors.

9. Where the client's participation in psychiatric, medical or other diagnostic or treatment program is significant in obtaining the client's desired result, counsel should so advise client.

10. Counsel should research and review relevant statutes and case law to identify defenses and legal arguments to support the client's case.

STANDARD 3.7. Pretrial Motions

Counsel should research, prepare, file and argue appropriate pretrial motions or responses whenever there is reason to believe the client is entitled to relief. Counsel should file briefs or memoranda in support of such motions or responses.

Implementation

1. Counsel should make appropriate pretrial motions including:

a. discovery motions;

b. motions for medical, psychological or psychiatric evaluation, parent–child interaction. developmental or neurological assessment;

c. motions challenging the constitutionality of statutes and practices;

d. motions to strike, dismiss or amend the petition;

e. motions for interpreters;

f. evidentiary motions and motions in limine; and

g. motions to consolidate.

2. Counsel should seek protective orders, make appropriate motions in limine and other evidentiary motions.

3. Counsel should make motions to meet the client's needs pending trial, including:

a. restraining orders;

b. orders for family reunification services;

c. orders for medical or mental health treatment;

d. orders for change of placement;

e. motions to increase, decrease or limit parental or sibling visitation;

f. motions seeking child support; and

g. motions seeking contempt for violations of court orders.

STANDARD 3.8. Negotiating A Settlement

Counsel should participate in settlement negotiations to seek expeditious resolution of the case and to obtain petition and disposition terms favorable to the client.

Implementation

1. If the attorney concludes, after sufficient investigation, that the petition will probably be sustained, the attorney should so advise the client and request consent to discuss settlement of case. Counsel should seek petition terms that cast the client in the most favorable light.

2. Counsel should fully explain to the client the rights that would be waived by a decision to admit to jurisdiction, and keep the client fully informed of settlement negotiations. Counsel must convey to the client any offers made for settlement and

the advantages and disadvantages of accepting the offers. Counsel may not accept any settlement without the client's authorization.

3. Counsel should be familiar with available mediation services and should consider whether the client's interests could best be served and whether the case could be more appropriately resolved by mediation or other settlement meetings.

4. Counsel should explain to the client the conditions and limits of the settlement, and the effect of the settlement on future actions such as criminal actions or termination of parental rights petitions.

STANDARD 3.9. Hearings

Counsel should be prepared before and during hearings to provide quality representation and advocacy for the client.

Implementation

1. In most circumstances, counsel should have the client present at significant court hearings and reviews. However, in determining whether to have a child present at a hearing or review, counsel should carefully consider the impact of the hearing on the child. If a parent or child over twelve years of age is waiving their appearance, counsel should have them execute a written waiver. Counsel should prepare the client for their role in the hearing or review.

2. A decision to exclude a young child from a hearing or review is appropriate if the child does not want to attend, is too young to sit through the hearing, would be significantly traumatized by such attendance, or for other good reasons. Concerns about the child being exposed to some of the testimony can be addressed by having the child temporarily excluded from the courtroom.

3. Counsel should avoid unnecessarily requiring young children to testify in dependency adjudication, review or termination of parental rights hearings. If testimony is necessary, counsel should, where appropriate, agree to steps to reduce the trauma to the child, such as having the child testify in chambers.

4. In determining whether to have the child testify, the child's counsel should consider:

a. the child's need or desire to testify;

b. any likely repercussions of testifying;

c. whether the child is likely to be found competent to testify;

d. the necessity of the child's direct testimony;

e. the availability of other evidence which may substitute for the child's testimony; and

f. the child's developmental ability to testify and withstand cross–examination.

5. If the child is capable of considered judgment, counsel is bound by the client's decision concerning testifying.

6. Counsel should be familiar with current law and empirical knowledge about children's competency, memory and suggestibility as they relate to the child's competence to testify or the reliability of testimony or out–of–court statements.

7. Counsel for the child should prepare the child to testify including:

a. familiarizing the child with the courtroom and court procedures;

b. advising the child what to expect during direct and cross–examination;

c. ensuring that testifying will cause minimum harm to the child by:

i. seeking modification in the location of the testimony;

ii. limiting who will be present;

iii. restricting the manner and phrasing of questions posed to the child; and

iv. objecting to questions to the child that are not phrased in a syntactically and linguistically appropriate manner.

8. At the hearing counsel should be fully prepared by:

a. having all relevant materials available at the trial, including all pleadings, discovery and investigative reports, as well as, relevant statutes, caselaw, and the evidence code;

b. having marshaled facts and legal arguments to prove or disprove the allegations of the petition, assuring that there is factual support for each service element being sought.

c. having a draft or outline of:

i. opening and closing statements;

ii. direct and cross-examination plans for all witnesses;

iii. amendments to the petition to be requested to conform the petition to the findings; and

iv. findings of fact and conclusions of law to be requested at the conclusion of the hearing.

9. Counsel should make appropriate motions, present and cross examine witnesses, offer exhibits, and provide independent evidence as necessary. During all hearings counsel should preserve legal issues for appeal, as appropriate.

STANDARD 3.10. Disposition

Counsel should be prepared to present a disposition plan on behalf of the client, as well as to respond to inaccurate or unfavorable information presented by other parties, ensuring that all reasonably available mitigating and favorable information is presented to the court and obtaining all appropriate orders to protect the client's rights and interests.

Implementation

1. Counsel should be prepared to participate fully in the dispositional hearing, which sets a course for the future of the case that will either result in reunification of the family or a severance of family ties. The attorney should counsel the client concerning the disposition prior to the hearing, including, explaining to the client the nature of the hearing, the issues involved, and the alternatives open to the court. Counsel should also explain fully the nature, obligations and consequences of any proposed dispositional plan.

2. Counsel should investigate all sources of evidence that will be presented at the hearing and interview material witnesses. Counsel also has an independent duty to investigate the client's circumstances, including such factors as previous history, family relations, economic condition and any other information relevant to disposition.

3. When the court has found evidence sufficient to support jurisdiction, counsel should, when appropriate, ask the court not to exercise jurisdiction and move to dismiss the petition on the ground that jurisdiction is not in the best interests of the child because the child and family do not require supervision, treatment or placement.

4. Counsel should advocate the least restrictive disposition possible which can be supported and is consistent with the client's needs and desires. Although a child's position may overlap with the position of one or both parents, third-party caretakers, or SOSCF, the child's counsel should be prepared to participate fully in any proceedings and not merely defer to the other parties. Any identity of position should be based on the merits of the position, and not be a mere endorsement of another party's position.

5. Counsel for the child should ensure that the court recognizes the need to speedily promote permanency for the child.

6. Counsel should, where appropriate, examine fully any witness whose evidence is damaging to the client's interests and challenge the accuracy, credibility and weight of any reports or other evidence before the court.

7. Counsel should be prepared to present a disposition plan that will achieve the client's desired ends. Counsel should be familiar with the dispositional alternatives available to the court and the various agencies that serve children and families that can provide placements, treatment, and other dispositional services and should fully discuss dispositional options, consequences and procedures with the client.

8. Counsel should secure the assistance of psychiatric, psychological, medical or other experts needed for purposes of evaluation, consultation or testimony about the dispositional plan. Counsel should obtain reports or subpoena evaluators or other expert witnesses to testify. Counsel should prepare the client for any evaluation by explaining the nature of the procedure and encouraging the client's cooperation.

9. Counsel should obtain the written Reports of the Juvenile Department, SOSCF, and the CASA sufficiently in advance of the dispositional hearing to prepare a response. Counsel should consider submitting a written dispositional report on behalf of the client to set out the client's plan and to counter information provided in other reports received by the court.

10. At the hearing, counsel should, where appropriate:

a. request orders that benefit the client;

b. be prepared to present evidence on the reasonableness or unreasonableness of SOSCF's efforts and alternative efforts that could have been made;

c. request that a "no reasonable efforts" finding be made by the Court;

d. request an order specifying what future services will make the changes in the family needed to correct the problems necessitating intervention and constituting "reasonable efforts" by SOSCF;

e. request orders for services or service agreements that include:

i. family preservation services;
ii. medical and mental health care;
iii. drug and alcohol treatment;
iv. parenting education;
v. housing;
vi. recreational or social services;
vii. domestic violence counseling;
viii. anger management counseling;
ix. independent living services; and
x. other individualized services.

11. Counsel should assure that the order includes a description of actions to be taken by parents to correct the identified problems. Counsel should request that the Court include in its order a timetable for accomplishing the changes required. Counsel should, where appropriate, seek Court approval of a written service agreement prepared by Counsel or SOSCF.

12. Counsel should also request specific visitation orders covering visitation between child and parent, between siblings and between the child and other significant persons.

13. Counsel should, where appropriate, request that the Court appoint counsel, a Court Appointed Special Advocate (CASA) or an educational advocate (Surrogate Parent) for the child. Where appropriate counsel should seek child support orders.

14. Counsel should seek to ensure continued representation of the client at all further hearings and reviews. Counsel should request that the Court set the next date for the case to be reviewed.

15. Counsel should assure that the client is informed of and understands the nature, obligations and consequences of the dispositional decision, and the need for the client to cooperate with the dispositional orders. Counsel should also explain the client's rights and possibilities of post-trial motions to reconsider, set aside, modify or review the disposition, as well as the right to appeal. Counsel should explain the

consequences of violating the dispositional order and the continuing jurisdiction of the court.

STANDARD 3.11. Post–disposition

The lawyer's responsibility to the client does not end with dismissal of the petition or entry of a final dispositional order. Counsel should be prepared to counsel the client and provide or assist the client to secure appropriate legal services in matters arising from the original proceeding.

1. Counsel should counsel the client and file any post–disposition motion or appeal that is needed.

2. Counsel should review the court's order to insure that it conforms with the findings and disposition.

3. Counsel should file, litigate or respond to any motions to reconsider, set aside, or modify the jurisdictional finding or disposition, as well as any appeals of referees' orders. Counsel should, as directed by the client, also file notice of appeal and either provide representation on appeal or assist the client in referral to other appellate counsel. Counsel should participate in an appeal filed by another party or assist the client in referral to other appellate counsel.

4. Counsel should monitor implementation of the caseplan and progress in the case, requesting additional services, seeking review or other relief, such as contempt, as appropriate. Counsel should be familiar with the procedures available to the client after disposition.

5. Counsel should monitor the case plan for implementation and maintain contact with both the client and the agency or institution involved in the disposition plan in order to ensure that the client's rights are respected and where necessary, to counsel the client concerning the dispositional plan.

6. Counsel should confer periodically with their client and the caseworker to review the service plan and service agreement, the extent of compliance with the plan by both the agency and the client, and the continued appropriateness of the plan. Where needed, counsel should request additional services for the client or family.

7. In monitoring the provision of dispositional services, counsel should request a review or permanent planning hearing if necessary to protect the client's interests. Counsel should investigate and prepare for review or permanent planning hearings as for adjudicatory hearings to the extent that is necessary. *See* Standards 3.6 and 3.9, *supra.*

8. Counsel for the child should file a petition for termination of parental rights when necessary or advocate for the district attorney or attorney general to do so.

9. When the representation ends, counsel should explain why the representation is ending and how the client can obtain assistance in the future should it become necessary.

STANDARD 3.12. Review Permanent Planning And Termination Of Parental Rights Hearings

Counsel's role is most critical at the review, permanent planning and termination of parental rights hearings, where decisions of whether the family will be reunited or permanently severed are made. Counsel should be fully prepared to represent the client at all reviews and must provide the most zealous and meticulous representation at the termination of parental rights stage of the proceedings.

Implementation

1. State and federal law requires that review hearings or CRB reviews occur at regular intervals. Clients are also entitled to request reviews, to assist them in moving the case along or addressing problems with the caseworker or caseplan.

Counsel should seek a review to request return of the child when any event happens that may significantly affect the need for continued placement. Counsel should also request a review when court intervention is necessary to resolve a dispute over such matters as visitation, placement or services.

2. Whether a review is periodic or at the request of one of the parties, counsel should conduct appropriate investigation to prepare for the review, which may include:

a. reviewing the SOSCF file and the report prepared for the review and obtaining all relevant discovery;

b. interviewing the caseworker to determine his or her assessment of the case, the case–plan, the child's placement and progress, and the parent's cooperation and progress;

c. contacting other agencies and professionals who are providing services to the child or parents;

d. interviewing other potential witness, which may include relatives, neighbors, school personnel and foster parents;

e. seeking evaluation of the client or other parties; and

f. subpoenaing needed witnesses.

3. At all review hearings and CRB reviews counsel should be prepared to present information on what the long–term plan for the child should be and whether SOSCF and the parents are taking the necessary steps to achieve the chosen plan in a timely fashion. Counsel should consider submitting a written report on behalf of the client. Counsel should specifically address:

a. whether there is a need for continued placement of the child;

b. reasons the child can or cannot presently be protected from the identified problems in the home even if services are provided;

c. whether SOSCF is making reasonable efforts to rehabilitate the family and eliminate the need for placement of the child;

d. why services have not been successful to date;

e. whether the court–approved plan for the child remains the best plan;

f. whether the caseplan or service agreement need to be clarified or modified;

g. the appropriateness of the child's placement; and

h. whether visitation or other orders should be made or modified.

4. At all review hearings, CRB reviews and permanent planning hearings, counsel should request specific findings and orders that advance the client's case. Where appropriate, counsel should ensure that parents receive a clear and authoritative statement of what is expected of them, the time they have, the possibility of return of the child if sufficient progress is made, and the risk of termination if not. Counsel should ask the Court to set the time frame for the next hearing, if needed.

5. Permanent planning hearings require the same preparation as other reviews, but counsel should, in addition, be prepared to address what the long–term plan for the child should be, including:

a. a specific date on which the child is to be returned home, or

b. a date on which the child will be placed in an alternative permanent placement;

c. whether the child will remain in foster care on a permanent or long–term basis, and

d. whether foster care will be extended for a specific time, with a continued goal of family reunification.

6. Counsel for the child should consider whether to file a termination petition on behalf of the child, or to join the state in prosecuting such a petition or the parent in

defending such a petition. Because termination of parental rights is a drastic and permanent deprivation of the fundamental right of family membership, and only the death penalty is a more severe intrusion into personal liberty, counsel should be zealous and meticulous in investigating and preparing for termination of parental rights hearings. Counsel should prepare for and try termination of parental rights hearings as for adjudicatory hearings. See Standards 3.6, 3.7, 3.8, 3.9 and 3.11 supra. In addition, counsel should:

a. thoroughly review the record of the case, carefully analyzing court orders and CRB findings and recommendations;

b. completely investigate the case especially issues unique to termination, such as the adoptability of the child and the child's ability to bond to new caretakers;

c. prepare a detailed chronology of the case to use in case presentation and in developing a theory and strategy for the case;

d. research termination statutes and case law with particular attention to constitutional issues and prepare trial memoranda if necessary;

e. obtain and review records to be submitted to the court and prepare objections or responses to objections to these documents;

f. subpoena and carefully prepare witnesses;

g. be aware of the heightened standard of proof in termination cases–clear and convincing evidence for most cases and beyond a reasonable doubt in cases covered by the Indian Child Welfare Act;

h. be prepared to present evidence of or address SOSCF's failure to adequately assist parents.

PERFORMANCE STANDARDS

CHAPTER 4. SPECIFIC STANDARDS FOR REPRESENTATION IN *CIVIL COMMITMENT PROCEEDINGS*

This chapter pertains to cases of involuntary commitment of the mentally ill. Under Oregon law, a mentally ill person is a person who, because of a mental disorder, is either dangerous to self or others or unable to provide for basic personal needs and is not receiving such care as is necessary for health or safety. The types of cases referred to in this chapter as "commitment proceedings" include initial commitment, re-commitment, conditional release, trial visit revocation, outpatient commitment, and "diversion" (a 14 day period of intensive treatment). Because it is generic, the term "commitment client" is used in this chapter in lieu of the term "allegedly mentally ill person."

Not addressed in this chapter are any specific standards that may apply to civil commitment of the mentally retarded. Nonetheless, counsel will find this chapter useful in cases involving involuntary commitment of the mentally retarded.

STANDARD 4.1. Prerequisites For Representation

In addition to being proficient in substantive and procedural law, counsel should possess knowledge, skill, training and experience commensurate with the nature of the allegations and the complexity of the case.

Implementation

1. At a minimum, counsel should meet the requirements of the Qualification Standards for Court Appointed Counsel to Represent Indigent Persons at State Expense, Oregon Judicial Department (1990), Standard 3.1 F.

2. Counsel should have basic knowledge of the classification of mental disorders (*Diagnostic and Statistical Manual of Mental Disorders [Fourth Edition Revised]*)

and the ability to read and understand medical terminology related to mental disorders and the treatment of the mentally ill.

3. Counsel should be familiar with the medications used to treat mental disorders and, in particular, the effects of those medications on the client's participation.

4. Counsel should be aware of how a particular mental disorder will affect attorney/client communications. Counsel should recognize communications may require special efforts on the part of counsel.

5. Counsel should have familiarity with mental health resources and other resources available in the community that will provide an alternative to involuntary hospitalization.

6. Counsel should be familiar with the facilities, both inpatient and outpatient, that provide services to the mentally ill.

7. Counsel should frequently represent clients in commitment proceedings. If counsel is not frequently before the court representing commitment clients, counsel should observe local court proceedings and/or consult with counsel experienced in local commitment proceedings. Counsel should be familiar with local court practices.

8. Counsel should avail oneself of any CLE's or specialized training to further educate counsel on substantive issues, substantive law, statutory law and procedures, local court rules, and local practices as they relate to commitment proceedings.

STANDARD 4.2. Counsel's Role

It is counsel's role to act as a zealous advocate for the client's ultimate goals and objectives in the commitment proceedings and to advise the client on how best to achieve them.

Implementation

1. It is counsel's duty to ascertain the client's ultimate goals and objectives in the proceedings.

a. It is the unusual circumstance where the client cannot express the ultimate goal, i.e., "I want out of this hospital, jail, custody situation." Counsel should nearly always be able to ascertain if the client's desire is "liberty". If the client desires liberty, then counsel should work to achieve liberty.

b. Counsel should assume the role of advocate for the client's rights and not attempt to take on an additional role. Counsel is not the judge, the consensus of the community, the client's family member, the prosecutor or the mental health provider.

c. In those rare instances when a client, because of mental status, cannot express his or her ultimate goals and objectives in the commitment proceedings, it is the role of counsel to protect the client's constitutional and statutory rights.

2. Counsel should advise the client of probable successes and consequences of adopting any posture in the proceedings.

3. Counsel should assess whether counsel has the requisite training, skill, knowledge and experience to represent a commitment client in other types of legal matters before undertaking representation in such matters.

4. If counsel represents the commitment client in other types of proceedings, such as guardianship, conservatorship, or criminal proceedings, counsel should assess how the client's participation and position in one proceeding may potentially affect the client's participation and position in other proceedings and advise the client accordingly. For example, if counsel represents a client in both a civil and criminal matter, it may potentially pose problems if counsel asserts a claim of mental disorder exculpating culpability in the criminal matter while on behalf of the same client counsel argues against a civil commitment because the client denies a mental disorder.

STANDARD 4.3. Initial Client Interview

Upon being retained or appointed by the court, counsel should conduct an initial interview with the client as soon as possible, in most cases within 24 hours, but in all cases prior to the hearing.

Implementation

1. Counsel should ascertain where the client is located and visit personally. In many instances, the client will be detained in a hospital, jail, or locked care facility. In the remaining cases, the client will be located via the information contained in the citation or delivery warrant.

2. In the initial interview, counsel should:

a. clearly introduce herself to the client and make sure the client understands the role counsel plays in the civil commitment process and the difference between counsel's role and that of the state's attorney;

b. discuss the issue of client confidentiality and secure the client's oral and written permission to obtain access to relevant records;

c. explain the reason for the commitment proceedings and the possible results;

d. ascertain the client's desired resolution;

e. explain legal rights;

f. provide legal advice;

g. describe the likely course of events;

h. prepare the client for a mental status exam by examiners appointed to aid the judge; and

i. describe the burden of proof and the findings the court must make in order to further deprive the client of liberty.

3. When counsel has ascertained the client's ultimate goal, counsel should advise the client of the available options and the probable success and consequences of choosing a particular option. For example, if the client wants discharge but in counsel's estimation is likely to be more successful in presenting a conditional release, that alternative should be presented to the client. Counsel should follow the client's desires as to which option to pursue.

4. Counsel should inform the client of:

a. the right to a postponement and the likelihood of continued detention during the postponement;

b. the right to subpoena witnesses, including expert witnesses;

c. the right to subpoena any physician who is, or has been, treating the client at the client's request and counsel's statutory obligation to do so under ORS 426.075(4);

d. the right to assert applicable privileges regarding confidential communications with a psychologist, psychiatrist, caseworker, physician, social worker or others, and the likely results of waiver of that privilege;

e. the right to have the investigator personally present at the hearing as a prerequisite to admissibility of the investigator's report;

f. the right to object to the admissibility of hearsay in the investigator's report; and

g. the right to request a qualified examiner in addition to the one the Court is required to appoint.

7. If the proceedings are for a violation of trial visit or a violation of conditional release, counsel should describe the proceeding, the standard of proof required, the allegations before the Court, and advise the client of the consequences of a revocation.

8. If the proceeding is a re–commitment proceeding, counsel should inform the client of the right to protest re–commitment and require an independent medical examination.

9. If the client is detained because of a certificate for a 14 day period of intensive treatment, "diversion", counsel shall meet with the client and review the certificate within 24 hours of the filing of the certificate. Counsel shall inform the Court whether the client consents to or protests the certificate within one judicial day of the time the certificate is delivered to the Court. ORS 426.237(3)(c)

10. Counsel should inform the client in the applicable case of the fact that the Court may prohibit the client from possession of a firearm in the future.

11. Counsel should advise the client of the legal basis under which the Court will order:

a. discharge;

b. commitment;

c. conditional release;

d. revocation or modification of a trial visit;

e. outpatient commitment;

f. recommitment; and

g. the length of commitment.

STANDARD 4.4. Obligations Of Counsel Pre–hearing

Counsel should obtain documents filed in the case, review reports and records of relevance, prepare pre–trial motions and engage in negotiations at the client's direction.

Implementation

1. Counsel should obtain and review where relevant the:

a. court file;

b. investigation report;

c. medical records;

d. police reports; and

e. evidence offered by opposing counsel.

2. Counsel should conduct interviews with relevant witnesses prior to the hearing.

3. Counsel should research, prepare, file and argue pre–trial motions to protect the client's statutory and constitutional rights:

a. counsel should review and challenge the substance and process of the initiation of the commitment proceedings:

i. counsel should ascertain if the notification of mental illness meets the statutory criteria for substance and process, including whether the notification is under oath, contains the factual basis for a commitment proceeding, meets the statutory requirements for a commitment proceeding, and comports with the timeliness provisions of the statute;

ii. counsel should review the notice and content of the investigator's report to see if they comport with the statutory requirements;

iii. counsel should review the notice and filing of medical records sought to be introduced; and

iv. counsel should review the basis for a warrant of detention and determine if the warrant is sufficient in its substance, execution and return.

b. counsel should challenge for bias the judge or mental health examiners, where appropriate.

c. counsel should be aware of the basis for and file a motion to seek release from custody in the form of a Petition for Writ of Habeas Corpus when appropriate.

d. counsel should be aware of the application of the rules of evidence in the commitment proceedings and litigate matters of admissibility of evidence by means of a motion in limine when appropriate.

e. counsel should make appropriate requests for extraordinary expenses for the services of experts when necessary.

4. Counsel should ascertain whether the client may achieve the ultimate goal without the necessity of a contested commitment hearing. If appropriate in furtherance of that goal, counsel should:

a. seek to negotiate a satisfactory outcome with opposing counsel;

b. approach the mental health investigator about a dismissal or less restrictive resolution without the necessity of a hearing;

c. prepare and present a conditional release alternative;

d. prepare and present a stipulation to the basis for a commitment to the court; and

e. determine if a postponement will assist in achieving the client's desired resolution. counsel should seek the postponement at the client's request.

STANDARD 4.5. Commitment Proceedings

Counsel should provide quality representation and advocacy for the client at commitment proceedings.

Implementation

1. At a hearing, counsel should be prepared to:

a. raise procedural motions, including the exclusion of witnesses at the client's request;

b. assert privileges, including the physician/ patient, psychotherapist/patient, social worker/patient and other privileges;

c. protect against self-incrimination;

d. make an effective opening statement as to the client's ultimate goal and the facts that will be presented to support that goal;

e. cross-examine and present expert and lay witnesses;

f. present a plan for discharge;

g. present alternatives, including conditional release, voluntary commitment and outpatient commitment, where appropriate; and

h. present stipulations.

