

**Public Defense Services Commission  
Service Delivery Plan for Judicial District No. 24  
(November 20, 2008)**

**Introduction**

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. From 2004 through October 2998, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Coos, Curry, Jackson, Josephine, Lane, Lincoln, Linn, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of the public defense systems in Grant and Harney Counties, a summary of the testimony received at PDSC's public meeting in Baker City on Wednesday, August 14, 2008, a summary of the PDSC's discussion at its September 11, 2008 meeting, and PDSC's final service delivery plan for the district.

PDSC's service delivery planning process

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

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

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

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

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

#### Background and context to the service delivery planning process

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

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

public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

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

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

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

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

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

The Commission is also concerned about the “graying” of the public defense bar in Oregon and the potential shortage of new attorneys to replace retiring attorneys in the years ahead. More and more lawyers are spending their entire careers in public defense law practice and many are now approaching retirement. In most areas of the state, no formal process or strategy is in place to

ensure that new attorneys will be available to replace retiring attorneys. The Commission has also found that the impact of such shortages is greatest in less populous areas of the state, where fewer lawyers reside and practice, but where the demands for public safety and functional justice systems with the requisite supply of criminal defense and juvenile attorneys are as pressing as in urban areas of the state. As a result, PDSC is exploring ways to attract and train younger lawyers in public defense practice across the state.

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

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

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

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

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

to OPDS the tasks of addressing performance issues with operational implications.

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

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

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

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

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d)

individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county's or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

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

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

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

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

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

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

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

2. Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for "succession" in the event that some of the consortium's lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

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

In addition to the access to experienced public defense lawyers they offer,

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<sup>3</sup> Id.

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

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

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

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

certification outlined above.

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

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

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

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

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

## **PDSC's Preliminary Investigation in Judicial District 24**

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

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

On June 23 – 25, 2008 Commissioner John Potter and OPDS Executive Director Ingrid Swenson visited with stakeholders in both Grant and Harney Counties. In addition to talking to PDSC's contractors in the district, they met with the Circuit Court judge and the two district attorneys. Telephone interviews were conducted after the visit with the Grant County Juvenile Department Director; a DHS representative from Grant County; Christie Timko, the CASA Director for Grant and Harney Counties; a Grant County Deputy District Attorney; two Assistant Attorneys General and the CRB coordinator for both counties.

The initial report set forth the information received in those interviews and in testimony provided to the Commission about the public defense system in Grant and Harney Counties, and recommended a plan for the continued delivery of services in the county.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in a particular judicial district turns out to be the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for Grant and Harney Counties.

## OPDS's Findings in Judicial District No. 24

### The Circuit Court

Judicial District No. 24 is comprised of Grant and Harney Counties. There are two courthouses in the district, one in Canyon City, just south of John Day (Grant County), and one in Burns (Harney County). The distance between the two courthouses is 68.3 miles. Video appearances by attorneys and in custody clients are common.

Judge William D. Cramer is the Circuit Court Judge in the district. Each county also has a justice court.

The two public defense contract providers in the district are Markku Sario and John Lamborn, of Mallon and Lamborn. Ken Bardezian from Baker County and other attorneys from the area handle conflict cases in the district on an hourly basis.

Both counties were preparing to initiate drug courts beginning in July of 2008.

### Grant County

Canyon City is the county seat of Grant County. In 2007 the population of Grant County was 6,904. The primary industries in the county are forest products, agriculture, hunting, livestock and recreation. More than 60% of the land is publicly owned. Grant County was not an "O&C" county but did receive federal forest payments. The loss of those payments represented a 22% reduction in the county general fund and a 73% loss in its road fund. These payments have now been temporarily restored.

Ryan Joslin is the District Attorney. His only deputy left at the end of July when the domestic violence grant that helped fund his position expired<sup>4</sup>. In general, he expects the caseload in the county to remain flat even though, over time, the population of the area continues to decline. Recently Mr. Joslin has been filing more misdemeanor cases in the Justice Court and fewer in the Circuit Court<sup>5</sup>.

The Grant County drug court will have a capacity of 12 clients and will focus on persons charged with drug offenses and other felonies motivated by drug use. It is intended to be a court for high-risk offenders.<sup>6</sup> Although only out-patient drug

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<sup>4</sup> He has been hired as a deputy district attorney in Morrow County.

<sup>5</sup> OPDS funds public defense representation at the trial level only in Circuit Court matters. ORS 135.055. Attorneys reportedly receive \$60 per hour for justice court public defense representation.