2. In closing, counsel should argue strict application of the burden of proof and the law.

3. At all times, counsel should endeavor to preserve the record for appeal.

STANDARD 4.6. Obligations Of Counsel Post-hearing

It is counsel's responsibility to represent or obtain representation for any residual legal matters relating to the case.

Implementation

1. Counsel should take the necessary actions to effect an appeal at the client's request. Counsel should undertake to file a Notice of Appeal or assure that alternative counsel is appointed to perfect an appeal.

2. Counsel should assess any treatment issues that exist requiring legal intervention and, where appropriate, refer the client to the bar association, advocacy group, attorney general's office, legal aid, private counsel or other appropriate source.

3. Counsel should, where appropriate, inform the client of the existence of social services, such as housing and food available in the community, the existence and location of community mental health providers, and the existence of medical treatment available in the community upon discharge from a hospital.

[Approved by the Board of Governors September 25, 1996.]

INDIGENT DEFENSE LEGAL SERVICES CONTRACT BETWEEN STATE COURT ADMINISTRATOR AND

(Contractor)

GENERAL TERMS AND SPECIFIC TERMS

[Value-Based/Outputs/Death Penalty]

(contract start date) TO (contract end date)

J.D. (JD #)

(County(ies)

Circuit Court

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GENERAL TERMS

1 DEFINITIONS AND CASE CREDIT RULES

1.1 Interpretation of Terms

Words, terms, and phrases not specifically defined in this contract shall have the ordinary meaning ascribed to them unless the context clearly indicates otherwise. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. The word "shall" is mandatory and not merely directive.

1.2 Construction and Jurisdiction

This contract shall be construed in accordance with the laws of the State of Oregon. A party shall bring any action or suit involving any question of construction arising under this contract in an appropriate court in the State of Oregon.

1.3 Severability

If a court of competent jurisdiction declares or the parties agree that any term or provision of this contract is illegal or in conflict with any law:

(a) the remaining terms and provisions shall remain valid; and

(b) the rights and obligations of the parties shall be construed and enforced as if the contract did not contain the particular term or provision held to be invalid.

1.4 Definitions

1.4.1 SCA

"SCA" and "State of Oregon" includes the respective agents, employees, members, officers, representatives, and successors of SCA and State of Oregon.

1.4.2 Contractor

"Contractor" includes Contractor's agents, employees, members, officers, representatives, successors, and subcontractors.

1.4.3 Public Defender

A "public defender" is a nonprofit organization established solely to provide contract services to persons qualifying for indigent defense representation.

1.4.3 Law Firm

A "law firm" is a sole practitioner, partnership, or professional corporation which provides contract services to persons qualifying for indigent defense representation and which may engage in non-indigent defense legal representation.

1.4.3 Consortium

A "consortium" is a group of attorneys or law firms that is formed for the sole purpose of providing contract services to persons qualifying for indigent defense representation. In addition to participating jointly to provide contract services, Consortium members retain their separate identities and may engage in non-indigent defense representation.

1.4.4 Indigent

An "indigent" is a person whom a state court has determined to be eligible for and entitled to court-appointed counsel at state expense.

1.4.5 Appointment

An "appointment" is the assignment of a contractor to represent an indigent on any matter under the terms of this contract.

1.4.6 Case

A "case" is any action in this state in which Contractor has been appointed to represent an indigent under the terms of this contract. Specific definitions of case types are listed in Appendix F.

1.4.7 Credit

A "credit" is an event or circumstance which counts toward Contractor's satisfaction of this contract.

1.4.8 Value

The "value" of a credit is the negotiated rate by type of credit as set forth in Appendix H.

1.4.9 Complex Case

A "complex case" is an appointment on a case type valued at $1,000 or more.

1.5 Rules for Counting Appointments

An appointment is credited, according to the following rules:

1.5.1 Complex Case Credit

An appointment to an indigent on a complex case is one credit. No extra credit may be taken for multiple incident dates or charges. A withdrawal for conflict of interest changes the credit type to "Other".

1.5.2 Criminal Appointment Case Credit (Non-Complex Case Credit)

(a) An appointment on criminal charges alleged to have occurred on the same **specific calendar day** is one credit, regardless of the number of charges or number of victims involved.

(b) An appointment on criminal charges alleged to have occurred on **indeterminate dates** (e.g., "on or between January 1, 1996, and July 1, 1996") is a credit for each count charged in the charging instrument which can be determined to allege different calendar days.

(c) Separate counts in a charging instrument that allege alternative theories of criminal liability on the same date are only one credit.

(d) No additional credit may be taken due to the following circumstances:

(i) more than one charging instrument (including Uniform Traffic Citation (UTC)) is filed; or

(ii) more than one case number is assigned.

1.5.3 Case Type Credit
The case type credited is for the most serious offense alleged to have occurred on a specific calendar day, even if the charge is later changed to a different case type. ***For cases in which the most serious charge is a Class C felony, the most serious offense is assault IV domestic violence, DUII felony, Class C felony or traffic felony, in this order.***

1.5.4 Credit for Recommenced Representation
Except for complex cases, if a contract case proceeding has been interrupted for the following reasons and time intervals, Contractor receives a new credit if:

(a) 365 Days After Aid and Assist Delay
more than 365 days have passed since the client was originally found unable to aid and assist and the client is brought before the court for a rehearing on the issue or trial; or

(b) 180 Days After Bench Warrant
more than 180 days have passed since a bench warrant was issued; or

(c) 18 Months with Repeated Bench Warrants
more than 18 months have passed since Contractor was originally appointed and the case is recommenced and no additional credit has been received because of Section 1.5.4(b); or

(d) 180 Days After Pre-Indictment Dismissal
on a felony case, more than 180 days have passed since a dismissal of a case pre-indictment; or

(e) After Appeal or Postconviction Relief
a new trial or sentencing follows an appeal or postconviction relief; or

(f) After Interlocutory Appeal
a case resumes at the trial level, following an interlocutory appeal by the state; or

(g) After Mistrial or Hung Jury
a new trial follows a mistrial or hung jury; or

(h) After Prosecutorial Misconduct
a case is refiled after dismissal without prejudice ***and 180 days have passed since the dismissal.***

1.5.5 Probation Violation Credit
An appointment to a probation violation case is a separate credit from any appointment to represent the indigent on a new criminal case. Each court case number to which Contractor is appointed is one probation violation credit. Provided however that if Contractor is appointed to more than one case number, additional credit is received ONLY for those case numbers in which the convictions involve different incident dates. Contractor receives no additional credit for appointments on new alleged probation violations if the original probation violation matter on which Contractor was appointed has not been adjudicated.

1.5.6 Diversion Show Cause or Conditional Discharge Hearing Credit
An appointment for a diversion show cause or conditional discharge hearing is a credit only if Contractor has not previously represented the individual on the underlying charge(s).

1.5.7 Juvenile Case Credit

1.5.7.1 General Provisions
A petition which is amended from or to a delinquency or dependency petition or the dismissal of one type of petition and refiling of another type of petition is not a new credit.

1.5.7.2 Prepetition Matters
An appointment to represent a child who is in custody and being interrogated or is otherwise detained is a credit, even if no petition is later filed on the allegations involved. The appointment continues through disposition on any petition that is later filed on those allegations and no additional case credit is received.

1.5.7.3 Delinquency Petitions
An appointment on a delinquency case is credited under the rules set out in Sections 1.5.2 - 1.5.4.

1.5.7.4 Dependency and Termination Petitions
An appointment to represent children, parents, or legal guardians in a dependency or termination of parental rights proceeding is generally one credit ***regardless of the number of petitions filed*** (see Section 1.5.7.4.1 for exceptions). ***Case credit for appointment in a dependency proceeding covers representation from appointment to the court's entry of the dispositional order required under ORS 419B.325 or ORS 419C.440.***

1.5.7.4.1 Representation of Multiple Children
An appointment to represent two or more related children in a dependency or termination of parental rights proceeding is a maximum of two credits if:

(a) the petition names as parents different mothers of different children; or

(b) the petition names as parents different fathers of different children, not including any putative father unless the putative father also appears in the case; or

(c) the children are living in more than one location.

1.5.7.4.2 Maximum Credit for Representing Parents
The maximum number of credits that may be counted when a Contractor attorney represents more than one parent or legal guardian in a dependency or termination of parental rights proceeding is one.

1.5.7.5 Postdispositional Juvenile Hearings
A postdispositional juvenile hearing is limited to a hearing that is held **after** the juvenile court enters the dispositional order required under ORS 419B.325 or ORS 419C.440. Postdispositional juvenile hearings, including six-month or other review hearings, Citizen Review Board (CRB) hearings and shelter care hearings, are a new credit for each hearing attended by Contractor. A single postdispositional hearing, even if it involves matters relating to more than one original juvenile petition, counts as only one postdispositional credit. Postdispositional hearings do not include probation violation hearings.

1.5.7.6 Juvenile Probation Violation Hearings
Juvenile probation violation hearings are governed by Section 1.5.5.

1.5.7.7 Waiver Proceedings
Contractor shall receive one additional "Juvenile Other" (see Appendix F) credit beyond that assigned for the original appointment for each waiver proceeding under ORS 419C.349.

1.5.8 Mental Health Case Credit
An appointment to represent an allegedly mentally ill or mentally retarded person is a credit. The appointment ends at the original disposition of that matter.

1.5.9 Contempt Case Credit
An appointment to represent an indigent on a contempt matter or matters is a credit. Contractor receives no additional credit for appointments on new allegations of contempt if the original contempt matter(s) on which Contractor was appointed has not been adjudicated.

1.5.10 Postconviction Relief and Habeas Corpus Case Credit
An appointment to represent an indigent on petitions filed at the same time or petitions with sequential numbers counts as one credit. The appointment ends at the original disposition of that matter.

1.6 Appointments That Do Not Qualify for Credit

1.6.1 Verification Removal
All appointments and reappointments are subject to verification of financial eligibility for counsel at state expense and do not count as a case credit where:

(a) Finding of Ineligibility
the court finds after screening or verification that the client is not financially eligible for appointed counsel at state expense and orders counsel withdrawn; or

(b) Withdrawal of Application for Counsel
the court withdraws counsel because the client withdraws the application for appointed counsel before the court completes verification.

1.6.2 Client Retains Contractor
An appointment to represent a client who later retains ***Contractor*** on the same case does not qualify for credit.

1.6.3 Reassignment Within Consortium
When a consortium member withdraws from a case because of a conflict and the case is reassigned to another consortium member, the case counts as one appointment only.

2 MUTUAL RIGHTS

2.1 Waiver
Either party's failure to enforce any provision of this contract shall not constitute a waiver by the party of that or any other provision.

2.2 Attorney Fees
If a party brings any action, suit, or proceeding to enforce this contract or to assert any claim arising from this contract, the prevailing party shall be entitled to such additional sums as the court may award for reasonable attorney fees and costs incurred as a result of the action, suit, or proceeding, including any appeal.

2.3 Termination
The parties may agree in writing to terminate this contract at any time. Unless otherwise agreed in writing, termination or expiration of this contract does not affect any existing obligation or liability of either party. In lieu of terminating the contract, SCA may agree in writing to alternative measures.

3 RIGHTS OF SCA

3.1 Subcontracts
Contractor shall not subcontract for or delegate any of the services required under this contract without obtaining SCA's prior written consent. SCA shall not unreasonably withhold consent to subcontract. Under this contract, SCA incurs no liability to third persons by making contract payments to Contractor.

3.2 Assignment of Contract
Contractor shall not assign Contractor's interest in this agreement without SCA's prior written consent. SCA shall not unreasonably withhold consent to assignment. Under this contract, SCA incurs no liability to third parties, including subcontractors, for making contract payments to Contractor.

3.3 SCA Powers for Failure to Obtain Workers Compensation
If Contractor fails to secure and maintain workers' compensation coverage or to provide SCA with a certificate of exemption, SCA may:

(a) withhold payment of any amount due Contractor until such coverage or certification is provided;

(b) suspend this agreement until Contractor complies; and

(c) terminate this contract:

(i) for willful or habitual failure to comply; or

(ii) for failure to comply within 30 days after SCA suspends this contract.

3.4 De Minimus Changes in Contractor Reports/Documents

At any time and by written instructions, SCA may make de minimus changes to the terms and conditions of this contract regarding any one or more of the following:

(a) format or content of any report or other document to be submitted by Contractor;

(b) number of copies of any report or other document that Contractor must submit; and

(c) time in which, or place at which, Contractor must submit any required report or other document. (See Section 6.2)

3.5 Termination by SCA for Cause

3.5.1 Reasons for Contract Termination

SCA may terminate this contract for cause, for the following reasons:

(a) Contractor's material breach of this contract including material misuse of contract funds;

(b) Contractor's willful or habitual disregard of the procedures required by the courts in which Contractor provides services;

(c) Contractor's demonstrated continued inability to serve adequately the interests of its contract clients;

(d) Contractor's willful or habitual failure to abide by minimum standards of performance and rules of professional ethics; or

(e) some other cause which has substantially impaired Contractor's ability to provide adequate legal services under this contract or fulfill the obligations of this contract.

3.5.2 No Appointments After Notice

When Contractor receives SCA's notice of termination for cause, Contractor shall not accept any further cases under the contract unless SCA otherwise agrees in writing.

3.6 Funding Modification, Suspension, or Termination

At the time this contract is executed, sufficient funds either are available within the Oregon Judicial Department's current appropriation or are expected to become available to finance the costs of this contract. However, payments under this contract are subject to the availability of funds. SCA may propose to modify, suspend, or terminate this contract if SCA reasonably believes that funds will not be sufficient to pay anticipated costs of indigent defense services and SCA has complied with the procedures setout below in Section 6.3 (State Funding Shortfall).

3.7 Increasing Workload: Renegotiation at SCA Option

The parties may renegotiate this contract to increase the total work to be performed by Contractor under this contract at additional cost to the state, if:

(a) the probable number of available cases increases substantially; and

(b) SCA determines that renegotiation is in the state's interest.

SCA will not pay Contractor for credits in excess of the maximum value agreed to under the original contract, unless renegotiation and agreement occurs prior to Contractor's assignment to such excess cases.

3.8 Review, Verification and Inspection of Records

3.8.1 Request

SCA may review or verify Contractor's records that relate to the performance of this contract:

(a) on reasonable written notice; and

(b) as often as SCA reasonably may deem necessary during the contract term.

3.8.2 Access to Facilities and Provision of Records

SCA may conduct fiscal or performance audits to monitor and evaluate the services provided under this contract. SCA will give reasonable written notice to Contractor before any evaluation. On SCA's proper request, Contractor shall provide access to its facilities and make records available to SCA or SCA's designee or agent at all reasonable times. SCA will not remove Contractor's original office records or other property of Contractor from Contractor's premises without Contractor's approval.

Contractor shall keep such data and records in an accessible location and condition. Notwithstanding any other provisions of this section, no constitutional, statutory, or common law right or privilege of any indigent or Contractor employee are waived by Contractor.

3.8.3 Other Information

Upon the SCA's determination that a significant question exists of Contractor's ability to perform this contract and subject to client confidentiality, personnel confidentiality and de minimus limits (Sections 4.4, 4.5 and 6.2), Contractor shall provide any other information that SCA reasonably identifies and requests as needed to ensure proper disbursement of state funds.

3.8.4 Timely Reports by SCA

When SCA undertakes a review of Contractor, SCA shall provide Contractor a draft review report for comment, clarification or rebuttal information. SCA shall issue a final report to Contractor. Draft and final reports shall be provided in a timely manner.

3.9 Use of Equipment Purchased with Contract Funds

Contractor may purchase in whole or in part from contract funds equipment required to perform services under this contract. Any equipment Contractor acquires with funds expressly provided by this contract under Section 14.2 shall be used for these purposes.

3.10 Return of Equipment Purchased with Contract Funds

Any equipment purchased with expressly identified contract funds under Section 14.2 shall accrue to SCA when this

contract is terminated or expires and no new contract is agreed upon within 60 days of termination, expiration, or completion of a negotiated wind-down, whichever occurs last, if:

(a) Contractor purchased the equipment with separately identified funds from this contract or indigent defense services contracts with similar provisions or with insurance proceeds to replace equipment that Contractor had purchased with funds from this contract;

(b) had an original dollar value of $500.00 or more; and

(c) whose useful life exceeds the term of this contract.

3.11 Limit on Return of Equipment to SCA
Section 3.10 does not apply to any Contractor that is a nonprofit, tax-exempt corporation whose articles of incorporation require the transfer or distribution of equipment to another nonprofit, tax-exempt corporation that provides indigent defense services in the event of full or partial wind-down.

4 RIGHTS OF CONTRACTOR

4.1 Termination By Contractor For Cause
Contractor may terminate this contract for cause should SCA materially breach any duty or obligation under this contract.

4.2 Court Appointments Outside Contract
Contractor may accept additional court appointments to cases in excess of contract coverage or excluded from contract coverage, but only to the extent that the additional appointments do not interfere with Contractor's ability to fulfill this contract. SCA shall pay for noncontract legal services under ORS 151.430(5). SCA shall not pay Contractor outside the contract for any services falling within the definition of "representation", set forth in Section 7.1, for cases assigned under this contract.

4.3 Request for Additional Credit
Contractor may make a written request for additional credit for cases Contractor believes required an extraordinary amount of time, effort, or expense, etc., on cases closed since the preceding periodic review (see Section 5.7). Only SCA may approve additional credit for cases assigned under this contract. Contractors shall not make requests of the court or court staff to approve additional credit.

4.3.1 In General
Contractor shall submit in writing any materials needed to show extra services beyond the contract and the amount of additional credit proposed.

4.3.2 Complex Cases in Which Contractor Withdraws
Contractor shall submit any materials needed to show extra services performed prior to a withdrawal on a complex case and the amount of additional credit proposed beyond one "Other" credit.

4.4 Client Records
Contractor grants no right to SCA or designee of SCA to observe attorney/client consultations or to review information in case files that is:

(a) privileged because of the attorney/client relationship; or

(b) work product identifiable to a particular case or client unless the client expressly, knowingly, and voluntarily agrees in writing. Contractor shall keep records, including time records, in such a manner as to allow SCA or SCA's designee reasonable access to other information for review purposes. Notwithstanding other provisions of this section, Contractor does not waive any client's constitutional, statutory, or common law right or privilege.

4.5 Personnel Records
Contractor grants no right to SCA or designee of SCA to review information in any personnel file unless the Contractor's employee expressly, knowingly, and voluntarily agrees in writing. Contractor shall keep records in such a manner as to allow SCA or SCA's designee reasonable access to other information, including specific compensation of individual staff members, for review purposes. Notwithstanding any other provisions of this contract, Contractor does not waive any of its employees' constitutional, statutory, or common law rights or privileges to the confidentiality of personnel records.

5 MUTUAL OBLIGATIONS

5.1 Successors in Interest
This contract shall bind and shall inure to the benefit of the parties and their respective successors and assigns.

5.2 Compliance with Applicable Law

5.2.1 In General
The parties shall comply with all federal, state, and local laws, regulations, and ordinances applicable to the work to be done under this contract. Such laws include, but are not limited to, those pertaining to tax liability and independent contractor status.

5.2.2 Laws Incorporated by Reference
The provisions of ORS 279.312, 279.314, 279.316, and 279.320 are incorporated herein by reference as conditions of this contract and shall govern performance of this contract.

5.3 Notice of Contract Modification, Suspension, or Termination
A notice to modify, suspend, or terminate this contract shall:

(a) be in writing;

(b) state the reasons therefor and may specify what may be done to avoid the modification, suspension, or termination;

(c) become effective for willful breach not less than 14 days from delivery by certified mail or in person; and

(d) become effective not less than 60 days from delivery by certified mail or in person for non-willful breach.

5.4 Modification or Termination Due to Legislative Action or Court Interpretation
SCA and Contractor may renegotiate this contract if there is a significant change in workload or cost of doing business contemplated under this contract due to amendments to or

court interpretations of federal or state laws. In addition, SCA may modify, suspend, or terminate this contract as needed to comply with amendments to or court interpretations of federal or state statutes that make some or all contract services ineligible for state funding.

5.5 Modification or Termination Due to Decreased Caseload

SCA and Contractor may renegotiate this contract if there is a significant decrease in the probable number of cases available.

5.6 Renegotiation Shall Minimize Reductions in Staff

SCA shall renegotiate with all Contractors affected by case decreases to apportion decreases in a manner that minimizes reductions in staff. Such renegotiations shall:

(a) reduce the total number of cases for the contract period and adjust the monthly payments to Contractor accordingly; or

(b) have Contractor refund or otherwise repay to the State any moneys saved.

5.7 Periodic Review

At the request of either party, SCA and Contractor will periodically review case assignment trends, requests for additional credit and any other matters needed to determine contract compliance or any necessary contract modifications.

5.7.1 Review of Assignments to Multiple Contractors and Mixture of Cases

In counties where more than one Contractor provides legal services, periodic review shall include a review by SCA, the court, and the Contractors of the number of appointments made to each Contractor. If the review shows that there is a substantial disparity in the actual appointment rates and the rates contemplated under the contracts, SCA shall notify the court and Contractors that appointment rates must be adjusted and corrected, to the extent total cases are available.

Similarly, if the periodic review discloses a substantial disparity between the case mix under the contract and the case mix actually assigned to Contractor, SCA will notify the court and Contractors that appointment case mix must be adjusted and corrected, to the extent total cases are available. (See Section 7.8.2.5)

5.7.2 Fungibility

The parties agree that SCA is contracting for the provision of legal representation by Contractor, as measured by [cases/hours/credits/value], and that the estimated workload, by case type, is the parties' expectation as to the distribution of the cases which may be available during the contract period. The parties expressly agree that Contractor may substitute one type of case for another, for the purposes of contract performance, with [cases/hours/credits/value] being fungible, except as specifically provided to the contrary in this contract.

5.8 Other Contractors and Vendors

SCA may undertake or award other contracts for additional or related work. Contractor shall cooperate with SCA and the courts to coordinate appointment procedures and other court activities necessary for efficient and effective administration of this and other contracts for indigent defense services.

Contractor shall reasonably assist nonattorney vendors in billing for services provided at Contractor's request, including providing to the vendor a fee statement/certification form with all information completed and copies of court orders preauthorizing the services.

6 OBLIGATIONS OF SCA

6.1 Indemnity of Contractor by SCA

SCA shall protect, indemnify, defend and hold harmless Contractor from all liability, obligations, damages, claims, suits, or actions of whatever nature that result from or arise out of the activities of SCA or State of Oregon under this contract.

6.2 De Minimus Changes in Contractor Reports/Documents

SCA shall not make any change that would cause more than a de minimus increase in cost or time required to perform the contract except by written agreement signed by both parties. (See Section 3.4)

6.3 State Funding Shortfall

6.3.1 SCA to Seek Additional Funding

If SCA reasonably believes that appropriated funds will not be sufficient, SCA shall seek additional funds from the Legislative Emergency Board or legislature at the earliest opportunity and, if possible, before modifying, suspending, or terminating this contract.

6.3.2 Negotiations

If the Emergency Board or legislature does not appropriate sufficient funds, SCA shall seek to apportion expenditure reductions equally and fairly among all indigent defense service providers, including the private bar. SCA shall seek first to modify the contract through negotiation with Contractor. In negotiating any modification, the parties will consider both cost and the level of representation that meets minimum allowable professional standards. SCA may suspend or terminate the contract if the parties cannot agree to modification.

6.4 Accounting Model

Payment under this contract shall be based on when work is performed, consistent with Oregon State government accounting procedures. Except for contracts based on number of hours, the accounting model used for payment under the contract assumes the disposition of an average case assigned under the contract occurs within 90 days of the assignment. The model also assumes approximately one-third of the work is performed in the month the case is assigned and one-third of the work is performed in each of the following two months. SCA shall pay Contractor according to this accounting model out of funds for the biennium during which the work is performed.

6.5 Payments in Addition to Contract Price

SCA shall pay for the following case expenses from funds available for the purpose:

(a) Discovery
Discovery expenses;

(b) Preauthorized Extraordinary Expenses
Extraordinary case expenses requested by Contractor and preauthorized by the court or other authority designated to approve extraordinary expenses in compliance with the requirements of ORS 151.430(6) and ORS 135.055(3). Unless the services are performed by Contractor's staff or subcontractors, extraordinary expenses include, but are not limited to:

(i) medical and psychiatric evaluations;

(ii) expert witness fees and expenses;

(iii) interpreters;

(iv) polygraph, forensic and other scientific tests;

(v) computerized legal research;

(vi) investigation expenses; and

(vii) any other extraordinary expenses the court or other authority designated to approve extraordinary expenses preauthorizes and finds necessary and proper for the investigation, preparation, and presentation of a case; and

(c) Lay Witness Fees
Lay witness fees and expenses incurred in bringing defense witnesses to court, but not including salary or expenses of law enforcement officers required to accompany incarcerated witnesses.

7 OBLIGATIONS OF CONTRACTOR

7.1 Obligations To Appointed Clients

7.1.1 Representation At All Court Proceedings in the Relevant Court

Contractor shall provide representation at all stages of a case assigned under this contract as limited by this contract. Representation means the provision of competent legal advice and assistance by appointed counsel to a person that a state court has determined to be indigent and entitled to appointed counsel at state expense on all matters related to the appointment, except DMV license suspension hearings, civil forfeiture proceedings, domestic relations proceedings and other civil proceedings.

7.1.2 Standards of Representation

Representation further means providing a level of legal service that does not fall below the minimum professional standards and canons of ethics of the Supreme Court of Oregon, the Oregon State Bar, the American Bar Association, and any applicable case law and court rules that define the duties of counsel to their clients.

7.1.3 Specific Representation Services

Contractor shall provide services on any and all matters necessary to provide adequate representation of the indigent, including but not limited to:

(a) having an attorney present at regularly scheduled arraignments or other initial appearance to make the necessary contact and appointments with clients assigned to Contractor (Contractor may make alternative arrangements with the court for actual presence);

(b) establishing and following procedures to ensure prompt notification to the court of the specific attorney assigned to each case;

(c) filing all necessary motions, including pre- and post-judgment motions;

(d) representation through judgment or other final order of the court on the case, including but not limited to:

(i) filing timely motions to dismiss in cases subject to diversion agreements, conditional discharge or similar provisions,

(ii) filing necessary paperwork under ORS 161.705 ("reduction of certain felonies to misdemeanors"), and

(iii) all prejudgment proceedings arising from a petition for a writ of mandamus or habeas corpus related to the case on which counsel was appointed;

(e) legal assistance to individuals who would be eligible for counsel at state expense if charged with a crime and where exigent circumstances preclude an appointment order (e.g., interrogation);

(f) preparing all documents, letters, research and referrals to appropriate agencies;

(g) continuous legal and support staff services, during case substitutions, to the extent necessary to ensure continuous representation and the establishment of the new attorney/client relationship;

(h) assisting in filing a notice of appeal, unless appellate counsel agrees to the timely filing of the notice of appeal;

(i) to the extent ethically possible, representing a client at a show cause hearing to determine client's indigence; and

(j) to the extent ethically possible, consulting with appellate or postconviction relief counsel on an appeal or postconviction relief proceeding.

7.1.4 Client Contact

7.1.4.1 In-Custody Initial Interviews

Contractor shall, whenever possible, speak to and conduct initial interviews in person with in-custody clients:

(a) within 24 hours of appointment; or

(b) by the next working day if the court appoints Contractor on a Friday, weekend, or holiday.

7.1.4.2 Out-of-Custody Interviews

Within 72 hours of the appointment, Contractor shall arrange for contact with out-of-custody clients, including notification of a scheduled interview time or what client must do to schedule an interview time.

7.1.5 Contractor Responsibilities -- Non-Indigent Clients

Contractor shall comply with the requirements of federal and Oregon constitutions, the Oregon Code of Professional Responsibility, and consider OSB Ethics Opinion 1991-34 if Contractor learns that the client is ineligible for state-funded legal services under this contract.

7.2 Withdrawal From Case Only on Court Approval

Contractor may withdraw only with the court's approval. Contractor shall promptly notify the court of any conflict of interest or any other reason requiring withdrawal from a case assigned under this contract. If the court approves Contractor's request to withdraw, the case shall be reassigned in the normal course.

7.3 Special Obligations To State of Oregon

7.3.1 Indemnity of SCA By Contractor

Contractor shall protect, indemnify, defend and hold harmless SCA and the State of Oregon from all liability, obligations, damages, losses, claims, suits, or actions of whatever nature that result from or arise out of Contractor's activities.

7.3.2 Independent Status of Contractor

For purposes of this contract, Contractor is an independent contractor and has so certified under Oregon laws. Neither Contractor nor any of its employees is an employee of the State of Oregon or a state aided institution or agency, by reason of this contract alone.

7.3.2.1 Ineligibility for Public Employee Benefits

Payment from contract funds does not entitle Contractor, its employees, officers, agents, members, and representatives, to any public employee benefits of federal social security, unemployment insurance, workers' compensation, the Public Employees Retirement System, leave benefits, or similar employment-related benefits.

7.3.2.2 Wages and Taxes

Contractor shall pay any compensation, wages, benefits, and federal, state, and local taxes to be paid under or as a result of the contract.

7.3.2.3 Workers' Compensation

As an independent contractor, as expressly certified in Appendix E, Contractor shall provide workers' compensation coverage for all subject workers performing work under this contract, including Contractor if self-employed or a business partner, to the extent required by all applicable workers' compensation laws and for the entire contract term.

Contractor, its subcontractors, if any, and all other employers working under this contract are "subject employers." As such, they shall provide coverage for workers' compensation benefits for any and all of their subject workers as required by ORS 656.017 and for the entire contract term.

7.3.3 State Tort Claims Act Not Applicable

For purposes of this contract, Contractor is not an officer, employee, or agent of the State of Oregon as those terms are used in ORS 30.265. Contractor accepts responsibility for all actions of its members, officers, employees, parties, agents and subcontractors.

7.3.4 Equal Rights of Contractor's Employees

Contractor shall comply with Title VI of the Civil Rights Act of 1964, with Section V of the Rehabilitation Act of 1973, and with all applicable requirements of federal and state civil rights and rehabilitation statutes, rules, and regulations. Contractor also shall comply with the Americans with Disabilities Act of 1990 (Pub L No. 101-336), including Title II of that Act, ORS 659.425, and all regulation and administrative rules established pursuant to those laws.

7.3.5 Contractor Insurance To Protect State of Oregon

Within thirty (30) days of the effective date of this contract, Contractor shall supply SCA with a certificate of insurance listing the coverage and additional insured information set out below.

7.3.5.1 General Liability Insurance

At its expense, in whole or in part from contract funds, Contractor shall procure and keep in effect during the contract term comprehensive general liability insurance with an extended coverage endorsement from an insurance company authorized to do business in the State of Oregon. The limits shall not be less than five hundred thousand dollars ($500,000) per occurrence for personal injury and property damage.

7.3.5.1 General Liability Insurance

At its expense, in whole or in part from contract funds, Contractor and each law firm or sole practitioner member of a consortium shall procure and keep in effect during the contract term comprehensive general liability insurance with an extended coverage endorsement from an insurance company authorized to do business in the State of Oregon. The limits shall not be less than five hundred thousand dollars ($500,000) per occurrence for personal injury and property damage.

7.3.5.2 Casualty Insurance

At its expense in whole or in part from contract funds, Contractor shall procure and keep in effect during the term of this contract, sufficient casualty insurance to replace any and all property losses caused by theft, fire, flood, or other casualty.

7.3.5.3 Additional Insured

The liability and casualty insurance coverages required for performance of the contract shall include the State of Oregon, the Oregon Judicial Department, and their divisions, officers, and employees as additional insureds but only with respect to the Contractor's activities to be performed under this contract.

7.3.5.4 Cancellation or Change

There shall be no cancellation, material change, potential exhaustion of aggregate limits, or intent not to renew insurance coverage without notice by Contractor to SCA. Any failure to comply with the provisions of these insurance requirements, except for the potential exhaustion of aggregate limits, shall not affect the coverage provided to

the State of Oregon, the Oregon Judicial Department, and their divisions, officers and employees.

7.3.6 Malpractice Insurance
During the entire contract period, and at the Contractor's own expense in whole or in part from contract funds, Contractor shall ensure that each of its attorneys has malpractice insurance coverage in the minimum amount required by the Oregon State Bar. Contractor shall provide proof of such insurance to SCA on request.

7.3.7 Internal Controls
Contractor shall establish internal controls, such as segregation of duties with respect to financial accounting, to ensure that contract funds are properly receipted, expended, and accounted for.

7.4 Staff and Equipment

7.4.1 Staffing Levels
Contractor has secured, or will secure at its own expense in whole or in part from contract funds, all personnel or employees necessary to perform services that this contract requires. Contractor shall maintain an appropriate and reasonable number of attorneys and support staff to perform its contract obligations.

7.4.2 Assigning and Associating Attorneys

7.4.2.1 Diligence in Hiring
Contractor shall use due diligence to hire, assign, or associate attorneys for this contract who are qualified to provide competent and effective services to their clients and the courts.

7.4.2.2 Supervision
Contractor shall have more experienced attorneys closely supervise lesser experienced attorneys' performance. Contractor shall provide information on the extent of supervision on SCA's request. However, Contractor shall not provide to SCA or any other person the contents of any employee's personnel files unless Contractor's employee expressly, knowingly, and voluntarily agrees in writing.

7.4.2.3 Certification
Contractor shall provide to SCA and each relevant court the name and qualifications of any attorneys added during the contract term to perform contract services. The newly added attorney shall meet the qualification standards established by SCA effective August 1, 1990, for the type of cases that will be assigned. A "certificate of attorney qualification" shall be filed with the court and SCA for each newly added attorney.

7.4.3 Interpreters
Contractor shall ensure that all interpreters who are staff employees or who subcontract with Contractor and provide in-court interpretation comply with all certification requirements established by SCA and the Code of Professional Responsibility for Interpreters in Oregon.

7.4.4 Limit on Contractor and Staff Noncontract Work
Contractor and Contractor's staff shall not let noncontract work interfere with adequate representation of indigent clients under this contract.

7.5 Record Keeping

7.5.1 Case Records
Contractor shall maintain current information, including case log notes, on individual contract cases. To the extent ethically possible, records shall be kept in a manner to be available on request for inspection by SCA, or SCA's designee or agent.

7.5.2 Financial Records
Contractor shall maintain financial records on an accrual basis. Contractor's records shall show that all disbursements or expenditures of contract funds were ordinary, reasonable and necessary, and related to providing direct services required under the contract or services necessary to performance of the contract.

7.5.3 Retention Period
For purposes of this contract only, Contractor agrees to preserve all appointment, service and financial records for a period of five (5) years after this contract expires.

7.6 Reports to SCA

7.6.1 Case Inventory
Within twenty (20) days of the end of each month, Contractor shall provide to SCA and the court, in a format specified by SCA, a reasonably accurate monthly case inventory report for the preceding month. Contractor may submit amended case inventory reports as necessary. However, amended case inventory reports shall not be submitted to SCA after 45 days from the expiration of the contract term.

7.6.2 Case Disposition
Within twenty (20) days of the end of each month, Contractor shall provide to SCA, in a format specified by SCA, reports for each case disposed of by Contractor during the preceding month for cases as described in Section 17. Contractor may provide a monthly summary of the information contained in the individual disposition reports, provided Contractor maintains the individual case information locally and makes it available for SCA or the court to review on request.

7.6.3 Case Withdrawal
Within twenty (20) days of the end of each month, Contractor shall provide to SCA, in a format specified by SCA, a report of each withdrawal from a contract case during the preceding month.

7.6.4 Financial
Forty-five (45) days after the end of each one-year period under the contract, Contractor shall provide to SCA a one-year expenditure report listing the amounts of contract funds expended by the same line items as are listed in Contractor's "Estimated Allocation of Contract Funds" (Appendix C).

In addition, within forty-five (45) days of the expiration of the contract term, Contractor shall provide to SCA an accrual-based financial report for the entire contract term; i.e., beginning balance, revenue, expenditures reported on an accrual basis, liabilities, and an end-of-contract balance.

7.6.5 Penalty for Late Reports
Contractor shall submit timely and properly completed reports. If Contractor fails to submit a proper, reasonably accurate report within thirty (30) days of its due date, SCA may withhold the next monthly payment until SCA or the court receives the report and supporting documentation.

7.6.6 Enforceability
The reporting requirements set forth in this section are enforceable after the expiration of this contract.

7.7 Costs and Expenses
Except for the expense items listed in Section 6.5, Contractor shall pay for:

(a) all ordinary, reasonable and necessary costs, fees, and expenses incurred in providing contract services;

(b) all other routine expenses related to case preparation and trial; and

(c) staff services, including routine travel expenses, if Contractor has staff investigators, interpreters, or polygraphers.

Contractor shall not expend contract funds for out-of-state travel costs unrelated to a specific case without the express written authorization of SCA.

7.8 Special Notices
Contractor shall provide SCA written notice of any significant changes affecting this contract. Such changes include, but are not limited to:

(a) Contractor's ability to carry out this contract, including changes in staff attorney names, staffing levels and office location;

(b) Contractor's ability to meet financial obligations; and

(c) matters affecting Contractor's ability to provide services to clients.

7.8.1 Time Requirement for Notices
All notices shall be provided to SCA within 30 days of the occurrence requiring the notice, unless a shorter time is provided.

7.8.2 Specific Notices Required

7.8.2.1 Insurance Cancellation or Change
Contractor shall provide notice of any material changes to any insurance policy listed in Sections 7.3.5 - 7.3.6 and immediate notice of the cancellation of any such policies.

7.8.2.2 Staffing Changes
Contractor shall provide, to SCA and the affected court, notice of the names of attorneys who are hired or leave Contractor's employ and any other substantial staffing changes. Upon request by SCA, Contractor shall provide a current list of attorneys and staff positions by full time equivalent.

7.8.2.3 Change in Contractor's Organization
Contractor shall notify SCA of any change in Contractor's organization that might affect staffing, payment, or tax reporting under the contract. Contractor shall assure SCA of its continued ability to meet contract requirements or shall propose reductions in caseload and price if Contractor is unable to meet contract requirements because of such organizational change.

7.8.2.4 Events Which Could Impair the Contract
Contractor shall notify SCA within 14 days of when Contractor learns that one of the following has occurred:

(a) Criminal Charges
A member of Contractor's attorney or investigator staff has been charged with a crime in which the alleged victim is or was a client or witness in a contract case.

(b) Criminal Conviction
A member of Contractor's attorney or investigator staff has been convicted of a crime punishable by a term of incarceration of one or more years or involving moral turpitude.

(c) Formal Bar Complaint
A formal accusation of misconduct, that is alleged to have occurred with respect to representation provided in a contract case, has been filed by the Oregon State Bar against a member of Contractor's attorney staff.

(d) Bar Discipline
Disciplinary action is taken by the Oregon State Bar against one of Contractor's attorney staff.

(e) Uninsured Practice of Law
A member of Contractor's attorney staff has engaged in the practice of law in an area not covered by Contractor's or the attorney's professional liability insurance coverage.

7.8.2.5 Nonassignment of Available Cases or Early Quota
Contractor shall notify SCA immediately upon determining that:

(a) the court is not assigning Contractor to cases available for appointment; or

(b) Contractor will reach its total contract quota before the expiration of the contract.

Within 45 days of notification to SCA that the court is not assigning Contractor to cases available for appointment, SCA shall propose a plan to Contractor and the court to remedy the nonassignment of available cases.

7.8.2.6 Independent Audit, Report, or Management Letter
To the extent only that it relates to this contract, Contractor shall provide to SCA, a copy of any independent audit, report, or management letter prepared for Contractor.

7.9 No Dual Payments for Contract Work
Contractor shall not:

(a) expend funds under this contract for work performed outside this contract;

(b) accept funds from anyone other than SCA for work performed under this contract, except for grants or funds for work study, job experience, internships, or other such grants or funds; or

(c) accept or keep credit for a case for which Contractor's attorney is subsequently retained.

7.10 Independent Auditor's Certification

Contractor, upon request of the SCA, shall provide a certification of "Agreed upon Procedures" from an independent Certified Public Accountant. The "Agreed upon Procedures" are that:

(a) the financial records are current;

(b) the books are closed monthly; and

(c) the amount of money received from the State for this contract has been placed into Contractor's business accounts.

7.10 Independent Audit Required

Contractor shall, from contract funds, be subject to an annual independent audit by a CPA firm.

7.11 Limits on Pro Bono Work

Nonprofit public defenders may provide pro bono representation only for:

(a) cases covered by contractor's or another's malpractice insurance; and

(b) cases that are;

(i) related to cases to which contractor's attorneys have been appointed; or

(ii) unrelated to contract cases, provided the pro bono services are rendered outside of the contract.

7.12 Limits on Full-Time Public Defender Attorneys

Attorneys employed full time by nonprofit public defender offices shall not accept employment on a retained basis.

8 MUTUAL RISKS

8.1 Impossibility of Performance

Neither party shall be held responsible for delay or default caused by theft, fire, flood, or other casualty, if the delay or default was beyond the party's reasonable control. In the event of circumstances beyond a party's control that may render timely performance by that party impossible, either party may terminate this contract, or the affected part, by written notice.

8.2 Tort Liability

Each party shall be responsible for the torts only of its own officers, employees, and agents committed in the performance of this contract.

9 RISKS OF CONTRACTOR

9.1 Refund for Shortage

Unless SCA agrees in writing otherwise, at the expiration or termination of the contract Contractor shall refund to SCA the average value per credit for each credit not assigned to Contractor below the [total workload value stated in Section 14.1 / minimum stated in Section 16.2].

9.2 Wind-Down Procedures

Unless SCA agrees in writing, if either party suspends or terminates the contract, or the contract expires, Contractor shall complete timely and adequate legal services on all existing contract appointments on cases assigned before the effective date of suspension or termination.

9.2.1 Negotiations

If the contract expires or terminates, SCA and Contractor shall negotiate wind-down procedures. Whenever possible, Contractor shall wind down pending cases within three months of contract expiration or termination by completing or, with SCA's agreement, reassigning the cases.

9.2.1 Negotiations

Except when SCA terminates the contract for cause under Section 3.5 and unless otherwise agreed, the parties shall, whenever possible, agree on wind-down procedures before the contract expires or terminates. If the parties cannot agree on wind-down procedures, SCA alone shall decide what state funds, if any, will finance wind-down procedures based on what SCA reasonably believes is necessary to ensure the indigent clients' right to adequate assistance of counsel and that Contractor's legal obligations are met.

9.2.2 Reduction in Contractor's Caseload

If Contractor's caseload or contract amount is reduced significantly resulting in layoffs, whether as a result of contract modification or contract renewal, SCA and Contractor may negotiate wind-down procedures.

SPECIFIC TERMS

10 PARTIES TO CONTRACT

Pursuant to ORS 151.460, this contract is between the State Court Administrator ("SCA") and _____ _____ ("Contractor").

11 APPENDICES TO CONTRACT

The following documents are attached to this contract as appendices and are incorporated within this contract by reference:

Appendix A: List of Contractor's Attorneys.
Appendix B: List of Contractor's Other Staff.
Appendix C: Contractor's Estimated Allocation of Contract Funds.
Appendix D: Certificate of Compliance with Oregon Tax Laws, subscribed and sworn to by Contractor. Contractor understands and agrees that this contract is subject to and conditioned on the representations made in Appendix D and on Contractor's timely delivery of Appendix D, completed and duly executed, to SCA.

Appendix D must be provided for the consortium (corporation) as well as for each consortium member.

Appendix E: Certificate of Contractor's Independent Status. Contractor understands and agrees that this contract is subject to and conditioned on the representations made in Appendix E, and on contractor's timely delivery of Appendix E, completed and duly executed, to SCA.
Appendix F: Appointment Type Definitions.
Appendix G: Payment Schedule.
Appendix H: Caseload and Case Value Matrix.

12 TERM OF CONTRACT

The contract term shall be from (contract start date) through (contract end date).

13 NOTICE

Each party shall provide to the other all notices regarding this contract:

(a) in writing, and

(b) delivered to the other party at the address below or to such person and address as the parties provide to each other from time to time:

SCA:
State Court Administrator
Supreme Court Building
1163 State Street
Salem, Oregon 97310

Contractor:
(contract contact person)
(mailing address)
(mailing address)

14 CONTRACT PAYMENT

14.1 Total Workload Value and Payment Schedule

For representation provided pursuant to this contract, SCA shall pay Contractor a total of (total contract value for workload) during the term of this contract, ($___ for the period _____ to _____; $___ for the period _____ to _____). SCA shall pay the total workload value in monthly installments, as shown in Appendix G.

14.2 Capital Reimbursement

In addition, SCA shall reimburse Contractor the actual cost, not to exceed $___, for capital purchases and/or one-time expenses listed below, after proper submission of two or more bids and approval by SCA, and proper detailed invoices. Authorized one-time expenses: $_____. Any capital purchases directly funded by SCA shall not be depreciated on Contractor's budget.

15 CASE TYPES INCLUDED

Contractor shall provide legal representation in the Circuit of _____ County(ies) for the types of cases listed below:

[For Death Penalty contracts:
(1) capital murder cases;
(2) noncapital murder cases; and
(3) complicated felony or other cases, at the request of Indigent Defense Services Division.]

(1) ___ _____ noncapital murder cases;
(2) ___ felony cases;
(3) ___ misdemeanor cases, including appeals to district or circuit court from municipal or justice court (tried de novo and considered trial court appointments);
(4) ___ probation violation proceedings;
(5) ___ contempt proceedings;
(6) ___ juvenile court proceedings brought pursuant to ORS Chapter 419B or 419C;
(7) ___ mental commitment proceedings brought pursuant to ORS Chapter 426 or 427, but excluding appeals under ORS 426.135;
(8) ___ extradition proceedings, pursuant to ORS 133.743 - 133.857, including a petition for a writ of habeas corpus filed pursuant to a pending extradition proceeding;
(9) ___ habeas corpus and postconviction relief cases; and
(10) ___ "other" cases (see definition in Appendix F).

16 WORKLOAD

[Contractor will provide legal representation for __(county percentage)__ percent of the indigents qualifying for court-appointed counsel (excluding conflicts) in the types of cases in the courts and counties as designated in Section 15.]

16.1 [Estimated] Number of Cases

Contractor's [estimated] workload is ___ cases, valued at _____, for the contract term, (___ cases for the period _____ to _____; ___ cases for the period _____ to _____). Appendix H is the caseload and case value matrix agreed to by SCA and Contractor.

16.2 Leeway

Assignment to cases [with a total value] within ___ percent (___ - ___ [$/cases]) of the total caseload [value/number] will not require the parties to renegotiate the contract price or terms, subject to the limitations stated in Section 16.3, below.

16.3 Caps, Limitations, or Parameters on Number of Certain Cases

[Describe here, if any.]

[For Death Penalty contracts:

16.1 Estimated Number of Hours

Contractor's workload is estimated to be ___ hours for the contract term __(contract start date)__ to __(contract end date)__. The parties anticipate that Contractor's case hours will be equivalent to ____ capital murder cases or ___ noncapital murder cases. Case hours within __ percent of the estimated number of case hours will not require renegotiation under paragraph D. below. Up to ___ hours may be administrative hours and contract administration unrelated to a particular case. CLE hours may not be claimed as administrative or case-related hours.

16.2 Caps, Limitations, or Parameters on Number of Certain Cases

Subject to SCA's prior approval on each case, Contractor may substitute hours spent on complicated felony or other cases in _____ County(ies).]

17 ADDITIONAL AGREEMENTS AFFECTING APPLICABILITY OF THE GENERAL TERMS OF THIS CONTRACT

[For Death Penalty contracts:

Section 7.6.2 is amended to read:

Contractor shall provide to SCA, in a format specified by SCA, a reasonably accurate disposition report for each case Contractor was appointed to, including withdrawals, within thirty days of disposition.]

[Contractor is required to provide case disposition reports under Section 7.6.2 for all Measure 11, termination of parental rights and complex cases.]

18 ADDITIONAL AGREEMENTS UNRELATED TO THE GENERAL TERMS

[Describe here, if any.]

19 MERGER CLAUSE

THIS WRITING CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES. THERE ARE NO OTHER ORAL OR WRITTEN UNDERSTANDINGS, AGREEMENTS, OR REPRESENTATIONS REGARDING THIS AGREEMENT. NO WAIVER, CONSENT, MODIFICATION, OR CHANGE OF TERMS OF THIS AGREEMENT SHALL BIND EITHER PARTY UNLESS IN WRITING AND SIGNED BY BOTH PARTIES. IF MADE, SUCH WAIVER, CONSENT, MODIFICATION, OR CHANGE SHALL BE EFFECTIVE ONLY IN THE SPECIFIC INSTANCE AND FOR THE SPECIFIC PURPOSE GIVEN.

CONTRACTOR, BY THE SIGNATURE BELOW OF ITS AUTHORIZED REPRESENTATIVE, HEREBY ACKNOWLEDGES THAT IT HAS READ THIS AGREEMENT, UNDERSTANDS IT, AND AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS.

_____ _____

KINGSLEY W. CLICK **DATE**
STATE COURT ADMINISTRATOR
STATE OF OREGON

_____ _____

(Contractor) **DATE**

_____

TITLE OR REPRESENTATIVE CAPACITY

APPENDIX A
TO CONTRACT BETWEEN SCA AND (Contractor)
CONTRACTOR'S ATTORNEYS

Contractor certifies that each attorney intended to perform services under this contract is listed in Appendix A and that each attorney listed satisfies the qualification standards that SCA has established for the types of cases to which that attorney will be assigned. (List vacant positions as well.)