<sup>6</sup> The DA will extend a plea offer to drug court candidates instead of requiring admissions to all the pending charges as is done in Umatilla County.

treatment is available in the county, the drug court has received a grant which will enable it to provide funding for residential treatment outside the county.<sup>7</sup>

Mr. Joslin noted that there is no early disposition program in his county because there is no lack of jail space. The county had previously rented beds to the state and to the federal government but these contracts are expiring.

Mr. Joslin said that his office tries a couple of criminal cases a month.

Ken Boethin has been the Director of the Grant County Adult and Juvenile Parole and Probation Services Department for many years. He would like to retire but the county has been unable to find a replacement so he agreed to stay on. He supervises one adult probation officer, a part time juvenile officer and two staff persons. His office prepares all of the paperwork in juvenile dependency and delinquency cases as well as probation violation cases. There are only 14 to 20 delinquency cases filed per year. Almost all of these youth have appointed attorneys. The department handles most referrals informally. The juvenile department also prepares all the paperwork in juvenile dependency cases. The court appoints counsel in all of these cases as well, for both children and parents. According to Judge Cramer there are a lot of children-per-1000-population in the county so the juvenile caseload is demanding. Less than half the time is court staff able to advise attorneys of shelter hearings in time for them to appear.

The Department of Human Services has experienced a high staff turnover rate in Grant County. Jan Keil is the current supervisor of that office. According to a number of reporters the agency is not held in high regard in the county as the result of events that occurred in the past and have not been forgotten. Many people feel that they have no one to go to with complaints or to get help.

Christie Timko is the CASA Director for Grant and Harney counties. She has nine CASA volunteers in Grant County. She is also the former District Attorney of Grant County. Travel time is a major issue for anyone who works in the Judicial District 24. In the winter it can take two hours to go from Canyon City to Burns and there is no cell phone service in the area to allow people to make better use of their travel time.

### Harney County

Burns is the county seat of Harney County. The population of Harney County was 6,767 in 2007. The primary industries in the county are forest products, manufacturing, livestock and agriculture.

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<sup>7</sup> At a meeting in late 2008 or early 2009, the Commission will be reviewing drug court models from around the state and the role of defense counsel in those courts. Based on its review, the Commission may wish to establish guidelines for defense counsel in these cases.

Tim Colahan is the District Attorney of Harney County. He has been with the office for 21 years and has one deputy. He says the county is experiencing some growing pains with people moving in from Bend and Prineville primarily. He files all misdemeanors that don't involve domestic violence in the county justice court. When the current full time justice of the peace retires it will be appropriate to consider adding a second Circuit Court judge in the district.

Currently, there is a "minimally adequate" number of public defense attorneys who have to split their time between the counties. Even when there is pro tem judge time available they are not able to take advantage of it because the attorneys are not able to cover cases in both courts. The low number of attorneys presents a real challenge. The juvenile dependency caseload has increased in the county. The district attorney's office has always appeared in these cases. Now they are getting a small amount of compensation from the state to support them in this role. Attorneys are now appearing at CRB hearings more often and this has been a positive development.

Mr. Colahan said that funding for the Harney County Sheriff's office has been fairly stable. The sheriff also administers parole and probation services.

Public defense attorneys appear at arraignments when they are able to and at shelter hearings more often in Harney than in Grant County because the court is able to provide more timely notice in Harney County.

The Department of Human Services in the county is considered to be an effective office with experienced caseworkers who have good working relationships with the public defense attorneys.

Christie Timko has thirteen CASA volunteers in Harney County. She says the dependency caseload has been declining because DHS is removing fewer children than in the past.

Ms. Timko served as a deputy district attorney in Harney County before she became the Grant County District Attorney. She believes that another public defense attorney is needed in Harney County.

#### Public defense contractors

Markku Sario. Mr. Sario is an attorney in private practice with an office in Canyon City. Although he considered hiring an associate, he was not able to do so and, instead, has hired a non-lawyer assistant to attend CRB hearings and perform other tasks. He handles most case types in both counties. He receives one rate for Grant County cases (where his office is located) and a different and higher rate for Harney County cases. Since the justice court in Harney County handles most of the misdemeanor matters, the cases in the circuit court there are mainly felonies. Mr. Sario is the defense attorney for the new Grant County drug

court. His contract provides for representation in 204 Grant County cases per year and 120 Harney County cases.