List attorneys by firm or office.

FIRM OR OFFICE	NAME	BAR #	CONTRACT WORK PERCENTAGE*

* Percentage of time attorney expects to spend on contract-related work.

APPENDIX B
TO CONTRACT BETWEEN SCA AND (Contractor)
CONTRACTOR'S OTHER STAFF

Directions: List every nonattorney position allocated to perform work under the contract.

List attorneys by firm or office.

FIRM OR OFFICE	POSITION TITLE	# OF PERSONS	# OF FTE	CONTRACT WORK PERCENTAGE*

* Percentage of time person(s) expects to spend on contract-related work.

APPENDIX C
TO CONTRACT BETWEEN SCA AND (Contractor)

ESTIMATED ALLOCATION OF CONTRACT FUNDS FOR (Contractor)

Directions: Provide estimated cost information for all applicable categories. If a category is not applicable, list "N/A." Add any necessary categories not listed below. **Prorate all estimated expenses for part-time attorneys or staff by the percentage of time they will spend on contract work.**

1. GROSS SALARIES	First Year	Second Year
Attorneys (estimated gross income to attorneys after attorneys' overhead and F.I.C.A. self-employment taxes are deducted) _____# _____FTE		
Secretarial/Reception/Clerical Staff _____# _____FTE		
Paralegal/Legal Assistant Staff _____# _____FTE		
Investigation Staff _____# _____FTE		
Other Staff (identify _____ _____) _____# _____FTE		
SUBTOTAL:		

2. STAFF BENEFITS		
F.I.C.A. Self-Employment Tax (if applicable)		
F.I.C.A. (Employer's portion or Social Security only)		
Unemployment Insurance		
Health Insurance		
Life/Disability Insurance		
Workers' Compensation		
Retirement Program		
SUBTOTAL:		

3. STAFF EXPENSES		
Malpractice Insurance check ____ PLF or ____ NLADA		
Other Professional Insurance (describe _____ _____)		
OCDLA--Membership Dues		

3. STAFF EXPENSES (continued)	First Year	Second Year
OSB--Membership Dues		

Other Membership Dues Necessary to Contract
(explain _____
_____)

Professional Licenses/Certificates
(explain _____
_____)

Education Training/CLE's--Attorneys

Education Training--Other Staff
(explain _____
_____)

Attorney Travel

Other Staff Travel

SUBTOTAL:

4. OVERHEAD (OCCUPANCY)

Office Rent/Lease

Office Insurance

Building Utilities

Building Maintenance

Real Estate Taxes (if separate from rent)

SUBTOTAL:

5. OVERHEAD (OPERATIONS)

Phone Services (Equipment/Local Calls)

Long Distance Calls

Office Supplies

Postage

Outside Photocopying/Printing

Library

Subscriptions

Other Case Expenses
(explain _____
_____)

SUBTOTAL:

	First Year	Second Year
6. OVERHEAD (NONCAPITAL EXPENSES)		
Furniture & Equipment Leases		
Description Annual Cost		
_____		
_____		
_____		
Equipment Repairs/Maintenance		
SUBTOTAL:		
7. OVERHEAD (OTHER)		
Personal Property Taxes		
Professional Contract Services (specify)		
Miscellaneous (specify)		
SUBTOTAL:		
8. TOTAL OPERATIONS (total of 1-7)		
9. CAPITAL (Items costing over $500 each and funded separately under Section 14.2)		
Computer--Hardware		
Description Quantity Unit Cost		
_____		
_____		
_____		
Computer--Software		
Description Quantity Unit Cost		
_____		
_____		
_____		
Office Furniture		
Description Quantity Unit Cost		
_____		
_____		
_____		
Office Equipment		
Description Quantity Unit Cost		
_____		
_____		
_____		
SUBTOTAL:		
10. GRAND TOTAL* (total of 8 and 9):		

*** Grand total must equal total annual contract price.**

10. ATTORNEY COMPENSATION

List ANNUAL direct and indirect compensation levels for attorneys who devote full-time to contract legal services.

For attorneys devoting less than full-time, list the anticipated ANNUAL amount to be paid as gross salary (after deducting overhead and F.I.C.A. self-employment taxes, if any) and the indirect compensation using contract funds. In the "Percent of Contract Work" column, estimate the percentage of time the attorney will devote to contract-related work; i.e., if an attorney is expected to work approximately one-third of his or her total billable hours, then enter .33. Please define or state assumptions made in determining percentages. Specifically, what basis is used to establish 100 percent of an attorney's time; i.e., _____ billable hours per year, 40 hours per week, etc. Assumptions:

_____

_____

_____

_____.

When listing compensation, use one line for each proposed annualized rate during the term of the contract. Vacant positions must be listed last and identified as such.

ATTORNEY	PERCENT OF CONTRACT WORK*	TIME PERIOD	ANNUAL RATE OF COMPENSATION FROM CONTRACT FUNDS	
			DIRECT (salary)	INDIRECT (benefits)

* Estimated percent of position's time spent on contract-related work.

11. OTHER STAFF COMPENSATION

In the same manner as "Attorney Compensation," list ANNUAL direct and indirect compensation levels for other contract staff, including directors and administrators, who devote full-time to contract work.

For contract staff devoting less than full-time, list the anticipated ANNUAL amount to be paid as salary and indirect compensation using contract funds. Assumption is that 100 percent of time is the equivalent of 40 hours work per week, unless stated otherwise.

STAFF PERSON	PERCENT OF CONTRACT WORK*	TIME PERIOD	ANNUAL RATE OF COMPENSATION FROM CONTRACT FUNDS	
			DIRECT (salary)	INDIRECT (benefits)

* Estimated percent of position's time spent on contract-related work.

APPENDIX D
TO CONTRACT BETWEEN SCA AND (Contractor)
CERTIFICATE OF COMPLIANCE WITH OREGON TAX LAWS

I, the undersigned, being first duly sworn,

Mark only one: (X)

____ hereby certify under penalty of perjury that I am not in violation of any Oregon tax laws.

____ authorized to act in behalf of _____,
*(name and address of firm, corporation,or partnership **[PLEASE TYPE]**)*

hereby certify under penalty of perjury that _____
*(name of firm, corporation, or partnership **[PLEASE TYPE]**)*

is, to the best of my knowledge, not in violation of any Oregon tax laws.

For purposes of this certificate, "Oregon tax laws" are ORS chapters 118, 119, 314, 316, 317, 318, 320, 321, and 323 and sections 10 to 20, chapter 533, Oregon Laws 1981, as amended by chapter 16, Oregon Laws 1982 (first special session); the Homeowners and Renters Property Tax Relief Program under ORS 310.630 to 310.690; and any local tax laws administered by the Oregon Department of Revenue under ORS 305.620.

Signature:_____

Printed Name:_____

Title:_____

Date:_____

Federal ID # or
Social Security #_____

Subscribed and sworn to before me this _____ day of _____, 199____.

_____
Notary Public

My commission expires:_____

APPENDIX E
TO CONTRACT BETWEEN SCA AND (Contractor)
INDEPENDENT CONTRACTOR CERTIFICATION STATEMENT

You can qualify as an independent contractor by certifying that you meet the following standards as required by ORS chapters 316, 656, 657, and 701:

1. You provide labor and services free from direction and control, subject only to the accomplishment of specified results.

2. You are responsible for obtaining all assumed business registrations or professional occupation licenses required by state or local law.

3. You furnish the tools or equipment necessary to do the work.

4. You have the authority to hire and fire employees to perform the work.

5. You are paid on completion of the project or on the basis of a periodic retainer.

6. You filed federal and state income tax returns for the business for the previous year, if you performed labor or services as an independent contractor in the previous year.

7. You represent to the public that you are an independently established business, as follows:

YOU MUST MEET FOUR (4) OR MORE OF THE FOLLOWING:

___ A. You work primarily at a location separate from your residence.

___ B. You have purchased commercial advertising, business cards, or have a trade association membership.

___ C. You use a telephone listing and service separate from your personal residence listing and service.

___ D. You perform labor or services only pursuant to written contracts.

___ E. You perform labor or services for two or more different persons within a period of one year.

___ F. You assume financial responsibility for defective workmanship and breach of contract, as evidenced by performance bonds or liability insurance coverage.

I hereby certify that the above information is correct.

Signature _____ Date _____

Entity _____

APPENDIX F
TO CONTRACT BETWEEN SCA AND (Contractor)
APPOINTMENT TYPE DEFINITIONS

( ) denotes the applicable appointment code.

A. CRIMINAL CASES

1. Appointments After Diversion Agreement (SCDV): For all criminal cases, Contractor shall report separately on cases where Contractor is first appointed:

   (a) after the court grants a diversion petition, and

   (b) when the court orders the defendant to show cause why defendant's diversion agreement should not be terminated.

   Contractor shall report these cases as "SCDV" rather than as the original case type.

2. Capital Murder Case (CMUR): A capital murder case is any appointment to represent a person charged with aggravated murder as defined by ORS 163.095 except as provided under paragraph A.3., below.

3. Noncapital Murder Case (MURD): A noncapital murder case is any appointment to represent a person charged with:

   (a) ***murder*** as defined by ORS 163.115; ***and***

   (b) aggravated murder where the ***person*** is a juvenile ***under 15 years of age*** who is ***waived*** to circuit court on the charge (a convicted juvenile cannot be sentenced to death or life without parole under ORS 161.620) ***or aggravated murder where the person was 15, 16 or 17 years of age on the date the crime is alleged to have occurred (no death sentence may be imposed under ORS 137.707(2)).***

4. Felony Case: A felony case is any appointment to represent a person charged with one or more crimes described by ORS 161.525, excluding capital murder and noncapital murder. A case is a felony case if it includes a felony charge at any time defendant appears in circuit court.

   a. Measure 11 Felony (AM11, BM11, JM11): Other than murder, a felony that is the subject of Measure 11 ***and ORS 137.700 or 137.707***. AM11 is a Class A Measure 11 felony with an adult defendant; BM11 is a Class B Measure 11 felony with an adult defendant; and JM11 is a Class A or Class B Measure 11 felony where a 15-, 16- or 17-year-old is indicted as an adult in circuit court.

   b. Class A Felony (AFEL): A Class A felony is a crime that a statute expressly designates as a Class A felony, ***other than an "AM11" case.***

   c. Class B Felony (BFEL): A Class B felony is a crime that a statute expressly designates as a Class B felony, ***other than an "BM11" case.***

   d. Class C Felony (CFEL): A Class C felony is a crime that a statute expressly designates as a Class C felony, other than a traffic felony (TFEL), ***DUII felony (DFEL), or domestic violence felony (DVIO).***

   e. Traffic Felony (TFEL): A traffic felony is limited to felony driving while suspended or revoked (ORS 811.182(3)).

   f. ***DUII Felony (DFEL): A DUII felony is a DUII case in which an element of the crime charged is that the defendant has at least three prior DUII convictions within the past ten years (ORS 813.010(5) effective 12/31/99).***

   g. Domestic Violence Class C Felony (DVIO): An Assault IV case which is elevated to a Class C felony ***under ORS 163.160(3).***

   h. Unclassified Felony (UFEL): A felony crime that the statute(s) do not expressly designate as a Class A, B, or C Felony.

5. DUII (DUIS): A DUII case is any appointment to represent a person charged with driving under the influence of intoxicants, ***other than DUII felony (DFEL).***

6. Misdemeanor Case (MISS): A misdemeanor case is any appointment to represent a person charged with one or more crimes described by ORS 161.545 or by local ordinance as a misdemeanor, excluding DUII, misdemeanor contempt and the misdemeanor traffic cases defined below.

7. Misdemeanor Traffic Case: A misdemeanor traffic case is any appointment to represent a person on a misdemeanor traffic charge for which a convicted defendant may be incarcerated as an original sentence under the Oregon Vehicle Code, othe than a traffic offense charged as a felony or DUII. For statistical purposes, report cases in the following categories:

   a. DWS Misdemeanor as "DWSS".
   b. Other Traffic Misdemeanor as "OTMS".

8. Extradition Case (EXTR): An extradition case is any appointment to represent a person in a proceeding under the Uniform Criminal Extradition Act, ORS 133.743 - 133.857. It includes representation on a writ of habeas corpus filed in a pending extradition proceeding.

B. PROBATION VIOLATIONS

Probation Violation: A probation violation is any appointment or reappointment to represent a person in a probation violation proceeding arising out of a criminal or civil contempt conviction(s) and sentencing(s), under Section 1.5.5. For reporting purposes, Contractor shall report each type of probation violation case by the following subcategories:

1. Felony PV (FPV): A felony probation violation case is any appointment to represent a person in a probation violation proceeding arising out of a felony conviction, including a traffic felony.

2. Misdemeanor PV (MPV): A misdemeanor probation violation case is any appointment to represent a person in a probation violation proceeding arising out of a misdemeanor conviction, including a traffic misdemeanor, except DUII.

3. DUII PV (DPV): A DUII probation violation is any appointment to represent a person in a DUII probation violation proceeding arising out of a DUII conviction.

C. CONTEMPT CASES

Contempt Case: A contempt case is any appointment to represent a person charged with contempt of court.

For statistical purposes, report cases in the following three categories:

1. FAPA (FAPA): Contempt for violating a Family Abuse Prevention Act (ORS 107.700 - 107.730) restraining order.

2. Support (SUPP): Contempt for failure to comply with an order or judgment in domestic relations or juvenile court proceeding for the payment of suit money, attorney's fees, spousal support, child support, maintenance, nurture, or education.

3. Contempt (CONT): Misdemeanor contempt or any other contempt that is not a "FAPA" or "Support" contempt.

D. CIVIL COMMITMENT CASE

Civil Commitment Case (MHMI): A civil commitment case is any appointment to represent a person in a proceeding brought under ORS Chapter 426 or 427.

E. JUVENILE CASES

Juvenile Case: A juvenile case is any appointment or a reappointment to represent a person(s) in a proceeding brought under ORS Chapter 419B or 419C.

For statistical purposes, report juvenile cases in the following categories:

1. Juvenile Felony (JUDF): If committed by an adult, alleged act would constitute a felony.

2. Juvenile Misdemeanor (JUDM): If committed by an adult, alleged act would constitute a misdemeanor.

3. Juvenile Other (JUDO):

   (a) if committed by an adult, alleged act would constitute a violation or infraction;

   (b) alleged act is a status offense;

   (c) an emancipation case (any appointment to represent a child in a proceeding under ORS 419B.550 - 419B.558);

   (d) a waiver case (any appointment to represent a child in a proceeding to waive the child to adult court for further proceedings under ORS 419C.340, ORS 419C.349, and ORS 419C.352).

4. Probation Violation or Motion to Modify (JPV): Proceeding based on allegation(s) that the child has violated the terms of probation or a proceeding based on a motion to modify a disposition.

5. Juvenile Dependency Case: A juvenile dependency case is any appointment to represent a person based on a new petition alleging that a child is within the jurisdiction of the juvenile court under ORS 419B.100(1)(a) - (g).

   a. Parent (JDEP): Appointment to represent parent(s) or guardian(s).

   b. Child (JDEC): Appointment to represent child(ren).

6. Postdispositional Proceeding: A postdispositional proceeding is any appointment in a juvenile court proceeding to represent a person at a court or Citizen Review Board review hearing and shelter care hearings held after the original disposition. It does not include probation violation proceedings. Probation violation proceedings are a separate category under delinquency.

   a. Parent (JPDP): Appointment to represent parent(s) or guardian(s).

   b. Child (JPDC): Appointment to represent child(ren).

7. Termination of Parental Rights Case: A termination of parental rights case is any appointment to represent the parent or child in a proceeding under ORS 419B.500 - 419B.530 OR in a contested adoption matter (Zockert v. Fanning).

   a. Parent (JUTP): Appointment to represent parent(s) or guardian(s), including contested adoption proceedings.

   b. Child (JUTC): Appointment to represent child(ren), including contested adoption proceedings.

F. OTHER CIVIL CASES

1. Habeas Corpus Case (CVHC): A habeas corpus case is any appointment to represent a person in a proceeding for a writ of habeas corpus under ORS 34.355, excluding:

   (a) habeas corpus petitions filed in a pending extradition proceeding (EXHC); and

   (b) habeas corpus petitions filed for a client whom Contractor represents on a related matter (not a separate appointment under the contract).

2. Postconviction Relief Case (CVPC): A postconviction relief case is any appointment to represent a person under ORS 138.510 - 138.687.

3. Psychiatric Security Review Board Case (PSRB): A Psychiatric Security Review Board case is any appointment by the PSRB to represent a person under ORS 161.346(11).

G. OTHER CASE

Other Case (OTHR): An other case is a complex case from which Contractor withdraws due to a conflict of interest, an appointment to represent a material witness or a case for which no other case type applies.

APPENDIX G
TO CONTRACT BETWEEN SCA AND __(Contractor)__
PAYMENT SCHEDULE

End of Month (Unless noted)	Monthly Payment
January 2000	$_____
February 2000	$_____
March 2000	$_____
April 2000	$_____
May 2000	$_____
June 2000	$_____
July 10, 2000	$_____
July 2000	$_____
August 2000	$_____
Setpember 2000	$_____
October 2000	$_____
November 2000	$_____
December 2000	$_____
First Year Subtotal	$_____
January 2001	$_____
February 2001	$_____
March 2001	$_____
April 2001	$_____
May 2001	(⅔ payment) $_____
June 2001	(⅓ payment) $_____
July 10, 2001	$_____
July 2001	$_____
August 2001	$_____
September 2001	$_____
October 2001	$_____
November 2001	$_____
December 2001	$_____
Second Year Subtotal	$_____
Total Payments	$_____

APPENDIX H
TO CONTRACT BETWEEN SCA AND ___(Contractor)___
CASELOAD AND CASE VALUE MATRIX

Case Types 1/1/00 - 12/31/00	Value	Number of Cases	Total Value
	$___	____	$___
	$___	____	$___
	$___	____	$___
	$___	____	$___
	$___	____	$___
First Year Total		____	$___
	Minimum	Midpoint	Maximum
__% range	$___	$___	$___
1/1/01 - 12/31/01			
	$___	____	$___
	$___	____	$___
	$___	____	$___
	$___	____	$___
	$___	____	$___
Second Year Total		____	$___
	Minimum	Midpoint	Maximum
__% range	$___	$___	$___
Contract Total		____	$___
	Minimum	Midpoint	Maximum
% range	$	$	$

OFFICE OF THE STATE COURT ADMINISTRATOR

REQUEST FOR PROPOSALS

FOR

INDIGENT DEFENSE LEGAL SERVICES CONTRACTS

FALL 1999

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PART IV - MODEL CONTRACT

PART I -- GENERAL INFORMATION

1.1 Request For Proposals (RFP) Description

The State Court Administrator (SCA) is seeking contract proposals to provide legal services to persons determined by the state courts to be indigent and entitled to court-appointed counsel at state expense. **Counties and case types that are subject to this RFP are set out in the table on the following page.** The **anticipated contract term** is **January 1, 2000 through December 31, 2001**. The basic services required are legal representation and support services necessary to provide effective legal representation that meets established professional standards of practice.

This RFP contains the instructions and requirements for proposals. It is organized in four parts:

Part I	General Information
Part II	Proposal Application Instructions and Requirements
Part III	Proposal Application and Proposal Outline
Part IV	Model Contract

1.2 Authority

ORS 151.460(1) authorizes SCA to contract for legal services for indigents in proceedings in which:

> a state court or magistrate has the authority to appoint counsel to represent an indigent, and
>
> the SCA is required to pay compensation for that representation.

SCA may contract with individual attorneys, groups of attorneys, private firms, and full-time, not-for-profit public defender organizations for these services.

Awarding these contracts is a proprietary function of SCA. All such contracts are:

> subject to SCA's express approval under ORS 151.460(1), and
>
> considered contracts with independent contractors for personal services.

1.3 SPECIFICATIONS FOR CONTRACT PROPOSALS

County(ies)	Case Types Subject to Proposal
Benton	All
Clackamas	Juvenile and civil commitment caseload
Coos & Curry	All
Crook	All
Deschutes	All
Douglas	All
Josephine	All
Jefferson	All
Klamath & Lake	All
Lane	All
Linn	All
Marion	All, except juvenile caseload
Multnomah	All, including felony conflicts, PCS and misdemeanor Early Disposition Programs, postconviction relief and ICWA cases.
Washington	All
Union & Wallowa	All

"All" includes murder, all other criminal, probation violations, extraditions, contempt, juvenile, civil commitment, postconviction relief, and habeas corpus cases.
"All" excludes death penalty and appellate cases.

As part of the Judicial Department, SCA is not subject to the Executive Department's administrative rules or the related statutes that govern competitive public bidding for personal services contracts. SCA reserves the right to reject any or all proposals received by reason of this RFP or to negotiate separately in any manner necessary to serve the best interests of the SCA and state. SCA reserves the right to seek clarifications of proposals and to award a contract(s) without further discussion of the proposals submitted. SCA reserves the right to amend or cancel this RFP without liability if it is in the best interest of the state and public to do so.

1.4 Funding Source

Under ORS 151.465, a State Court Indigent Defense Account in the General Fund is continuously appropriated to SCA to pay attorney compensation and other expenses related to the legal representation of indigent persons for which SCA is responsible, including contract payments under ORS 151.460(1).

1.5 Schedule of Events

Release of RFP	On or before September 10, 1999
Proposal Submission Deadline (Receipt by 4:30 p.m. OR Postmark)	October 13, 1999

Proposal Evaluation and Negotiation Period	October 14 - December 17, 1999
Contract Awards	On or before December 17, 1999
Contract Effective Date	January 1, 2000

SCA presently intends to award indigent defense legal services contracts according to the above time schedule. By publishing this schedule, SCA does not represent, agree, or promise that any contract will be awarded on a specified date or any other time in any particular county or judicial district. SCA intends, however, to adhere to these time frames as closely as possible.

1.6 General Proposal Review Procedures

The application forms, instructions, and information necessary to prepare and submit proposals are found in Part II of this RFP. SCA will evaluate proposals based on the contents of the applications, their review by the affected court(s), and any other information available to SCA. Applicants must submit a completed application using the forms and format provided. Applications MUST be received by SCA and the appropriate presiding judge(s) by 4:30 p.m. OR be postmarked on the submission deadline date. The following events will then follow.

A. Inadequate Proposals

SCA may immediately reject proposals that do not meet the minimum service or RFP requirements. If a proposal is unclear or appears inadequate, SCA may give the applicant an opportunity to further explain or provide additional information. If SCA finds the explanation or additional information inadequate, SCA's decision to reject the proposal will be final and not subject to appeal.

B. Facially Adequate Proposals

SCA will evaluate proposals that meet the administrative and contractual minimum requirements as set forth in Part II of the RFP. SCA will evaluate each proposal based on its total characteristics and any other information available to SCA. During the evaluation period, SCA may:

1) request additional information from applicants to clarify information or material in the proposal;

2) consult with judges, court administrative staff, and others who have knowledge of the applicant or the local caseloads and practices to aid in the review of the proposal's merits;

3) request individuals with experience and expertise in the proposed case types to review the apparent qualifications of the applicants, the strengths and weaknesses of the management plans submitted by applicants and the apparent cost-effectiveness and quality of the various proposals.

C. Negotiations

SCA must ensure that each contract is compatible with:

1) the needs of the particular court(s), county(ies), judicial district(s), region(s), and the state;

2) other indigent defense contracts in place or contemplated; and

3) budget allocations.

During negotiations, SCA may discuss adjustments to proposed costs, caseload types, coverage, level of services, or service providers necessary to meet these objectives.

D. Contract Awards

If SCA and an applicant reach agreement on a contract award, the parties will circulate a "Preliminary Agreement" memorandum, followed by the contract documents. Award of any contract will be final only when the applicant and the SCA have properly completed and executed the contract documents.

E. Model Contract

SCA will offer all applicants the same model contract provisions. Successful applicants will enter into a contract substantively similar to the model contract document in Part IV of this RFP, unless otherwise specifically agreed by SCA.

An applicant may request in the proposal to amend terms of the model contract for good reason. SCA must approve any change. Applicants who do not otherwise accept the model contract in Part IV may be disqualified.

1.7 Proposal Evaluation Criteria

SCA shall evaluate proposals based on the criteria listed below. SCA reserves the right to reject any proposals that do not comply with the RFP requirements. SCA shall be the sole determiner of the relative weight given any criterion. Although price is an important criterion, the intent is to provide indigent persons with effective legal representation. The applicant with the lowest cost proposed will not necessarily be awarded a contract. SCA reserves the sole right to make this determination.

CRITERIA:

1) The proposal and any modification is complete and timely, in conformance with the RFP.

2) The applicant meets the minimum attorney qualification standards for the types of cases proposed, as specified in "Oregon Judicial Department Policy Statement on Qualification Standards for Court-Appointed Counsel."

3) The proposed plan for delivery of services is adequate to ensure effective legal representation. Among the factors SCA may consider are the quality of legal representation, the experience of the attorneys, staffing patterns, available support staff and other services, and caseload per attorney.

4) The applicant has the ability to perform the contract effectively and efficiently and to provide representation in the type of cases proposed. Among the factors SCA may consider are financial ability, personnel qualifications, and successful experience providing indigent defense services under contract or on a private bar basis.

5) The cost for services is reasonable. SCA may consider factors that affect the cost, including those outside the applicant's control, such as district attorney (DA) negotiation practices, local jail facilities, and court programs and procedures.

6) The budget is reasonable, and expenses are prorated to the proportion of applicant's time to be devoted to the contract. Among the factors SCA may consider are the ratios of administrative cost, support services, and nonpersonnel expenses to direct legal services, as well as compensation, benefit, and other resource levels.

7) The proposal is consistent with the needs and best interests of the court(s), county(ies), judicial district(s), and region(s) involved. Among the factors SCA may consider are the other service methods and service providers available, the applicant's ability to work with the court(s) and within its procedures, and the mix of service providers.

8) The proposal is consistent with the needs and best interests of the state as a whole. Among the factors SCA may consider are the other service methods and mix of service providers available, and the applicant's ability to work with other groups affected by the contract, legislative mandates, or other directives that affect the entire statewide contracting patterns or terms.

In addition to the criteria listed above, SCA will evaluate the available caseload, the current number of contractors or private bar providers, and the relative cost of administering current contracts and/or new contract proposals.

The SCA has the sole discretion to apportion or not to apportion caseloads between applicants AND to award or not to award contracts.

1.8 Proposal Records

No materials submitted by applicants will be available for public review until after contract awards have been made.

Written inquiries on preparing applications may be directed to:

Ann Christian, Director
Indigent Defense Services Division
Office of the State Court Administrator
Supreme Court Building
1163 State Street
Salem, Oregon 97310

PART II -- PROPOSAL APPLICATION INSTRUCTIONS AND REQUIREMENTS

This part of the RFP contains the instructions and requirements for preparing and submitting proposals for indigent defense legal services contracts.

2.1 Submitting Proposals

The applicant is responsible for any costs incurred in preparing or delivering the proposal. The applicant is responsible for ensuring that the proposal is received timely by the Office of the State Court Administrator and presiding judge(s).

There is no implied promise to award a contract to any applicant based upon the submission of a proposal.

A. Number of Copies

Except for applicants for **death penalty** contracts only, each applicant must submit one original and two copies of its proposal, distributed as follows:

1) Office of the SCA--Original and One Copy

Applicants must submit the original and one copy of each proposal, addressed to the attention of:

Ann Christian, Director
Indigent Defense Services Division
Office of the State Court Administrator
Supreme Court Building
1163 State Street
Salem, Oregon 97310

2) Presiding Judge(s)--One Copy Each (except Multnomah County)

Except for proposals for Multnomah County, applicants must submit one copy of each proposal to the presiding judge of each judicial district in which applicant proposes to provide services. For **Multnomah County,** one copy of each proposal must be submitted to the **Trial Court Administrator**, Mr. Douglas Bray.

Applicants for death penalty contracts only need to submit the original and one copy of the proposal to the Indigent Defense Services Division; i.e., no copy needs to be provided to the Presiding Judge of counties in which applicant proposes death penalty coverage.

B. Deadline

Proposals MUST BE:

1) POSTMARKED no later than the submission deadline date; OR

2) ACTUALLY RECEIVED by SCA and the appropriate presiding judge(s) no later than 4:30 p.m. on the submission deadline date.

The submission deadline is October 13, 1999.

Hand-delivery of proposals must be made to the appropriate presiding judge(s) AND the Indigent Defense Services Division (IDSD) of the Office of the State Court Administrator, Justice Building, 1162 Court Street, 5th Floor, Salem, Oregon (corner of Court and 12th Streets). **(NOTE: IDSD's physical address is different from its mailing address.)**

If the applicant fails to submit the proposal(s) to all the relevant courts in accordance with the deadline, SCA may disqualify the applicant's proposal(s).

If the applicant fails to submit the proposal(s) in accordance with the deadline to SCA, SCA will disqualify the proposal(s), unless prior authorization for late submission is granted by SCA.

2.2 Application Format

Applicants must use the attached application format for submission of all proposals and must answer all questions or state the reason why a specific question is not relevant to the particular proposal. SCA may disqualify any proposal that is not in the required format or is incomplete.

A diskette containing the "Application Summary and Certification Form" and "Indigent Defense Legal Services Proposal Outline" (i.e., the application form) will be provided upon request. To request a diskette, contact Diane Combs, Indigent Defense Services Division, at (503) 986-5948. Be prepared to provide what size diskette and what word processing format is needed.

Applicants who do not or are unable to use a diskette to prepare their application must, at a minimum, identify responses prepared on separate sheets of paper by the number, major heading, and each subsection subject.

2.3 Acceptance of RFP and Model Contract Terms

A. Applicants are responsible for reviewing the terms and conditions of the RFP and model contract.

B. By signing and returning the application form, the applicant acknowledges that the applicant accepts and intends to abide by the terms and conditions of the RFP. Further, the applicant accepts the terms and conditions of the model contract contained in Part IV, unless and only to the extent that the applicant proposes exceptions as described below.

C. The applicant must clearly state in its proposal any proposed exceptions to the model contract terms, including reasons to support the exceptions and estimated efficiencies/cost savings if SCA accepts the proposed exception(s). SCA reserves the right to accept, reject, or negotiate exceptions to the contract terms.

D. Any changes to the model contract terms proposed by SCA will be provided, in writing, to each applicant.

2.4 Multiple Proposals

An applicant may submit more than one proposal. Each proposal must be complete in itself. The proposal must state whether it is in addition to or an alternative to other proposals submitted by the applicant.

2.5 Modification of Proposals

A. When Permitted

Applicants may not modify proposals after the submission deadline, unless SCA agrees thereto, upon written request by applicant. Until that date, an applicant may modify its proposal(s) in writing. Modifications must be:

1) prepared on the applicant's letterhead,

2) signed by an authorized representative(s), and

3) must state whether the new document supersedes or modifies the prior proposal.

B. Delivery

Applicants must deliver any modifications in the same number and manner as required by Section 2.1 for original proposals. The envelope should be marked as follows:

Indigent Defense Legal Services Contract
Proposal Modification
from
(Applicant Name and Address)

C. Included in Proposal File

All documents relating to the modification of proposals will be made part of the proposal file.

2.6 Mistakes in Submitted Proposals

A. When Corrections Permitted

SCA will permit applicants to correct mistakes on a proposal only to the extent correction is not contrary to SCA's interest or to the fair treatment of other applicants. SCA has sole discretion to allow an applicant to correct a mistake. The SCA will notify the applicant and the presiding judge(s) of the affected court(s) if and when SCA allows corrections to proposals.

B. Procedure When SCA or Applicant Discovers Mistake

If SCA or the applicant discovers a mistake before the proposal deadline, the applicant may amend the error using the procedures for proposal modification in Section 2.5 above.

SCA will proceed as follows when SCA discovers or is notified of mistakes in proposals after the submission deadline but before contract awards are made:

1) Minor Inaccuracies

SCA may waive or correct minor inaccuracies or insignificant mistakes. Minor inaccuracies are:

a) matters of form rather than substance that are evident from the proposal documents; or

b) insignificant mistakes that do not prejudice other applicants; e.g., the inaccuracy or mistake does not affect price, quantity, quality, delivery, or contractual conditions.

2) Mistakes Where Intended Correct Proposal is Evident

If the mistake and the intended correct proposal are clearly evident on the face of the proposal or can be determined from accompanying documents, SCA may consider the proposal. Examples of mistakes that may be clearly evident on the face of the proposal are typographical errors, errors in extending prices or caseload numbers, transposition errors, and arithmetic errors. For discrepancies between specific prices and extended prices, specific prices shall prevail.

3) Mistakes Where Intended Correct Proposal is Not Evident

SCA may not consider a proposal in which a mistake is clearly evident on the face of the proposal but the intended correct proposal is not evident or cannot be determined from accompanying documents, including requests for correction or modification under Sections 2.5 and 2.6.

C. Included in Proposal File

All documents relating to correcting a mistake will be made part of the proposal file.

2.7 Withdrawal of Proposals

A. Request to Withdraw

An applicant may withdraw a proposal at any time by written request. Requests to withdraw a proposal from consideration must be:

1) on the applicant's letterhead;

2) signed by an authorized representative; and

3) submitted to SCA and presiding judge(s) of the affected court(s) and should be marked as follows:

Proposal Withdrawal
from
(Applicant Name and Address)

B. Included in Proposal File

All documents relating to the withdrawal of proposals will be made a part of the proposal file.

2.8 Evaluation of Proposals

SCA will begin to evaluate proposals upon receipt, subject to the procedures and criteria described in Part I, Sections 1.5 and 1.6. SCA intends to make contract awards on or before December 17, 1999.

2.9 Categories of Cases Available for Contract

Subject to the case type limitations set out at page 2 of Part I, an indigent defense proposal for legal services may include coverage of all, some, or any of the following categories of cases for which indigent persons have a right to appointed counsel in state court at state expense:

- Capital Murder (death penalty)
- Noncapital Murder
- Felony
- Misdemeanor
- Probation Violation
- Juvenile
- Postconviction Relief
- Habeas Corpus
- Civil Commitment
- Extradition
- Contempt

Applicants should refer to Part IV, "Appendix F" to the Model Contract for specific definitions of the categories.

2.10 Number of Cases

A. Available Caseload

To obtain the number of contract cases and/or work load likely for a particular court, county, or case type, the applicant should contact the Indigent Defense Services Division (IDSD) of the Office of the State Court Administrator at (503) 986-5907.

B. Outputs or Fixed Caseloads and Case-, Value- or Hourly-Based Work Loads

SCA will contract for:

1) outputs caseloads (for example, 100% of total caseload(s), except conflicts);
2) fixed work load by number of cases, value of cases or hourly based; or
3) hourly based work loads for death penalty contracts.

C. Proposed Caseload

The applicant should propose no more than the number of cases or hours for which the applicant can provide effective and efficient representation and adequate staff support resources. Based upon national and other states' guidelines and SCA's experience, the following caseloads are suggested for each full-time attorney without paralegal, legal assistant, or investigator services:

- 200 felonies per attorney per year, or
- 400 misdemeanors per attorney per year, or
- 250 juvenile cases per attorney per year, or
- 300 mental commitment cases per attorney per year.

Attorneys employed less than full-time in contract work should handle a proportional caseload.

Applicants should rely on their experience in handling cases to evaluate local factors and proposed support staff (e.g., investigators, legal assistants) that allow meeting or exceeding these limits or that require stricter limits. Applicants must explain the effect of local factors on the ability to provide adequate representation.

D. No Credit for Certain Cases -- Financially Ineligible Persons or Cases Where Contractor is Retained After Appointment

Appointments that are terminated because the court finds that the person is not financially eligible for appointed counsel are not counted as assigned cases. Applicants should consult with the appropriate court(s) or IDSD on local verification procedures.

Cases where contractor is retained after appointment are not eligible for contract case credit.

2.11 Cost of Services

A. Expenses Included in Contract Price

Indigent defense contractors are responsible for all reasonable and necessary expenses that are ordinary and related to routine case investigation, preparation, and trial. Applicants should therefore calculate their cost of providing contract services to include:

1) all contract-related overhead and "out-of-pocket" expenses except discovery costs (see Sections 5.2.A and 5.2.B of the "Indigent Defense Payment Policy and Procedures");

2) cost of ordinary travel;

3) cost of secretarial support; and

4) other contract staff support; e.g., in-house investigators, interpreters, paralegals, or legal assistants.

SCA bears the costs outside of any indigent defense contract for:

1) discovery;

2) transcripts;

3) witness fees and expenses; and

4) extraordinary case expenses that are preauthorized (e.g., expert witnesses; psychiatric exams; and "extraordinary" investigation requiring an investigator's services, unless Contractor has staff investigator(s) for this purpose).

Applicants should not include these case-related expenses in calculating the cost of providing contract services.

B. Reasonable Expenses

Applicants should project the cost of occupancy, staff, or other contract expenses at rates no greater than customary for the community and the type of service or expense. SCA will not pay premium rates. SCA expects contractors to provide facilities reasonably adequate to ensure an environment conducive to providing effective and efficient legal services and to maintaining the dignity of attorney, staff, and clients.

C. Factors to Consider

In calculating overall case cost figures, applicants should consider the percentage of appointments by case type (the "mix" of cases) and the percentage of appointments that:

1) usually terminate before trial or contested adjudication, and at what stages and why they terminate (such as, withdrawals, dismissals, multiple cases negotiated together, and bench warrants); and

2) usually go to trial or contested adjudication.

The applicant may consider any other relevant factors in constructing costs, as long as these factors do not jeopardize the delivery of adequate legal services at the prices proposed. Applicants must describe in the application all factors or premises on which costs are based.

2.12 Proposal Application Format (Part III of RFP)

The application format consists of:

A. Application Summary;

B. Certification Form; and

C. Proposal Outline divided in the following sections:

1) Service Delivery Plan

2) Proposed Estimated Allocation of Contract Funds

3) Proposed List of Contract Attorneys

4) Proposed List of Other Contract Staff

5) Certificate of Attorney Qualification

6) Criminal/Juvenile Law Experience Questionnaire (to be completed by attorneys who have not provided indigent defense services pursuant to a contract).

THE FOLLOWING PAGES APPL. 1 THROUGH APPL. 18 ARE THE RFP APPLICATION AND PROPOSAL OUTLINE.

OFFICE OF THE STATE COURT ADMINISTRATOR

REQUEST FOR PROPOSALS

FOR

INDIGENT DEFENSE LEGAL SERVICES CONTRACTS

PART III

PROPOSAL APPLICATION SUMMARY AND PROPOSAL OUTLINE

(TO BE COMPLETED AND SUBMITTED TO SCA)

PART III
PROPOSAL APPLICATION SUMMARY AND PROPOSAL OUTLINE

(January 1, 2000 - December 31, 2001)

3.1 Application Summary

APPLICANT INFORMATION

County or Counties to be served _____

Formal Name of Applicant _____

Contact Person for Proposal _____

Address _____

Telephone Number _____ Fax Number _____

Fed. I.D. No. _____ ***or*** S.S.N. _____

Type of Organization (*check one*):

☐ Sole Practitioner ☐ Nonprofit P.D. ☐ Partnership or P.C. ☐ Consortium

☐ Other (*describe*)_____

COST SUMMARY

	Cost of Contract Proposal	Average Cost Per Case
First Year	$_____	$_____
Second Year	$_____	$_____
TOTAL (2 years)	$_____	$_____

CASELOAD INFORMATION

A. Case Types Covered: All case types as defined in the model contract document that are subject to this RFP excluding:

_____

_____

B. Complete one of the sections below: Section #1 for Fixed caseload proposals **OR** Section #2 for Outputs proposals.)

Section #1 -- To be completed for Fixed caseload proposals only			
Case Types	Value	# of Cases	Total Value
1/1/00 - 12/31/00			
	$		$
	$		$
	$		$
	$		$
	$		$
	$		$
First Year Total			$
1/1/01 - 12/31/01			
	$		$
	$		$
	$		$
	$		$
	$		$
	$		$
Second Year Total			$
Contract Total			$

OR

Section #2 -- To be completed for Outputs proposals only

Percentage Caseload Coverage *(check one)* :

☐ 100% of indigent defense caseload, excluding conflicts.
Estimated ANNUAL number of cases: _____ Estimated conflict rate: _____%
(NOTE: Independent members of a consortium can accept each other's conflicts).

☐ _____% of indigent defense caseload, excluding conflicts.
Estimated ANNUAL number of cases: _____

☐ Other, please specify. *(for example, 100% primary contractor's conflict cases, 100% juvenile cases, or 70% of Class A felony caseload)*

_____
Estimated ANNUAL number of cases: _____

A. METHODOLOGY, EXPLANATIONS AND ESTIMATES

1) Service Cost Basis. For the types of cases, extent of coverage, and services proposed, explain how costs were projected and the premises underlying the projection.

2) Case Costs

Explain:

a) how the various case types were weighted;

b) how the cost varies by case type; and

c) how staff investigator, paralegal, and/or interpreter costs were factored in.

Estimate:

d) what percentage of each case type is disposed by jury trial, court trial, plea, dismissal, withdrawal, bench warrant;

e) the average number of hours required for each case type proposed;

f) the cost of providing contract counsel at arraignments to advise defendants regarding plea offers or resolution of probation violation or contempt matters if a program were established to facilitate early resolution of cases. Describe the time required and the potential number of cases involved; and

g) the percentage of attorney time and staff time required for administrative duties, CLE, and other professional duties not related to a particular case.

3) Other Information: Include any other relevant information that SCA should consider in evaluating proposal costs.

B. PROPOSAL STAFFING SUMMARY ("FTE" means "full-time equivalent;" e.g., four attorneys each committing 50% of their full time to contract work equals two FTEs.)

Number of Attorneys _____ / FTE_____

Number of Secretarial/Receptionist Staff _____ / FTE_____

Number of Paralegals/Legal Assistants _____ / FTE_____

Number of Administrative Staff _____ / FTE_____

Number of Investigators _____ / FTE_____

Number of Interpreters _____ / FTE_____

Number of Other Staff _____ / FTE_____

Identify "Other Staff" type: _____

3.2 CERTIFICATION FORM

I hereby certify that:

A. applicant submits the above summary and accompanying proposal subject to the terms and conditions of the RFP and relevant model contract, which applicant acknowledges that he/she has read and understands; and

B. I have the authority to submit this proposal on behalf of the applicant.

_____ _____

Signature Date

_____

Typed or Printed Name of Authorized Representative

_____

Title or Representative Capacity

_____

Applicant Name

3.3 PROPOSAL OUTLINE

The following is an outline of the information each applicant MUST provide. ALL questions must be answered and all requested information must be completed. If a certain question or requested information is "Not Applicable" to the applicant's proposal, please note "NA".

Applicants who do not or are unable to use a diskette (allowing sufficient room for complete responses) must present their responses on separate sheets of paper in accordance with Section 2.2 of the Application Instructions.

A. SERVICE DELIVERY PLAN

The purpose of an indigent defense legal services contract is to provide cost-effective delivery of legal services that meet constitutional, statutory, and other legally mandated standards. Please describe, in detail, applicant's service delivery plan and how it will ensure effective and efficient legal representation. Include information on the following:

1. Contractor Staff Services. Describe legal, support, and other services to be provided under the contract. Include any express limitations on the range of services.

   IN ADDITION to providing the information requested above, (1) each attorney included within applicant's proposal must complete a "Certificate of Attorney Qualification" form, to be included with applicant's proposal (see page "Appl. 16"); and (2) each attorney included within applicant's proposal who has not previously provided indigent defense services pursuant to a contract with SCA must complete the "Criminal/Juvenile Law Experience Questionnaire," to be included with applicant's proposal (see page "Appl. 17").

2. Case Services. Describe the caseload and case types to be covered. Include any limitations in coverage by case type. Include any differing values per type of case that applicant proposes.

3. Service Delivery. Describe how applicant will provide timely, effective, and efficient case-related services. Include:

   a) how the court would assign cases to applicant;

   b) whether applicant attorneys would be present at first appearances;

   c) how applicant would assign cases to attorneys;

   d) how applicant would provide for interviews with both in-custody and out-of-custody clients in accordance with the model contract;

   (e) how applicant would process cases from assignment through reporting to SCA;

   (f) how applicant would work with the court to coordinate services with other contractors and with the court; and

   (g) how applicant would investigate and provide information, if any, on sentencing alternatives to the court.

4. Facilities. Describe applicant's office(s). Include information on:

   a) office sharing arrangements;

   b) conference room(s);

   c) library (size and contents);

   d) handicapped access (if none, describe alternative arrangements for meeting handicapped clients or witnesses) (if applicant is a consortium, describe the handicapped access or alternative arrangements for each consortium member's office); and

   e) number of separate law firms/sole practitioners included.

Does each of applicant's attorneys have his/her own office? _____ Yes _____ No.

Are any offices housed in a residence? _____ Yes _____ No.

Does applicant or any of its members own or have an interest (direct or indirect) in the office building(s)? _____ Yes _____ No.

If yes, please explain: _____

_____

5. Equipment. Describe equipment or information systems applicant has or will obtain to improve the provision of services under the proposal. If applicant uses or will use a computer system, please specify hardware and software to be used.

6. Professional Education and Supervision Plan. Describe plans for professional development and supervision of all attorneys, direct support, and administrative staff. Include:

   a) training;

   b) CLE;

   c) educational methods to maintain current awareness of new developments in criminal and indigent defense-related case law and procedures; and

   d) supervision and development of less experienced attorneys.

7. Readiness Status. Describe what applicant needs to do to be ready and able to begin services on the proposed contract effective date. If more time is needed, explain why and when applicant will be available. Include information on positions that need to be filled and equipment or facilities that need to be procured. If positions need to be filled, describe recruitment procedures and affirmative action plans.

8. Local Factors. Identify and discuss, in detail, local factors that affect caseload and case processing that may affect cost. The following are examples of some of the factors that may affect work load/costs.

   a) Does the DA use "permissive joinder" to charge separate criminal episodes or incidents in one charging instrument; for example, three thefts, alleged to have occurred on three different dates?

   b) How often does the court grant motions to sever charges or codefendants for trial?

   c) Are law enforcement or prosecution personnel or resources likely to increase or decrease within the next year?

   d) To what extent are diversion agreements/conditional discharges used?

   e) Does the court schedule mandatory pretrial conferences? (Describe the scope and effectiveness of such conferences.)

   f) Discuss the DA's policies and practices regarding negotiated pleas (charges/sentencing).

   g) To what extent are misdemeanors prosecuted as violations?

   h) To what extent are treatment programs available?

   i) Are intensive supervision programs in place for pretrial release or probation (e.g., "DROP" programs)?

For applicants proposing coverage of juvenile dependency cases:

   j) Describe the process by which juvenile dependency petitions are filed.

      For example,

      is one petition filed for each child? are subsequent petitions filed under a formerly assigned case number? are proceedings consolidated?

   k) Does the judge or referee presiding over the juvenile court have regular review hearings in juvenile dependency cases? If so, describe the frequency and scope of the hearings.

   l) Describe the efficacy, effectiveness, and frequency of Citizen Review Board hearings.

9. Other Information. Include any other information you believe is important or relevant to SCA's review of the service delivery plan.

10. Contract Terms. Include any requests to modify model contract terms or definitions. Explain the purpose of and need for modification and how it will affect the service delivery plan and cost. Again, SCA has sole discretion to allow modification of any contract term.

B. PROPOSED ESTIMATED ALLOCATION OF CONTRACT FUNDS

Applicant must complete the form contained on the following three pages and estimate how contract funds would be allocated to cover service costs.

If applicant is a consortium, submit a separate form for each firm or member. In addition, you must compile all members' estimated allocations into one, overall consortium contract fund allocation form. To arrive at allocation figures, each member should estimate by line item the amount of funds reasonably necessary to perform the indigent defense services contemplated under the proposal. Generally, an attorney who would be spending 50 percent of his/her total billable time on indigent defense contract cases may allocate no more than 50 percent of total rent and other overhead costs to the proposed allocation.

The following are MAXIMUM amounts for certain proposed allocation line items, unless the SCA makes a special exception based upon written compelling circumstances.

Item	Amount
FICA	7.65% of salary total
Health and Other Insurance Coverage	$350 per employee FTE per month
PLF, NLADA, or NACDL	$1,900 per attorney FTE per year
OCDLA Dues	$125 per attorney FTE per year
OSB Dues	$366 per attorney FTE per year
Education & Training/ CLEs--Attorneys	$525 per attorney FTE (does not include travel costs) per year

("FTE" means Full Time Equivalent; i.e., an attorney or other staff whose "full time" (100 percent of full time) is devoted to proposed contract services.)

Under no circumstances will the SCA fund any lobbying or other political activities for an indigent defense contractor.

Each consortium must provide expense information in the allocation categories for all members, not just for the umbrella corporation or other umbrella entity. Any nonprofit organization or consortium that has expenses related to its Board of Directors' or Trustees' meetings should include that expense information with the proposed, estimated allocation as well as any other expenses not otherwise listed.

APPLICANT'S PROPOSED ESTIMATED ALLOCATION OF CONTRACT FUNDS

Directions: Provide estimated cost information for all applicable categories. If a category is not applicable, list "N/A." Add any necessary categories not listed below. **Prorate all estimated expenses for part-time attorneys or staff by the percentage of time they will spend on contract work.**

		First Year	Second Year
1.	**GROSS SALARIES**		
	Attorneys (estimated gross income to attorneys after attorneys' overhead and F.I.C.A. self-employment taxes are deducted) _____# _____FTE	_____	_____
	Secretarial/Reception/Clerical Staff _____# _____FTE	_____	_____
	Paralegal/Legal Assistant Staff _____# _____FTE	_____	_____
	Investigation Staff _____# _____FTE	_____	_____
	Other Staff (identify _____ _____ _____# _____FTE	_____	_____
	SUBTOTAL:	_____	_____
2.	**STAFF BENEFITS**		
	F.I.C.A. Self-Employment Tax (if applicable)	_____	_____
	F.I.C.A. (Employer's portion or Social Security only)	_____	_____
	Unemployment Insurance	_____	_____
	Health Insurance	_____	_____
	Life/Disability Insurance	_____	_____
	Workers' Compensation	_____	_____
	Retirement Program (attach plan description, including number of employees covered and percentage of employer's contribution)	_____	_____
	SUBTOTAL:	_____	_____
3.	**STAFF EXPENSES**		
	Malpractice Insurance check ____ PLF ____ NLADA or ____ NACDL	_____	_____
	Other Professional Insurance (describe _____ _____)	_____	_____
	OCDLA--Membership Dues	_____	_____
	OSB--Membership Dues	_____	_____
	Other Membership Dues Necessary to Contract (explain _____ _____)	_____	_____

3. STAFF EXPENSES (continued)	First Year	Second Year
Professional Licenses/Certificates (explain _____)	_____	_____
Education Training/CLE's--Attorneys	_____	_____
Education Training--Other Staff (explain _____)	_____	_____
Attorney Travel	_____	_____
Other Staff Travel	_____	_____
SUBTOTAL:	_____	_____
4. OVERHEAD (OCCUPANCY)		
Office Rent/Lease	_____	_____
Office Insurance	_____	_____
Building Utilities	_____	_____
Building Maintenance	_____	_____
Real Estate Taxes (if separate from rent)	_____	_____
SUBTOTAL:	_____	_____
5. OVERHEAD (OPERATIONS)		
Phone Services (Equipment/Local Calls)	_____	_____
Long Distance Calls	_____	_____
Office Supplies	_____	_____
Postage	_____	_____
Outside Photocopying/Printing	_____	_____
Library	_____	_____
Subscriptions	_____	_____
Other Case Expenses (explain _____)	_____	_____
SUBTOTAL:	_____	_____
6. OVERHEAD (NONCAPITAL EXPENSES)		
Furniture & Equipment Leases	_____	_____

Description Annual Cost

_____

_____

_____

		First Year	Second Year
6.	**OVERHEAD (NONCAPITAL EXPENSES) (continued)**		
	Equipment Repairs/Maintenance		
	SUBTOTAL:		
7.	**OVERHEAD (OTHER)**		
	Personal Property Taxes		
	Professional Contract Services (specify _____)		
	Miscellaneous (specify_____)		
	SUBTOTAL:		
8.	**TOTAL OPERATING BUDGET (total of 1-7)**		
9.	**CAPITAL PURCHASES (Items costing over $500 each)**		
	Computer–Hardware		
	Description Quantity Unit Cost		
	Computer–Software		
	Description Quantity Unit Cost		
	Office Furniture		
	Description Quantity Unit Cost		
	Office Equipment		
	Description Quantity Unit Cost		
	SUBTOTAL:		
10.	**GRAND TOTAL* (total of 8 and 9):**		

* **Grand total of proposed estimated allocation of contract funds must equal total proposed annual contract price.**

11. ATTORNEY COMPENSATION

List ANNUAL direct and indirect compensation levels for attorneys who devote full-time to contract legal services.

FOR ATTORNEYS DEVOTING LESS THAN FULL-TIME, list the anticipated ANNUAL amount to be paid as gross salary (after deducting overhead and F.I.C.A. self-employment taxes, if any) and the indirect compensation using contract funds. In the "Percent of Contract Work" column, estimate the percentage of time the attorney will devote to contract-related work; i.e., if an attorney is expected to work approximately one-third of his or her total billable hours on contract work, then enter .33. Please define or state assumptions made in determining percentages. Specifically, what basis is used to establish 100 percent of an attorney's time; i.e., _____ billable hours per year, 40 hours per week, etc. Assumptions:

_____

_____

_____.

When listing compensation, use one line for each proposed annualized rate during the term of the contract. (See examples below.)

CURRENT CONTRACTORS MUST ALSO LIST CURRENT ANNUAL COMPENSATION RATES FOR CURRENT ATTORNEYS. Vacant positions or proposed new positions must be listed last and identified as such. The listings set forth below are **EXAMPLES ONLY** of the requested information.

ATTORNEY	PERCENT OF CONTRACT WORK*	TIME PERIOD	ANNUAL RATE OF COMPENSATION FROM CONTRACT FUNDS	
			DIRECT (salary)	INDIRECT (benefits)
John Deer	100%	Current	$24,000	$4,800
	100%	1/1/00 - 12/31/00	$24,000	$4,800
	100%	1/1/01 - 12/31/01	$24,000	$4,800
Mary Doe	33%	Current	$ 8,000	$1,600
	33%	1/1/00 - 6/30/00	$ 8,000	$1,600
	33%	7/1/00 - 12/31/00	$ 8,160	$1,632
	33%	1/1/01 - 12/31/01	$ 8,320	$1,664
Vacant	50%	Current	$12,000	$2,400
	50%	1/1/00 - 12/31/00	$12,480	$2,496
	100%	1/1/01 - 12/31/01	$25,000	$5,000

* Estimated percent of position's time spent on contract-related work.

12. OTHER STAFF COMPENSATION

In the same manner as "Attorney Compensation," list ANNUAL direct and indirect compensation levels for other contract staff, including directors and administrators, who devote full-time to contract work.

For contract staff devoting less than full-time, list the anticipated ANNUAL amount to be paid as salary and indirect compensation using contract funds. Assumption is that 100 percent of time is the equivalent of 40 hours work per week, unless applicant states otherwise. If Applicant is a consortium of separate law firms, list staff by firm or office.

STAFF	PERCENT OF CONTRACT WORK*	TIME PERIOD	ANNUAL RATE OF COMPENSATION FROM CONTRACT FUNDS	
			DIRECT (salary)	INDIRECT (benefits)
Sarah Jones	50%	1/1/00 - 12/31/00	$ 8,000	$300
	75%	1/1/01 - 12/31/01	$13,500	$400
Fred Smith	80%	1/1/00 - 12/31/00	$15,000	$450
		1/1/01 - 12/31/01	$17,400	$550

* Estimated percent of position's time spent on contract-related work.

C. PROPOSED LIST OF CONTRACT ATTORNEYS

Directions: List every attorney position that applicant has budgeted to perform the contract. If the position is vacant, note that fact.

If applicant is a consortium of separate law firms, list the attorneys by firm or office.

FIRM OR OFFICE	NAME	BAR #	CONTRACT WORK PERCENTAGE *

* Percentage of time attorney expects to spend on contract-related work.

D. PROPOSED LIST OF OTHER CONTRACT STAFF

Directions: List every nonattorney position that applicant has budgeted to perform the contract. If the position is vacant, note that fact.

If applicant is a consortium of separate law firms, list each position by firm or office.

FIRM OR OFFICE	POSITION TITLE	NUMBER OF PERSONS	NUMBER OF FTE	CONTRACT WORK PERCENTAGE *

* Percentage of time person(s) expects to spend on contract-related work.

E. CERTIFICATE OF ATTORNEY QUALIFICATION

(Submit one certificate for each attorney proposed to provide contract services.)

NAME _____ BAR NUMBER _____

ADDRESS _____

_____

Years Experience: Practice of Law _____ Criminal _____ Juvenile _____

I certify that I have reviewed the Qualification Standards for Court-Appointed Counsel to Represent Indigent Persons at State Expense, and that I meet the requirements of those standards and wish to be listed as willing to accept appointment to the case types checked below.

I. TRIAL LEVEL

A. Capital Murder
- Lead Counsel ____
- Co-counsel ____

B. Murder
- Lead Counsel ____
- Co-counsel ____

C. Major Felony ____

D. Lesser Felony ____

E. Misdemeanor ____

F. Juvenile
- Delinquency ____
- Dependency ____
- Termination ____

G. Civil Commitment ____

H. Postconviction Relief
- Capital Murder ____
- Murder ____
- Other Criminal ____

I. Habeas Corpus ____

II. APPELLATE LEVEL

A. Capital Murder
- Lead Counsel ____
- Co-counsel ____

B. Murder
- Lead Counsel ____
- Co-counsel ____

C. Other Criminal ____

D. Juvenile
- Delinquency ____
- Dependency ____
- Termination ____

E. Civil Commitment ____

F. Postconviction Relief
- Capital Murder ____
- Murder ____
- Other Criminal ____

G. Habeas Corpus ____

___ Letters of reference or ___ evidence of equivalency qualification under Standard 3.1 are attached.

_____ _____

Signature Date

F. CRIMINAL/JUVENILE LAW EXPERIENCE QUESTIONNAIRE

Directions: This questionnaire has been developed to supplement the bid information and to identify more specifically each attorney's experience in criminal and juvenile law. One questionnaire must be completed by each attorney proposing to perform work under the contract, if the attorney has not performed contract work in the past. If this questionnaire does not address important aspects of an attorney's experience, please feel free to attach additional information. If more space is needed to answer any of the questions below, please do so on additional pages.

1. Name (please print):

2. Date admitted to Oregon State Bar:

3. Oregon State Bar number:

4. Number of years and location(s) of legal practice in Oregon:

5. Number of years and location(s) of legal practice outside Oregon:

6. What percentage of your present practice involves handling criminal cases? juvenile cases?

7. What percentage of your present practice involves handling indigent defense cases?

8. Briefly describe the nature and extent of your work experience in the criminal and juvenile law areas. (Include case types and lengths of time you have practiced criminal law.)

9. Before which courts and judges have you regularly appeared in criminal case proceedings and when? (List name of judge, court, location, and during which year(s) appearances were made.)

10. Before which courts and judges have you regularly appeared in juvenile case proceedings and when? (List name of judge, court, location, and during which year(s) appearances were made.)

11. What has been the extent of your participation in the past two years with continuing legal education courses and/or organizations concerned with criminal and juvenile law matters?

12. List at least three names and addresses of judges and/or attorneys who would be able to comment on your experience in handling criminal and juvenile law cases.

I certify that the above information is true and complete.

_____ _____

SIGNATURE DATE

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The Importance of Private Bar Involvement in the Nation's Indigent Defense System

By Robert L. Spangenberg

This article is adapted from a 1/17/2000 paper prepared by Robert L. Spangenberg for members of the "Core Committee" of the Kennedy School Executive Session on Indigent Defense Systems. The Executive Session is a project funded by the U.S. Department of Justice Bureau of Justice Assistance.

The core committee has discussed the necessity of including the topics of private assigned counsel and private bar contracting in our sessions on indigent defense systems. This paper suggests a few reasons why I think this is necessary.

A Look at the Numbers

Of the 50 largest counties in the country, ten do not have a public defender program. The combined population of these counties exceeds 14 million. It is my best estimate that today only approximately 1,350 of the 3,083 counties in the country have a public defender program. This amounts to only about 44% of the counties in the country. Maine and North Dakota have no public defender programs. Alabama, with 67 counties, has only three or four public defender programs. North Carolina, with 100 counties, has fifteen. Georgia, with 159 counties, has fourteen. Michigan, with 83 counties, has five. Nebraska, with 93 counties, has seven. Oklahoma, with 77 counties, has ten. South Dakota, with 66 counties, has three. Texas, with 254 counties, has five.

In addition, a rather significant number of the 1,350 counties with public defender programs have part-time or contract public defenders.

Assigned Counsel and Contract Defenders Lack a National Voice

There is no organized, national network of private assigned and private contract programs. Few states have statewide organizations serving these programs for training, education or exchange of information.

American Bar Association Standards

The ABA Standards for Criminal Justice, Providing Defense Services states in Standard 5-1.2 Systems for Legal Representation:

> (a) The legal representation plan for each jurisdiction should provide for the services of a full-time defender organization when population and caseload are sufficient to support such an organization. Multi-jurisdictional organizations may be appropriate in rural areas.

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(b) Every system should include the active and substantial participation of the private bar. That participation should be through a coordinated assigned-counsel system and may also include contracts for services. No program should be precluded from representing clients in any particular type or category of case.

(c) Conditions may make if preferable to create a statewide system of defense.

Unfortunately, the trends across the country in the last decade have not been consistent with Standard 5-1.2. None of the 50 largest counties have changed to a public defender system during that period.

In many counties where there is a primary public defender the system no longer includes the active and substantial participation of the private bar. In some of these counties a second or third public defender has been created, cutting back dramatically on private bar involvement.

In Missouri, which has a state public defender system, regional public defender offices trade off conflict cases with other regional offices, thus virtually eliminating all private bar appointments.

In every jurisdiction that uses a public defender program as the primary provider of representation to indigent defendants, there must also be an alternate system for appointment where public defenders have conflicts of interest. Thus, while there may be only approximately 1,350 counties in this country with public defender programs, there are over 3,000 with an alternate system which will most often be either a private court-appointed or a private bar contract system. However, despite the ABA's recommendation in Standard 5-1.2 that private bar participation should be through a coordinated assigned counsel system, few actually exist in the country.

Contract Programs are on the Rise

The growth of private bar contract programs has been substantial over the past 20 years. Contracts may be entered into with individual private attorneys, a group of unassociated private attorneys, law firms bar associations. In a number of instances contracts are put out to bid and awarded to the lowest bidder.

In many instances the contract program is created by the funding source primarily as a way to save the county or state money. In other instances statewide public defender systems are also contracting with the local bar for services and all too often without regard to the quality of the lawyers and without appropriate standards and guidelines.

Lack of Communication Between Private Bar and Public Defenders

Unfortunately, in all too many jurisdictions, there is little communication and cooperation between the public defender system and the private court-appointed system. All too frequently the two systems feel they are in competition for the same pot of money, and rather than become allies, they become adversaries.

Some public defenders view most of the pri attorneys doing court-appointed work as less than competent, unconcerned about their clients and always looking for the earliest plea that will result in a fee.

Many private court-appointed counsel look at public defender attorneys as young and inexperienced, overworked and constantly picking the most complicated and difficult co-defendant to pass on to the private bar.

Erosion of the Private Bar's Presence in Criminal Law

As second public defenders grow along with large private bar contracts, there is a danger that the practice of criminal law will consist primarily of government paid, contracting law firms and a handful of highly paid private criminal attorneys who represent individuals with large sums of money who are indicted in complex litigation.

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In my judgment, the responsibility for providing court-appointed counsel to indigent criminal defendants in this country should rest with the entire legal profession. More and more we find state and metropolitan bar associations spending less and less time discussing and supporting the right to counsel and the lawyers and agencies providing the representation.

Furthermore, in my travels around the United States, I am beginning to see a further erosion among bar associations regarding the rights of indigent defendants as bar groups spend more time addressing the significant needs of low-income clients in civil cases. This has become more of a concern recently as I have observed civil legal services programs seeking state funds of various kinds to replace cutbacks in LSC federal funds. In one state I visited last year, the state bar president told me that he could not support an increase in state funds for indigent defense because he had previously made that commitment to the civil legal services program.

In some states the battle is on (although never discussed in this form) between state funds for the poor in criminal cases versus state funds for the poor in civil cases. The feeling in some states is that there is a limited pot of funds for legal services to poor people and the organization with the greatest lobbying power will win.

In the 35 years I have worked in the field of legal services for the poor, I have observed that public defenders and civil legal services lawyers seldom work together on the problem of legal services to low income persons, notwithstanding the fact that from time to time they may well be dealing with the same community, population and families.

In my travels around the country providing technical assistance to local jurisdictions attempting to improve their indigent defense systems, I have found that visiting the local civil legal services program will seldom give me insight into the strengths and weaknesses of the indigent defense program or the major concerns that have brought me to the community. Having also performed technical assistance to civil legal services programs over the years, the same could be said about the lack of understanding or knowledge that public defenders have regarding the needs of the local civil legal aid program.

The Private Bar is a Needed Constituency for Indigent Defense

Institutional public defender systems need the support of state and local bar associations and the private criminal bar in order to keep the criminal justice system fair and to support an adequate budget for a quality defense system for both the public defender and private court-appointed counsel. The more private court-appointed counsel are driven out of the system, the less likely it is that necessary support can be maintained.

Keep in mind the private court-appointed system is an important vehicle for full-time public defenders who leave public defender offices but want to continue the practice of criminal law. In some jurisdictions thee attorneys become the best and most dedicated private court-appointed counsel in the area.

These are some of the reasons why I believe the public defender members and the core committee cannot ignore what I call "the rest of the world." I hope this information will be helpful in assessing the future of our Executive Sessions and methods that we can agree upon that will result in the inclusion of this vast body of lawyers providing court appointments to this poor in criminal cases in this country.❖

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NEWS FROM AROUND THE NATION

North Carolina Indigent Defense Study Commission Unanimously Votes to Recommend a Permanent Statewide Indigent Defense Commission

With the principal mandate of studying "the methods of improving the management and accountability of funds expended to provide counsel to indigent defendants without compromising the quality of legal representation mandated by state and federal law," the North Carolina Indigent Defense Study Commission held its fourth meeting on December 17, 1999, in Raleigh, North Carolina, where, by unanimous vote, the Study Commission recommended the following:

- Legislation be enacted by the North Carolina legislature to create a permanent Indigent Defense Statewide Commission to be an independent agency within the Judicial branch;
- The Commission be broad-based, but not include any active prosecutor or judge;
- The Commission be charged with determining the type of indigent defense system to exist in each of the judicial circuits throughout the state;
- The Commission appoint an Executive Director and full-time Judicial District Public Defenders who, on an annual basis, shall submit a plan and budget to the Commission regarding effective representation in each county of the Judicial District;
- The Commission be required to promulgate uniform qualifications and performance standards for each type of system throughout the state and to further develop an implementation plan to ensure that the standards are being met; and
- The Commission be responsible for providing effective assistance of counsel in all cases where counsel is mandated in North Carolina.

In North Carolina, the state pays for all indigent defense expenditures. Trial level representation is provided at the local level; each county has the responsibility of organizing its system. A handful of the state's 100 counties employ the public defender model while the rest use assigned counsel or contract defenders. Appellate representation is provided by the State Appellate Defender.

The Study Commission was created in 1999 when the North Carolina legislature passed two bills that were merged to look at the state's indigent defense system. Senate Bill 1366 called for the creation of an Indigent Fund Study Commission to be established by the AOC with broad representation of the three branches of government, the two state bar associations, the North Carolina Academy of Trial Lawyers and the North Carolina Association of Public Defenders. Senate Bill 1255 mandated that the Administrative Office of Courts study the efficiency and cost effectiveness of the public defender program established in several judicial districts. This bill called for recommendations relating to the implementation of a plan for the potential expansion of judicial district public defenders along with cost estimates for the increase.

The Study Commission was aided in its research by The Spangenberg Group under the auspices of the joint U.S. Department of Justice, Bureau of Justice Assistance and American Bar Association, Bar Information Program State Commissions Project. The Bar Information Program (BIP) was created in 1983 by the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (SCLAID) and shortly thereafter contracted with The Spangenberg Group to provide on-site technical assistance to states interested in improving their indigent defense systems. In 1999, BIP was awarded a grant from the Bureau of Justice Assistance to increase its ability to work with states with no statewide oversight of indigent defense. The aim of

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the State Commissions Project is to assist state task forces gather data and address such issues as: system funding; standards for assigned counsel, public defenders and contract counsel; and uniformity of data collection.

The Study Commission has been ably staffed by John Rubin from the University of North Carlina Institute of Government and Rick Kane, the Administrator of the Administrative Office of the Courts and his staff.❖

West Virginia Task Force Recommends an Increase to the Public Defender Services' Budget, the Establishment of a Statewide Indigent Defense Advisory Commission, and Stricter Rules Governing the Submission of Assigned Counsel Vouchers for Payment

In January, a 25-member task force made up of judges, legislators, public defenders, district attorneys and executive branch representatives recommended to the Governor and Legislature that the budget for West Virginia Public Defender Services (PDS) be increased for the specific purposes of: increasing salaries of PDS staff to competitive levels; hiring qualified management-information systems staff; and, operating an auditing division, resource center and appellate division as required by statute. Additionally, because the Task Force found the collaborative process involved in bringing together a broad-based coalition to address indigent defense issues to be an effective way to address both the quality and cost-effectiveness of defender services, it also recommended that a ten-person Advisory Commission be established to provide counsel to the Executive Director of PDS on the following areas of concern: securing adequate financing; overseeing budget preparations; developing procedures to monitor indigent defense caseloads; establishing indigent defense standards and guidelines; and, evaluating the need to establish new public defender corporations. Finally, the Task Force recommended that the Legislature substantially reduce the window for submitting assigned counsel vouchers for payment. The Task Force recommendations are especially significant as the task force was created to address the rising cost of indigent defense services in the state.

Public Defender Services (PDS) is a statewide agency of the executive branch responsible for the administration, coordination and evaluation of local indigent defense programs in West Virginia's 31 judicial circuits. All funds for indigent defense in West Virginia are provided in a state general fund appropriation. The Executive Director of PDS, appointed by the Governor with the consent of the Senate, is authorized to make grants to and contract with Public Defender Corporations in those judicial circuits in which the chief judge and/or the majority of active local bar members have determined a need for a public defender office.

Throughout the 1990's, PDS had a history of funding problems and carried a certain level of debt from year to year. For instance, in FY 1996, despite a supplemental state appropriation of $3.5 million, PDS finished the fiscal year with a debt level of approximately $4.5 million. Another supplemental appropriation of $3.4 million in FY 1997 still left PDS with a debt of $5,041,190 heading into FY 1998. Despite a 3.4% increase in its FY 1998 state funding (from $17.6 million to $18.2 million), PDS depleted its resources after only five months. A further supplemental appropriation still left PDS with a debt of approximately $4 million at the close of FY 1998. In FY 1999, the Legislature increased the appropriation to over $22 million and increased it another 22.61% (up to $27,110,905) for FY 2000.

The Executive Director of PDS, with the consent of the Governor, appointed the Task Force to study the rising costs of defender services and hired The Spangenberg Group to conduct a data audit of PDS and to help the Task Force understand the funding issues from a national perspective. The resulting assessment, *Final Report to the West Virginia Indigent Defense Task Force,* made several findings upon which the Task Force made its recommendations. For instance, TSG found that PDS is forced to base budget requests on data that is

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incomplete because court-appointed attorneys are allowed to submit vouchers up to four years after the completion of the case. As such, a significant portion of each year's budget goes to paying assigned counsel for cases several years old. TSG also found that potential overall savings could be had by increasing the PDS budget to fund the auditing division, resource center and appellate division that are required by statute but have never been funded. Finally, TSG concluded that public defenders in West Virginia provide more cost-effective representation than do court-appointed attorneys, and suggested that an advisory committee be established to explore expanding the public defender system. For a copy of the report, please contact The Spangenberg Group, tsg@spangenberggroup.com or call (617) 969-3820.❖

Mississippi Lawsuits Add Pressure to State to Fund State Public Defender System

In December and January, on the eve of the Mississippi legislature's return to session, four lawsuits were filed in Mississippi trial courts that ask the courts to order the state to fund a statewide public defender system.

Three of the four lawsuits were brought on behalf of Mississippi counties and their taxpayers against the Governor and the Attorney General of Mississippi. *Quitman County v. Mississippi*, *Jefferson County v. Mississippi*, and *Noxubee County v. Mississippi*. The fourth lawsuit was brought on behalf of a public defender, J.B. Van Slyke, working in Forrest County, Mississippi, and names as defendant, in addition to the Governor and Attorney General, the Forrest County Board of Supervisors.

Plaintiff's complaint in *Quitman County v. Mississippi* notes that all costs for criminal prosecutions are paid for by the state, but the state contributes no funds for indigent defense representation. All indigent defense funds are paid by the counties, despite enactment of the Mississippi Statewide Public Defender Act of 1998, which called for numerous reforms, including state-funded, district public defender offices. Beyond minimal first year funds, the State legislature has so far refused to appropriate funds for the Commission to do its work Indeed, the state's Attorney General, one of th defendants in the county lawsuits, has written an Advisory Opinion that the Commission's enabling legislation should be removed from the state's law books. The plaintiffs seek an order compelling the state to fund a statewide public defender system such as that called for in the 1998 Public Defender Act; one which is comparable to the existing statewide district attorney system.

In *Quitman County v. Mississippi*, plaintiffs argue the state's imposition of indigent defense costs on the counties amounts to an unfunded mandate which is inherently arbitrary because of the unpredictability of crime on a county-by-county basis. In Quitman County, the complaint recounts, county officials were forced to take out a bank loan and raise taxes to pay for $250,000 in legal costs for the death penalty trials and appeals of two men convicted of killing four members of one family. It took the county three years to repay the loan. With another appeal recently filed in the case, the county faces raising taxes again, incurring additional debt or reducing other services t pay for the legal representation.

Quitman County officials point out the crime was committed by defendants who reside outside of Quitman County, but because the crime was committed within its borders, Quitman County is obligated to pay for the legal representation of the indigent defendants.

Van Slyke's claim argues that he lacks enough resources to adequately do his job as public defender. For the past six years, Van Slyke has worked as one of two part-time public defenders under a contract with the Forrest County Board of Supervisors. In his complaint, Van Slyke reports he has an annual budget of approximately $100,000 to pay his salary, plus that of an assistant and a part-time secretary. Van Slyke, who does not have any investigators, says he represents about 800 people at initial appearance and 500 who are indicted on felony charges each year.

There are currently only three counties in Mississippi (Hinds, Jackson and Washington) that

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operate full-time public defender offices to represent indigent defendants. The remaining counties appoint lawyers on a case-by-case basis, or use part-time public defenders, such as Van Slyke, who operate under contract with the county to accept an unlimited number of cases each year.

Van Slyke is represented by attorneys Steven Hanlon and Leo Rydzeqski of Holland & Knight, which has offices in Tallahassee, FL and Washington, DC. Counsel for the county lawsuits includes William H. Voth and Kathleen A. Behan of Arnold & Porter, which has offices in New York, NY and Washington, DC. Jackson, MS attorneys Robert McDuff and Dennis C. Sweet, III, are involved in all four cases, and Jackson, MS attorney Everett Sanders is part of the county lawsuits team.❖

Work Begins on Fair Defense Project In Texas

Texas Appleseed, a non-profit public interest law center based in Austin, has kicked off a multi-phase campaign to educate the public and to build a strong coalition between the bar and the community to achieve reform in the Texas indigent defense system. The Project On Fair Defense for the Indigent Accused in Texas (Fair Defense Project) has three components: (1) research and analysis of the present Texas system; (2) public education about the present system and various alternative approaches; and (3) creation of a broad coalition to promote dialogue, movement and consensus on improving equity and efficiency in the Texas indigent defense system.

Legal representation for indigent criminal defendants in Texas is provided under independent systems that have evolved in each of the state's 254 counties, with little or no oversight, and no funding from the state. For over a decade, state and national media have spotlighted Texas as a place where poor people receive unequal justice and much of that attention has focused on problems inherent in Texas' indigent defense systems.

In 1999, legislation proposing modest improvements in the Texas indigent defense law was approved by unanimous vote of both houses of the Texas legislature, but was vetoed by Governor George W. Bush. (*See Texas Governor Bush Vetoes Indigent Defense Reform Measures,* The Spangenberg Report, Vol. V, Issue 2.) The veto sparked a flurry of national media interest due in part to the seeming inconsistency with Bush's self-professed "compassionate conservatism." The veto inspired renewed determination on the part of the many individuals and institutions to join together and continue attempts to reform the system.

Over the summer and fall of 1999, Texas Appleseed began building a diverse coalition of individuals and organizations to work toward fundamental improvements in Texas' indigent defense system. Included in the coalition are lawyers, organized bar institutions, judges, prosecutors, criminal justice system administrators and community-based groups around the state. In addition, the organization has a working relationship with State Senator Rodney Ellis, the principal author of the 1999 indigent defense legislation and Chair of the Jurisprudence Committee in the Texas Senate.

Texas Appleseed received grants from the Open Society Institute and the Public Welfare Foundation to carry out the initial phase of its Fair Defense Project. With these grants, Texas Appleseed has enlisted the assistance of both The Spangenberg Group and the Texas-based Center for Public Policy Priorities to conduct research for the project. The Spangenberg Group will conduct a quantitative and qualitative study of the delivery of indigent defense services in a representative cross-section of counties in Texas. No such study has ever been undertaken in Texas, although the State Bar of Texas Committee on the Provision of Legal Services to the Poor in Criminal Matters has just completed a multi-year survey of judges, prosecutors and criminal defense attorneys in Texas, which the Appleseed research will complement. A report detailing findings of the study is expected in November 2000.

The Fair Defense Project is also receiving support from the State Commissions Project, which is a joint effort between the American Bar Association Bar Information Program and the U.S. Department of

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Justice Bureau of Justice Assistance. The purpose of the State Commissions Project is to provide technical assistance and information to state task forces attempting to improve their indigent defense systems. Texas is one of several states receiving assistance from this project (*see* related article on North Carolina, infra.) ❖

Illinois Governor Calls for Moratorium on Executions

In the wake of the release of four men from death row in the past year, Illinois Governor George Ryan announced in January that he would halt all executions until a commission can review the problems of Illinois' capital punishment system. Illinois has released 13 inmates from death row since reinstating the death penalty in 1977. Most recently exonerated was an inmate whom the Illinois Court ruled was convicted with the use of improper evidence. Twelve of Illinois' death row inmates have been executed since 1977.

In announcing he was temporarily placing a moratorium on executions, Governor Ryan was quoted in the *Chicago Tribune* as saying, "I can't support a system which in its administration has proven to be so fraught with error and come so close to the ultimate nightmare - the state's taking of an innocent life." Ryan said he would appoint a commission to study the capital punishment system "in it's totality." Last year the Illinois Supreme Court and the Illinois General Assembly created their own committees to study possible reforms.

Reasons for the exoneration of the 13 former death row inmates include new DNA evidence and recanted testimony by prosecution witnesses. Convictions in five of the 13 cases were attributed in part to testimony from jailhouse informants.

According to an analysis by the *Chicago Tribune,* Illinois courts have imposed a death sentences in nearly 300 cases since the state reinstated the death penalty in 1977. At least one round of appeals has been completed in 260 of those cases, and half were reversed for a new trial or sentencing hearing.

On March 9, Governor Ryan appointed a group of high-profile Illinois attorneys and politicians to lea the probe of the state's capital punishment syste Chairing the governor's 14 member Commission on Capital Punishment will be former Chief U.S. District Judge Frank McGarr, with former U.S. Senator Paul Simon and former U.S. Attorney Thomas Sullivan serving as co-chairs. Acting as a special advisor to the commission will be William Webster, a senior partner in the Washington, D.C. law firm of Milbank, Tweed, Hadley & McCloy and a former director of the Federal Bureau of Investigation and Central Intelligence Agency.

As reported in *American Lawyer,* panelists appointed in addition to McGarr, who is a private practitioner, Sullivan, a partner at Jenner & Block, and Simon, director of Southern Illinois University's Public Policy Institute, are: Cook County Public Defender Rita Fry; Lake County State's Attorney Mike Waller; Roberto Ramirez, a non-lawyer and Mexican immigrant who is the founder and president of the janitorial company Tidy International; best-selling author and former federal prosecutor Scott Turow; Tom Needham, a former Cook Cou prosecutor who now serves as chief of staff for Chicago Police Superintendent Terry Hillard; former Cook County prosecutor Bill Martin; criminal defense lawyer Donald Hubert; State Appellate Defender Theodore Gottfried; Matt Bettenhausen, deputy governor for criminal justice and public safety; corporate lawyer and former prosecutor Andrea Zopp; and Montgomery County State's Attorney Kathryn Dobrinic.

The committee appointed by the Illinois Supreme Court to review capital punishment produced a report last fall with a lengthy list of reform proposals. One was to create a capital litigation trial bar of specially qualified defense attorneys and prosecutors who meet minimum levels of experience. While such a system has been used for defense attorneys in other states, the suggestion that prosecutors meet minimum standards was criticized by prosecutors as violating the Illinois Constitution by usurping the power of elected state's attorneys.

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Illinois is the only one of the 38 states with the death penalty to officially halt executions while it reviews its death penalty procedures. A similar precaution was approved by the Nebraska legislature, but vetoed by the governor last year.

Governor Ryan's moratorium was reportedly hailed by Bill Paul, President of the American Bar Association. In February, 1997, the American Bar Association called for a moratorium on executions until the nation's death penalty system is changed to afford due process.❖

Kentucky Governor's Budget Includes Significant Increases to Department of Public Advocacy

Kentucky Governor Patton announced in his biennium budget address on January 25, 2000 that he is recommending an additional $4 million be appropriated for the Department of Public Advocacy (DPA) in 2001 and another additional $6 million be provided to the agency in 2002. These proposed increases were influenced by recommendations from a Blue Ribbon Group formed by the Kentucky Public Advocate and the Public Advocacy Commission in 1999 to study indigent defense in the state.

The Blue Ribbon Group, consisting of more than 20 distinguished members representing all three branches of the government, the bar and key officials of criminal justice agencies across the state, recommended that an additional $11.7 million be appropriated for DPA in each of the upcoming biennium years. In its May 1999 report, *Analysis of Indigent Defense in Kentucky: Bringing the Department of Public Advocacy into the 21st Century*, the Blue Ribbon Group justified the increase expenditure by documenting the effects that years of chronic under-funding have had on the DPA. The report found that:

- Kentucky ranks among the bottom five states in the U.S. in funding for public defender systems;
- Kentucky ranks near the bottom of the states in public defender salaries;
- Kentucky provides inadequate representation to juveniles;
- Kentucky's public defender caseloads are two times the national recommended standards; and
- Private lawyers are inadequately compensated for work on indigent defense cases.

The Department of Public Advocacy is a statewide entity which is responsible for overseeing the delivery of indigent defense services in Kentucky's 120 counties. By statute, the state is responsible for funding indigent defense in Kentucky with the expectation that the counties may contribute local funds to augment the state appropriation. The original goal of the DPA was to have regional public defender offices providing indigent defense representation in all parts of the state. The under-funding of the DPA has limited this goal, and regional offices operate in only 73 of the state's 120 counties. In 47 counties, representation is provided by attorneys who are under contract with the DPA. The Department of Public Advocacy also contracts yearly with independent, non-profit county public defender offices in the urban counties of Jefferson (Louisville) and Fayette (Lexington). Unlike most other counties in the state, these two counties provide substantial funds to supplement state funds for the two offices. A 12-member Public Advocacy Commission assists the DPA with budgetary and certain supervisory responsibilities, and conducts public education about the purpose of the public advocacy system.

The Governor's proposed budget increases are designed to:

- Correct a budget imbalance caused by increased caseloads;
- Bring the salaries paid to Kentucky's public defenders in line with those paid in comparable southeastern states;
- Open new public defender offices in 21 counties to improve access to and raise the quality of representation;
- Reduce public defender caseloads by adding new attorneys; and
- Provide adequate support services to the public defender system.

For more information on the work of the Blue Ribbon Group, see Volume V, Issue 2 of *The*

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Spangenberg Report. The Blue Ribbon Group report was prepared following a study conducted by The Spangenberg Group under a grant to the Kentucky Public Advocate.❖

Washington Legal Foundation Challenge to Texas IOLTA Dismissed

A U.S. District Judge in Austin ruled in late January that the Texas Interest on Lawyers Trust Accounts program (IOLTA program) did not unconstitutionally take the money of a lawyer's client, dismissing with prejudice a long-running challenge to the program.

The Washington Legal Foundation (WLF) brought suit against the Texas Equal Access to Justice Foundation, which administers the Texas IOLTA program, on behalf of William Summers, a client of a Houston attorney. WLF argued there was an improper taking of Summers' property under the Fifth Amendment when Summers complained the interest on his $1,000 retainer belonged to him, and should have not been used by the IOLTA program to finance legal services for low-income Texans. WLF also unsuccessfully argued that the IOLTA program violates the First Amendment as it forced clients such as Summers to support speech he finds offensive.

All 50 states have IOLTA programs. Under these programs, law firms deposit funds held for clients into special accounts when the funds constitute nominal amounts or are only held for a brief time. Interest from these accounts is distributed to programs that provide legal services to low-income persons. The vast majority of states use IOLTA funds to assist programs providing assistance in civil matters, but two -- Georgia and Michigan -- also use IOLTA funds to assist indigent criminal defense programs.

The opinion comes following a remand by the U.S. Supreme Court for a determination of whether there had been a taking of Summers' property and whether he was due any compensation. A Fifth Circuit panel had reversed the district court's summary judgment for the defendants, concluding that the interest earned on client funds held in IOLTA accounts is a property interest within the reach of the Fifth Amendment. The same judge who granted summary judgment to the Texas IOLTA program almost six years ago, U.S. District Judge James Nowlin, again wrote for the defendants. "The Court finds that the costs of sub-accounting in lawyer and staff hours . . . in addition to bank charges exceed the costs of IOLTA . . . . These costs make net interest to clients infeasible except in cases where large sums of money are held or when client funds are held for long periods of time. In these cases, the client funds would not be placed in IOLTA."

Judge Nowlin found the IOLTA program cost Summers nothing, thus the governmental action involved does not implicate fundamental principles of justice and fairness. Nowlin rejected Summers' First Amendment claim on the basis that the purpose of the program -- to fund legal services for the poor -- is an important state interest.

The IOLTA program in Texas was adopted by the Texas Supreme Court in 1984 and became mandatory in 1988. The program raises nearly $5 million annually to fund legal services for the poor. WLF reportedly plans to appeal the decision.❖

Chief Judge Calls for Increased Compensation to Court-Appointed Counsel in New York

In her January 2000 State of the Judiciary Address, New York Chief Judge Judith S. Kaye called for sweeping reforms to New York's system of assigned counsel, including an increase in compensation rates paid to court-appointed attorneys in the state. Last increased in 1986, the current rates paid to New York court-appointed attorneys are among the lowest paid in the nation: $25 per hour for out-of-court work and $40 per hour for in-court work, with caps of $800 for non-felony cases and $1,200 for felony cases. The rate for appellate work in criminal cases is fixed at $40 per hour. Kaye called for an elimination of per-case limits and new rates of $60 per hour for misdemeanor cases and $75 per hour for felony and family court cases.

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Judge Kaye's recommendations were based on a report, *Assigned Counsel Compensation in New York: A Growing Crisis*, prepared by Chief Administrative Judge Jonathan Lipmann and Deputy Chief Administrative Judge for Justice Initiatives Juanita Bing Newton on behalf of the Office of Court Administration (OCA). One of the findings influencing a call to increase assigned counsel compensation rates was that of a dramatic attrition rate over the past decade in the number of attorneys who agree to accept court-appointed cases. The largest drops were in judicial districts covering the southern part of New York, where the cost of living is the highest. In the First Department (which covers the Bronx and Manhattan) in 1989, there were 1,030 attorneys on the assigned counsel panel who actively accepted assignments. In 1999, that figure was down to 400; a decrease of more than 60 percent. The decline in active panel participants in the Second Department (encompassing Brooklyn, Queens and Staten Island) was even more dramatic, with almost 70 percent fewer attorneys taking appointments in 1999 (300) than 1989 (940).

Assigned Counsel Compensation in New York: A Growing Crisis also discusses findings of a recent New York State Bar Association study on the economics of law practice in New York, which calculated that the average New York attorney's hourly overhead rate was $35.75. That is $10.75 an hour *more* than a court-appointed attorney would be paid for an hour of out-of-court work.

The report predicts that raising attorney compensation to the recommended levels would cost an additional $71,800,000 annually. Currently, all assigned counsel costs in New York are the responsibility of the counties. To ease the fiscal impact on the counties, the report recommends that the increased cost of assigned counsel be funded by revenue from mandatory surcharges imposed upon conviction in all offenses. The majority of revenue from the surcharges, which range from $5 for a parking offense to $150 for a felony conviction, currently goes to the state's general fund and totals roughly $70 million annually. After Judge Kaye announced this proposed funding measure, Governor Pataki announced he has no intention of diverting court-generated fees to fund increased assigned counsel compensation rates, and that he is unlikely to support any increase in assigned counsel rates, no matter what the source of funding.

The report proposed one other salient reform: creation of a commission that would periodically review assigned counsel compensation rates. The proposed commission would make non-binding suggestions to the legislature, and would consist of representatives of the governor, the legislature, the chief judge, counties and municipalities. ❖

NYCLA Seeks Injunction Setting New Rates For Court-Appointed Counsel

The New York County Lawyers Association (NYCLA) recently filed suit against the State of New York claiming that the inadequacy of the rates of compensation for assigned counsel is a systemic violation of the rights of children and indigent adults to legal representation under the state and federal constitutions. *New York County Lawyers' Association v. George E. Pataki and The State of New York.*

The NYCLA action seeks declaratory and injunctive relief against Governor George E. Pataki and the State of New York, alleging that failure on the part of the State to increase the rate of compensation for assigned private counsel who appear in these proceedings constitutes denial of access to meaningful and effective legal representation for children and indigent adults as required by the New York and United States Constitutions.

While the number of attorneys in New York's First and Second Departments who actively participate in the assigned counsel program has plummeted in the past ten years, the number of children and indigent adults in New York City required to be represented by assigned private counsel in family and criminal court proceedings at the trial and appellate levels has escalated. To meet this increase in demand, plaintiffs contend, those lawyers who participate in the assigned counsel program must

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take on more cases, which in turn undermines the quality of the representation and causes delays in the administration of justice.

As noted in the preceding article, the compensation rates for assigned counsel in New York, which are set out in Article 18-B of the New York County law, Article 2 of the Family Court Act, and Article 2 of the Judiciary Law, have not been changed since 1986.

The NYCLA argues that Defendants have a constitutional and statutory obligation to ensure that qualified assigned private counsel are available and able to provide meaningful and effective representation to children and indigent adults in New York City, and that Defendants' failure to increase the rates paid to assigned private counsel, to abolish the arbitrary distinction between the rates paid for in-court and out-of-court work, and to remove the caps on total compensation per case has created a disincentive for adequate preparation prior to a hearing or trial on the part of the attorney, as well as a risk of inadequate legal representation in New York City, in violation of the state and federal constitution.

The NYCLA asks the Court to declare as unconstitutional those portions of the County Law, Family Court Act and Judiciary Law which provide for fixed rates and per-case limits for the representation of children and indigent adults in New York City. Further, the NYCLA claims that Defendants' failure to provide sufficient compensation to assigned counsel constitutes tortious interference with NYCLA's obligation under the assigned counsel program to provide a list of attorneys competent to provide meaningful and effective representation to children and indigent adults in New York City.

The NYCLA's complaint references Chief Judge Kaye's State of the Judiciary Address and the report prepared by the OCA. The NYCLA is represented by attorneys Davis Polk & Wardwell.

New York Supreme Court Rules That Capital Defense Counsel Can Claim Fees of Their Associates and Paralegals

Genesee County Supreme Court Justice Joseph McCarthy in a declaratory judgment against New York State recently ruled that lawyers representing indigent capital defendants were entitled to the reimbursement not only of their fees, but also the fees of their associates and paralegals. *Mahoney v. Pataki*, 1-1999- 45939.

The court commented that the New York Court of Appeals had properly approved a fee schedule for capital counsel that included rates of compensation for legal and paralegal assistants. The Supreme Court stated that the interpretation of the terms "fee schedules" and "rates of compensation" allowed for sufficient leeway to include within the broad ambit of those terms the hourly rates for other staff members uniformly accepted in current law firm business practice.

The tension between Governor Pataki and the Court of Appeals can be traced back to November 1996, when the Court of Appeals authorized a capital defense counsel fee schedule establishing hourly rate for lawyers and their legal assistants. The Court of Appeals, which has final authority to approve compensation rates in capital cases, set hourly rates of $175 for lead counsel, $150 for second counsel, $40 for law firm associates and $25 for paralegals. In 1998, the Court of Appeals reduced the fees for lead and secondary attorneys to $150 per hour and $100 per hour, respectively, but did not change the fees for legal assistants and paralegals.

After initial Court approval of the fee schedule in 1996, the State refused to pay law firm associates and paralegals for capital defense assistance, claiming misinterpretation of statutory law.

Mark J. Mahoney, who brought this case on behalf of himself and other capital defense lawyers, argued that by refusing to pay the fees of paralegals and associates, the State forced experienced lawyers to spend time doing tasks that can be done by less costly

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paralegals and associates, which in the end costs the State more in attorney fees.❖

BJS Issues Report on State Prison Expenditures, 1996

Based on the 1996 Survey of Government Finances by the U.S. Bureau of the Census, in August of 1999 the Bureau of Justice Statistics released *State Prison Expenditures, 1996*. According to the report, in 1996 the states and the District of Columbia spent $22 billion on building, staffing and maintaining adult prisons; the Federal Bureau of Prisons allocated an additional $2.5 billion, for a total expenditure on prisons of $24.5 billion. Total state correctional expenditures include the cost of operating prisons and ". . .related institutions such as reformatories, prison farms, (and) institutions exclusively for the criminally insane. . ."

State prison expenditures increased 83% between 1990 and 1996, an average 11% increase per year, while federal prison expenditures inflated 160%, an average increase of 17% each year. BJS estimates the average annual operating cost of a state inmate is $20,100, a federal inmate $23,500. The total annual cost of state correctional expenses increased from $53 per U.S. resident in 1985 to $103 in 1996, a 7.2% increase per year. This spending is approximately twice the annual increase per year for state education (3.6%) and more than twice the increase for state natural resources (2.9%). However, *State Prison Expenditures, 1996* reports that "corrections' relative share of the total outlay remained small. At $994 billion, State spending for education in FY 1996 was nearly ten times larger than that for corrections."

BJS reports that most correctional funds are used for daily prison operations. The states allocated only six percent of the 1996 state prison expenditure for new construction or major repairs and used the remaining 96% of prison funds for "salaries, wages, benefits, and other operating expenses." Employee salaries and benefits accounted for two-thirds of operating costs in 1996. Operating costs in 1996 varied from state to state, due to differences in costs of living, wage rates, climate and geography. However, BJS notes certain conditions affect operating costs state-wide, such as inmate-to-staff ratios. Those prisons with low average costs per-inmate reported high inmate-to-total-staff ratios; those with low inmate-to-total staff ratios were of a high average cost per inmate. Minnesota accounts for the highest average annual operating cost- per-state-inmate at $37,800, whereas Alabama is the lowest with $8,000.❖

U.S. Department of Justice Bureau of Justice Statistics Issues Special Report on Women Offenders

The Bureau of Justice Statistics (BJS) recently released *Women Offenders*, a special report based on Census Bureau population estimates for July 1, 1998. The report states that women account for approximately 14% of violent offenders in the United States, an average of 2.1 million female violent offenders per year. Women ". . . accounted for 1 in 50 offenders committing a violent sex offense including rape and sexual assault, 1 in 14 robbers, 1 in 9 offenders committing aggravated assault, and more than 1 in 6 offenders described as having committed a simple assault." The authors of *Women Offenders* report that more than three out of four female offenders victimize other females. Approximately 62% of those female offenders had a previous relationship with their victims (either as an intimate, relative or acquaintance) as opposed to male offenders, of whom only 36% knew their victims. The report also notes that both male and female murder rates have declined; 1998 is of the lowest rate since 1976.

According to the report, in 1998, an estimated 3.2 million women were arrested; that number accounts for nearly 22% of all arrests that entire year. Twice as many juvenile females were arrested in comparison to adult females. The report found women offenders are more likely to be under the influence of drugs at the time of their offense rather than alcohol: "40% of women inmates compared to 32% of male inmates

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had been under the influence of drugs when the crime occurred." Women inmates are also of greater economic disparity compared to male inmates. Only eight percent of male inmates received welfare assistance before arrest, whereas 30% of female inmates reported receiving welfare assistance prior to arrest.

Women Offenders estimates 84,000 women were incarcerated in the U.S. in 1998. Excepting property offenses, women received shorter sentences than those of men and length of prison stay for women was less than that of men for every type of offense. Of those serving sentences, "nearly two-thirds of women under probation supervision are white," however, "nearly two-thirds of those confined in local jails and State and Federal prisons are minority – black, Hispanic and other races." About six in ten women in state prisons are the victims of past physical or sexual abuse, usually by a family member or intimate. Approximately seven in ten women under correctional sanction are mothers of minor children, which accounts for more than 1.3 million children under the age of eighteen.❖

BJS Report Finds That Imprisonment of Juveniles Doubles

The number of offenders under age 18 admitted to adult state prisons in the U.S. more than doubled over a 12 year period, rising from 3,400 in 1985 to 7,400 in 1997. These figures were revealed in *Profile of State Prisoners Under Age 18, 1985-97*, a recently released report of the U.S. Justice Department's Bureau of Justice Statistics (BJS).

The report notes that in 37 states and the District of Columbia, all eighteen-year-olds are processed as adult defendants and most states allow certain categories of offenders under age eighteen to be incarcerated in adult prisons and housed with older inmates.

The report attributes the crack-down on youthful offenders primarily to the spate of drug-gang violence and high-profile school shootings in the last decade. Since 1992, over 30 states have passed laws that expanded provisions for prosecuting offenders under age eighteen in adult criminal courts, thus eroding protections traditionally available to juvenile offenders.

According to the report, every state now has at least one provision to transfer juveniles to be tried in adult courts. As of 1997, 28 states have statutes that automatically exclude certain types of offenders from juvenile court jurisdiction, 15 states permit prosecutors to file some cases directly to adult criminal courts and 46 states allow juvenile court judges to decide to send cases to adult courts.

As a result of such changes, the number of young people sent to prison rose from 18 per 1,000 violent crime arrests of persons under age 18 in 1985 to 33 per 1,000 arrests in 1997.

In a related development, on March 7, Californians voted affirmatively to a proposal that will make it easier to charge juveniles as young as fourteen as adults for serious crimes and impose life sentences.❖

CASE NOTES

Second Circuit Upholds Limit on Attorney-Client Communications Intended to Conceal Witness Tampering Probe

In *U.S. v. Padilla,* Second Cir., No. 98-1360 (February 2, 2000), the Second Circuit Court of Appeals held that a court order preventing defense lawyers from revealing during an ongoing trial that their clients were being investigated for alleged jury and witness tampering did not violate their clients sixth amendment right to counsel.

The defendants were on trial for murder and other crimes stemming from an extortion business and a gang war. During their trial the judge received a letter from a jail inmate alleging that the defendants were plotting to pay witnesses to commit perjury and that

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a juror had already been "bought off." The inmate asked that the information not be revealed to the defendants or their lawyers, citing fear of reprisals against himself or his family.

The judge agreed with the prosecution and ordered defense counsel not to reveal the investigation to their clients. Sixteen days after the first meeting and a week before trial, the judge turned over evidence from the investigation to the defense and lifted the ban against discussing it with the defendants.

The defendants were convicted. On appeal, they argued that the judge's order prohibiting their lawyers from discussing the mid-trial investigation with them violated their Sixth Amendment right to counsel.

Rejecting the defendants' argument, the court distinguished *Geders v. United States* 425 U.S. 80 (1976) which involved a blanket prohibition of lawyer-client communications. The court stressed that even though *Geders* involved a blanket prohibition of lawyer-client communications, the prohibition here was narrow. The court stated that the difference between *Geders*, and this case "is not the quantity of communication restrained but its constitutional quality." For similar reasons, the defendants could be excluded from conferences involving the obstruction of justice investigation.

The court agreed with the ruling in the case of *Perry v. Leeke*, 488 U.S. 272 (1989), which found no Sixth Amendment violation in a court barring a defendant from communicating with counsel during a brief recess that intervened between the defendant's direct and cross-examination.

The Court agreed with *Perry* that even though a lawyer's communications with his or her client must "remain unconstrained," they are subject to "reasonable limitations" when the client is acting as a witness. The court declared that the district court's order banned only communications that were "centrally related" to the investigation of the uncharged crimes which would jeopardize the integrity of the trial process. On this basis, no Sixth Amendment rights were violated in *Padilla.*❖

Florida Supreme Court Holds That Absent Client's Consent, Admission of Client's Guilt Is Ineffective Assistance, Whether Or Not There Was Prejudice

A majority of the Florida Supreme Court in *Nixon v. Singletary, Fla.*, No. SC 93192 (January 27, 2000) held that a defense attorney who concedes the defendant's guilt to the trier of fact without the defendant's consent renders ineffective assistance in violation of the sixth amendment. In a per curiam opinion the majority ruled that the showing of prejudice that is usually required for a finding of ineffective assistance was unnecessary in this situation.

The Petitioner in this post-conviction relief proceeding had pleaded not guilty to murder. Defense counsel, facing what he considered overwhelming evidence of the petitioner's guilt, adopted a strategy designed to save the petitioner from the death penalty rather than win an acquittal.

The defense counsel in his opening statement at trial told the jury that it will be proved beyond reasonable doubt, "that the petitioner is responsible for the victim's death." During closing argument defense counsel also declared, "I wish I could stand before you and argue that what happened was not caused by Mr. Nixon, but we all know better."

The petitioner claimed that he did not give counsel permission either to enter such a plea or to employ a trial strategy in which guilt would be admitted.

The prosecution urged the application of the exception to *Strickland v. Washington,* 466 U.S. 668 (1984), carved out in *United States v. Cronic,* 466 U.S. 648, 659 (1984).

In *Cronic*, the Supreme Court stated that prejudice will be presumed if the accused is denied counsel at a critical stage of the trial or "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."

The prosecution argued that counsel's statement during opening and closing argument would constitute a breakdown of the adversarial process.

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Even though a majority of the court accepted that counsel may have been acting in good faith in employing a strategy which might be in the petitioner's best interest, this decision cannot be made without the consent of the defendant. The determining factor is whether the petitioner consented to counsel's strategy. The case was remanded for evidentiary hearing to determine whether the petitioner consented to his attorney's strategy.❖

South Carolina Supreme Court Holds That Deliberate Misconduct on the Part of the Prosecution Creates Irrebuttable Presumption of Prejudice

In *State v. Quattlebaum, S.C.,* No. 25051 (January 26, 2000), the South Carolina court held that a prosecutor's deliberate eavesdropping on a conversation between a criminal defendant and his attorney violated the defendant's Sixth Amendment right to counsel regardless of whether the defense can show prejudice as a result.

The defendant turned himself into the sheriff's officers for questioning about a murder and other crimes. His attorney met with him at the sheriff's office in a polygraph room that was equipped with a video camera, which could be monitored from a detective's office. Several sheriff's officers and a prosecuting attorney listened to the conversation between the defendant and his attorney and recorded it. The eavesdropping and the recording were not disclosed to the defendant or his attorney until two years later. A jury convicted the defendant and sentenced him to death.

On appeal, the state Supreme Court agreed with the defendant's arguments that the eavesdropping violated his Sixth Amendment right to counsel and that the prosecutor's subsequent participation in the trial undermined the integrity of the judicial system.

The state argued that since charges had not been filed against the defendant when the eavesdropping occurred, the Sixth Amendment's right to counsel had not yet attached. The court declared that this argument "ignores the two years during which the State continued adversarial proceedings against appellant while failing to disclose the fact of the eavesdroppi and the existence of the videotape."

In *Weatherford v. Bursey,* 429 U.S. 545 9 (1977), the U.S. Supreme Court faced a situation in which a co-defendant serving as an informer attended meetings between the defendant and his attorney. The Supreme Court held there was no Sixth Amendment violation in the absence of any tainted evidence, communication of defense strategy to the prosecution, or purposeful intrusion by the government.

The South Carolina court determined that this case departed from *Weatherford* because the prosecutor knowingly eavesdropped on the attorney-client conversation. Precedents from federal courts of appeal on prosecutorial receipt of confidential defense information show a mix of approaches. The South Carolina court in deciding to adopt an approach which is consistent with existing federal procedure and was endorsed by the Supreme Court prior to *Weatherford,* stated:

> "a defendant must show either delibe prosecutorial misconduct or prejudice to make out a violation of the Sixth Amendment, but not both. Deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice. The content of the protected communication is not relevant. The focus must be on the misconduct."

The court went on to state that it will not tolerate "deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice."❖

The U.S. Court of Appeals for the First Circuit Holds That Funding of Sentencing-Related Expert Services Must be Handled Ex Parte

In a decision which the First Circuit Court of Appeals noted may be its first explicit ruling on the point, the court held in *United States v. Abreu,* First Cir., No. 99-1403 (January 3, 2000), that government funding of sentence-related expert services must be

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handled ex parte. The first circuit overturned a district court ruling which allowed the government to attend a hearing on a defense lawyer's request for funding for a psychiatric examination he hoped would support a downward departure for diminished capacity.

The defendant pleaded guilty to a drug crime while represented by counsel appointed pursuant to the CJA. Counsel, concerned about the defendant's mental state sought an evaluation by a licensed psychologist before sentencing. Using the procedure set forth in the CJA, counsel filed an ex parte application for the funding of expert services. The District Court held an ex parte hearing but limited it to the question of whether the hearing of the application would be ex parte. The District Court answered that question in the negative and required defense counsel to file a new application with notice to the government.

On appeal, the court stated that section 3006A(e)(1) makes clear that the request for funding should have been handled ex parte:

> "Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain services."

The court also pointed out that given the importance of sentencing to the defendant, it is crucial that he have a fair opportunity to marshal a defense at sentencing as well as trial. The case was remanded, so that the District Court could hear ex parte any matters that were not presented by counsel due to the government's presence and then reconsider whether it should grant the funding application.❖

U.S. Court of Appeal For the Ninth Circuit Finds the Pre-1998 System Fails AEDPA Requirements for Appointment of Counsel

In *Ashmus v. Woodford*, Ninth Cir., No 99-99007 (January 24, 2000), the Court of Appeals for the Ninth Circuit held that California's pre-1998 mechanisms for appointing counsel and assuring competency of appointed counsel on review of death penalty cases do not satisfy the "opt in" provisions of the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA).

The court reversed *Calderon v. Ashmus,* 523 U.S. 740, 63 CrL 245 (1998), which overturned on procedural grounds the ruling reached in this case in a class action suit.

The AEDPA's opt-in provision, codified at Chapter 154 of Title 28 of the U.S. Code, creates a quid pro quo arrangement States that meet certain requirements regarding the appointment of counsel for indigents in death penalty cases are rewarded with favorable deadlines and expedited treatment for habeas corpus petitions in such cases.

Among the standards imposed by the provisions is the requirement that a state "establish by rule of its court of last resort or by statute, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings."

The Ninth Circuit evaluated and held inadequate the pre-1998 rules regarding the appointment of counsel in collateral proceedings which were governed by the California Supreme Court's "Policies Regarding Cases Arising from Judgments of Death" and "Internal Operating Practices and Procedures."

The court decided that the legislative history of 2265(a) shows that Congress intended the rule or statute to be mandatory and that Congress deemed the provision of competent counsel at all stages of post-conviction review to be essential to the quid pro quo of Chapter 154. The court further stressed that Congress had further sought to avoid the case-by-case evaluations of the competency of individual

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appointed counsel that federal courts would have to contact in the absence of a mandatory state scheme.❖

Massachusetts Applies State Constitutional Principle

In *Commonwealth v. Rodriguez,* Mass No. 07984 (January 18, 2000), a majority of the Massachusetts Supreme Court held that highway roadblocks conducted by police to interrupt the flow of drugs or other contraband violated Article 14 of the Massachusetts Declaration of Rights.

The court had previously upheld roadblocks aimed at catching intoxicated drivers using the balancing test that is called for under Article 14's federal constitutional counterpart, the Fourth Amendment. The Fourth Amendment test uses a balancing test to weigh the severity of the road block's interference with the driver's liberty.

Departing from this analysis, the majority in this case felt that "there is no imminent threat to public safety and no nexus between the activity (driving) and the law enforcement objective (narcotics interdiction)." The court commented that since there was no connection between the means and the ends "there is nothing to balance." The court went on to say that:

> "Unlike the minimal and focused intrusion occasioned by operating while under the influence road blocks, drug interdiction road blocks are designed solely to further criminal justice goals."

The majority compared its state constitutional analysis to the "special needs" analysis of the Fourth Amendment. Under the special needs test "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'. . . .But where. . .public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."❖

U.S. Supreme Court Approves California Procedure To Guarantee Appellate Rights Indigents

The majority of the U.S. Supreme Court held in *Smith v. Robbins,* U.S., No.98-1037 (January 19, 2000) that the procedure set out in *Anders v. California,* 386 U.S. 738 (1967), is not the only procedure capable of protecting indigent defendants' constitutional rights. The majority asserted that an alternative procedure outlined by the California Supreme Court in a post-*Anders* decision, *People v. Wende* 600 P.2d 1071 (1979), is sufficient and is in some way superior.

The procedure established in *Wende* differs from the *Anders* procedure by not requiring appointed counsel to identify arguable issues. Instead, counsel files a brief that summarizes the procedural and factual history of the case, with citations to the record. Counsel also asks the court to independently examine the record for arguable issues, and he or she remains available to brief any issues flagged by the court. Another digression from *Anders* is that counsel neither moves to withdraw nor explicitly expresses the judgment that any appeal would be frivolous, although this judgment is implicit.

Anders and the case law upon which it rested were intended to promote due process as well as equal protection, the majority observed. The majority concluded that the *Wende* procedure fulfills these goals.

In comparing the *Wende* procedure to the one disapproved in *Anders*, the majority pointed out that the old procedure required only a determination by counsel that an appeal would be unlikely to succeed and not that an appeal was frivolous. Under *Wende,* both the counsel and the appellate court must find the appeal to be totally lacking in arguable issues before the appeal can be cut off.

Secondly, the old procedure allowed counsel to withdraw and for the court to decide that an appeal would be meritless without appointing new counsel. Under *Wende*, counsel does not move to withdraw,

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and the court orders briefing by counsel if it finds arguable issues.

Thirdly, while the old procedure allowed counsel to make a bare assertion that an appeal would be meritless, under *Wende,* counsel does not move to withdraw, and the court orders briefing by counsel if it finds arguable issues.

The majority concluded that since there were some weaknesses in the *Anders* procedure and that the *Wende* procedure has corresponding strengths, there was no constitutional violation in California's failure to follow *Anders.*

The dissenting opinions described the majority opinion as a deviation from settled law.❖

Louisiana Supreme Court Holds That Confession to Another Crime Should Not Have Been Admitted Without Corroboration

A majority of the Louisiana Supreme Court held in *State v. Hobley,* La., No. 98-KA-2460 (December 15, 1999), that a capital defendant's uncorroborated confession to an unadjudicated offense should not have been admitted at the penalty phase of his trial. The majority distinguished *State v. Hamilton,* 681 So.2d 1217 (La. 1996), where an uncorroborated confession to an unadjudicated offense was deemed admissible at the penalty phase. In *Hamilton,* defense counsel had conceded that the defendant had committed the unadjudicated murder to which he had confessed, and therefore, the court had not addressed whether the confession was reliable to prove by clear and convincing evidence that the defendant had committed murder.

The defendant in *Hobley* confessed to the murder of which he was found guilty and told police that, at the time, he had been hiding out after being involved with others in a fatal shooting in Houston. The state was allowed to present the portion of the defendant's confession regarding the Texas shooting.

In *Hobley,* the Louisiana Supreme Court preferred to adopt the ruling in *State v. Brooks (Brooks 11),* 648 So.2d 366 (La. 1995), and *State v. Connolly,* 700 So.2d 810 (La. 1997). In *Brooks 11* and *Connolly,* the court refrained from adopting in full force the corpus delicti rule that requires, in the guilt phase, corroboration of a confession to support a guilty verdict.

The majority asserted that *Brooks 11* and *Connolly* "established the baseline for determining the reliability and trustworthiness of a confession to other crime evidence introduced at the penalty phase," and the state's showing in this case did not meet this standard. In reversing the death sentence the majority stated:

> . . .Absent extrinsic evidence linking defendants to the alleged crime, we cannot say that defendant's admission to the unadjudicated crime was neither the result of braggadocio nor, as his sister suggested in her testimony, an attempt to protect a sibling.

Dissenting opinions believed that the overall confession was corroborated by the evidence of the charged murder and was indistinguishable from *Hamilton.*❖

Missouri Court of Appeals Narrows Definition of "Frivolous" Appeal

The Missouri Court of Appeals, Western District in *Martin v. State,* Mo. Ct. App. (En banc), No. WD54915 (December 21, 1999), held that counsel appointed to represent a convicted defendant on direct appeal or on appeal of the denial of a motion for post-conviction relief is not obligated to pursue an issue that counsel believes is frivolous. The court further held that the *Anders* brief is not required on post conviction review when counsel determines that an appeal would be frivolous.

In *Anders v. California,* 386 U.S. 738 (1967), the U.S. Supreme Court held that a request for withdrawal of an appeal the court-appointed appellate counsel believes to be wholly frivolous must be accompanied with a brief "referring to anything in the record that might arguably support the appeal."

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The court stated that case law interpreting *Anders* blurred the distinction between "the concept of an appeal without merit and the concept of a frivolous appeal."

As to what constitutes "frivolousness," the court explained was the idea that a claim or defense is clearly and facially so devoid of any rational argument "that it has absolutely *no prospect* of succeeding."

In post-conviction matters, such as an appeal of the denial of post-conviction relief, counsel faces less burdensome requirements than on direct appeal. Rule 55.03(b) provides that by asserting an argument in a court document, counsel certifies to the best of his or her knowledge, information, and belief that the legal contentions in the document are warranted by existing law or by a nonfrivolous argument for a change in the law or the establishment of new law.

The court decided that when counsel has made a careful study of the applicable transcripts and there is no arguable claim, counsel should advise the client of Rule 4-3.1 which forbid counsel to bring proceeding or assert an issue without a nonfrivolous basis for doing so. The court, taking into consideration the fact that potential claims of error on the part of counsel are generally more readily identifiable at the post-conviction stage than in direct appeal, concluded that it was not necessary to impose upon counsel the requirement of a brief similar to an *Anders* brief at this stage.❖

Appellate Court of Illinois Holds Doctrine of Sovereign Immunity Does Not Apply to State or County Employees if the Duties Breached Do Not Arise as Result of Defendants' State Employment, and Sovereign Immunity Does Not Pertain to County Employees

In a legal malpractice action filed by a former client of the Cook County, Illinois Public Defender against several individual public defenders and the County of Cook, the Appellate Court of Illinois held that whether or not public defenders are state employees or county employees, the circuit court erred in applying sovereign immunity because defendants' professional duties to their clients did not arise solely as a result of their government employment. *Johnson v. Halloran,* No. 1-98-2365, (Ill App. 1 Dist.) (Jan 13, 2000).

In the underlying criminal case, lab reports disclosed by the State during pre-trial discovery showed that body fluids on the panties and a vaginal swab taken from the victim immediately following the attack revealed the presence of H activity, indicating that such body fluids were from a person who was a secretor. The blood and saliva samples taken from the victim and from Johnson, who was charged with the rape, showed that they were both nonsecretors. These results established that Johnson could not have been the sole donor of the foreign body fluids found on the person or clothing of the victim. Johnson's public defender, Halloran, did not seek to use this information in the trial. Instead, at a pretrial hearing, Halloran presented a motion in limine to prohibit the State from introducing any evidence of blood, semen or saliva testing. The circuit court granted Halloran's motion in limine in September, 1992. Following a bench trial, Johnson was convicted and sentenced to 30 years in the Illinois Department of Corrections. Prior to this conviction, no DNA test was performed on Johnson, the victim, or the victim's husband. Johnson's conviction was vacated on March 8, 1996, pursuant to a post-conviction petition based on DNA test results.

In the instant case, defendants filed a motion to dismiss plaintiff's complaint based on the statute of limitations, which was denied. Defendants also filed a motion for summary judgment on the basis of sovereign immunity, arguing that public defenders are employees of the state and therefore the circuit court lacked subject matter jurisdiction to hear the case because plaintiff's claims must be brought in the Illinois Court of Claims. The circuit court granted this motion.

On appeal, plaintiff contended that the circuit court erred in granting summary judgment in favor of the defendants on the basis of sovereign immunity because a) public defenders are not agents or

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employees of the state, and b) defendants' professional duties to their clients do not arise solely as a result of their government employment.

The question to be determined by the court was whether the defendants owed a duty to the plaintiff which existed independent of their employment by the state or if the duty allegedly breached by defendants had no existence outside their state employment.

The court, applying *Currie v. Lao,* 148 Ill. 2d (1992), quoted from that case:

> Where the charged act of negligence arose out of the State employee's breach of a duty that is imposed on him solely by virtue of his State employment, sovereign immunity will bar maintenance of the action in circuit court. Conversely, where the employee is charged with breaching a duty imposed on him independently of his State employment, sovereign immunity will not attach and a negligence claim may be maintained against him in circuit court. In other words, where an employee of the State, although acting within the scope of his employment is charged with breaching a duty that arose independently of his state employment, a suit against him will not be shielded by sovereign immunity.

The Illinois Court of Appeals, drawing analogies with state-employed doctors, decided that the duty of representing a client is derived from the lawyer's status as a licensed attorney and is wholly independent of the lawyer's state employment. The court also referred to *Polk County v. Dodson,* 454 U.S. 312 (1981) where the Supreme Court of the United States ruled that, "Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defense program."❖

TRANSITIONS

Pittsburgh Has New Public Defender

After last fall's election resulted in a new county government, Allegheny County (Pittsburgh), PA now has a new Director of its Office of the Public Defender. Susan Ruffner most recently served as a juvenile judge on the Allegheny County Court of Common Pleas, to which she been appointed by Pennsylvania's Governor Ridge. Now, Allegheny County's new County Executive, Jim Roddy, has appointed Ruffner to assume the difficult task of heading the public defender's office.

Ruffner is well-known in the Pittsburgh legal community. After graduating from George Washington University Law School, Ruffner worked in the Allegheny County district attorney's office as a general trial attorney and an appeals attorney, and in grand jury investigations. In 1984, she became a liaison for then-county Commissioner Barbara Hafer. When Hafer became state auditor general, Ruffner became her chief deputy counsel. She worked as a chief magistrate in the city of Pittsburgh for three years, beginning in 1991. From 1994, until her appointment to the bench in 1999, she served as chief legal counsel to the Port Authority.

Our regular readers know that the Allegheny County Public Defender's Office is currently operating under a consent decree arising from a suit on behalf of indigent defendants, who accused the county of neglecting to provide adequate legal services to poor criminal defendants and the mentally ill. Under the consent decree, Allegheny County agreed to hire a consultant to assist the public defender's office in improving the quality of services it provides to indigent persons. Last fall, the County and the plaintiffs agreed to retain The Spangenberg Group to help the office develop a variety of practices and procedures, including a merit hiring policy, a

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computerized case-tracking system, performance standards and procedures for addressing excessive workloads. The Spangenberg Group's work is part of a process that will ultimately result in substantial increases in staffing, resources and technology, all to the end of providing higher quality legal services to indigent defendants in Allegheny County.

WHAT'S NEW AT THE SPANGENBERG GROUP?

NEW STAFF!

TSG welcomed two new staff members in February.

Research Associate Rangita de Silva-de Alwis has a Masters-in Law (LL.M) and a Doctorate in Law (S.J.D.) from Harvard Law School. Before coming to the Boston area, she taught international law and jurisprudence at the Faculty of Law, University of Colombo in Sri Lanka. Rangita has worked as a Fellow of the European Law Research Center at Harvard Law School and taught constitutional law at Stonehill College in Massachusetts. Before joining The Spangenberg Group she was a Policy Analyst with the Massachusetts Immigrant and Refugee Advocacy Coalition. Rangita is working on TSG's international projects and on the BJA-BIP State Commissions Project.

Research Assistant Jaime Bailey is a 1999 graduate of Boston College, where she earned a Bachelor of Arts in English, cum laude. Most recently Jaime worked at the Boston College Development Office. She also served as an intern for a Massachusetts state senator. Jaime is currently working on projects in Texas and King County, WA. Don't be surprised if you get a call from Jaime requesting comparison information from your program on caseload, expenditure, etc.❖

NEW PROJECTS!

State Commissions Project

In August, 1999, TSG began work on a one-year project funded jointly by the American Bar Association Bar Information Program and the U.S. Department of Justice Bureau of Justice Assistance called the State Commissions Project. The goal of this joint effort is to provide technical assistance and information to state task forces attempting to improve indigent defense systems. TSG is currently working with state task forces in Georgia, Illinois, Nevada, North Carolina, Oregon, Texas and Vermont. The project has been granted a one-year renewal. (*See* related articles in this issue on the Texas Fair Defense Project and on the North Carolina Indigent Defense Study Commission).

King County, Washington

In January, TSG began work on a project in King County (Seattle), Washington. King County's public defense system is quite unique. It consists of a single county agency (The Office of Public Defense) that administers contracts with four private, non-profit public defender agencies. King County selected The Spangenberg Group as consultant to its Public Defense Study Oversight Committee, which is examining whether the current system produces:

- A lack of coordination with other criminal justice agencies;
- A lack of parity with County departments with regards to compensation of staff and technology; and
- A lack of a strong public policy voice to represent the views of the public defense function.

Under the guidance of the Oversight Committee, The Spangenberg Group is preparing a report that evaluates the current system, provides comparison information from the indigent defense systems in other similarly-sized counties, and analyzes the costs and benefits of adopting alternative approaches in King County. The Spangenberg

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Group will then facilitate at least two meetings during which key stakeholders will work to develop a consensus on improvements to the system. A final report, including a plan for implementing the changes, if any, will be completed in May, 2000.❖

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We welcome your comments on this issue and would be pleased to consider your suggestions for future articles. *The Spangenberg Report* is written and produced by members of The Spangenberg Group:

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