Mallon and Lamborn, PC. John Lamborn handles the great majority of public defense cases in Judicial District 24 since Gordon Mallon devotes most of his time to his death penalty contract. The firm currently has two members and maintains its office in Burns. Gordon and Mallon gets a higher rate for cases in Grant than in Harney County. The firm has contracted to handle 180 cases in Harney County and 48 in Grant. Mr. Lamborn is the defense attorney for the new Harney County drug court.

Mr. Mallon noted that the cost of travel is a major issue for attorneys in this part of the state. He also said that as the current generation of lawyers retires new associates will need to be brought in and trained even if there are not a sufficient number of cases to provide them with full caseloads as they learn the practice.

In addition, as noted above, there are attorneys from other areas who are regularly appointed to handle cases in Judicial District 24.

#### Comments on quality

Although the focus of this review is on the structure of the public defense system in Judicial District 24, quality of representation is an important measure of how well the system is working particularly where, as here, quality is very much affected by the lack of a sufficient number of attorneys.

The following comments were provided by one or more of the persons interviewed and represent only a summary of the information provided.

One reporter said that all of the attorneys are doing a pretty good job but they do not put in the time that is needed on their cases.

Some interviewees said they had no difficulty contacting attorneys, others said they could not get them to return their calls.

Other comments were: Attorneys are always pressed for time. They are so overworked they cannot give a case the attention it needs. Some are very good trial lawyers but there are very few trials. Some attorneys are unprepared in criminal cases. Some do the best they can but are just too overworked. There is one hourly attorney from outside the county who should not be permitted to handle public defense cases. He is incompetent. There was an hourly paid attorney who appeared in Grant County recently and provided very high quality representation – he was described as “a consummate professional.” Attorneys are clearly frustrated by the number of cases they have. All are stretched thin in their criminal and juvenile practices. One attorney was said to do good work but lacked the training and resources to provide the quality of work that is the norm in

other counties. One of the attorneys is prepared 99% of the time but juvenile work is not his preferred area of practice. There are no juvenile law specialists in the area. Attorneys are not meeting with child clients in dependency cases or delinquency cases. One person's biggest frustration is that most of the lawyers never meet with child clients at all, even over the course of multiple years of representation. Another said that when they represent children most attorneys have done nothing but read the DHS court report and often say nothing in court. Some are not prepared to represent parents either and their clients are confused about what is happening in their cases. Juvenile dependency cases are not a priority for these lawyers. One attorney, however, was singled out for having particularly strong trial skills and for fighting vigorously for his clients at trial.<sup>8</sup>

Responses to OPDS's 2007 Public Defense Performance Survey in Judicial District 24 included similar comments by some of the same reporters. In addition, it included the following statements:

"I believe the quality of representation will increase proportionately with an increase in compensation of the defense attorneys. The dollars paid to these contractors don't allow adequate time to be spent on each case, and ethics aside, it seems unrealistic to expect adequate time to be spent on each case when the attorney is not appropriately compensated."

While compensation was increased under the current contract, the increase does not appear to have been sufficient to address the needs reported in 2007.

### **OPDS's Recommendations for Further Inquiry at PDSC's August 14, 2007 Meeting in Baker City**

Based on the information provided to OPDS during its visit to Grant and Harney Counties in June 2008, OPDS recommended that the Commission consider the following in developing a service delivery plan for Judicial District 24.

#### **1. Need for additional attorneys**

Although not unique to Judicial District 24, the scarcity of attorney resources is probably as great in Judicial District 24 as anywhere in the state. As one person noted in response to the 2007 survey:

"I am very concerned in both counties that there is an insufficient number of attorneys to do the required work. We need the assistance of the commission in recruiting attorneys to do work here in our counties. .... I am very concerned that even the current contractors and att[orney]s won't continue to take cases unless there

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<sup>8</sup> Most of the persons who provided information about the quality of performance of the public defense attorneys in these two counties attributed the deficits in representation to a lack of adequate time, and not to a lack of skill or zeal.

is a real and substantial raise in their wages. This latter point may be my greatest concern for the criminal and juvenile systems and their efficient functioning.”

Judge Cramer told OPDS that the system is working now because the attorneys are experienced but the number of available attorneys continues to go down and it is very hard to bring in new attorneys. Fluctuation in the caseload, the need for attorneys to handle matters in other counties, and attorney vacations make scheduling very difficult. The court is unable to use much pro tem time because of the limited availability of the attorneys. There is probably not enough civil work to supplement another attorney’s practice. The attorneys should receive enough for their public defense work so that they don’t have to do other things.

The problem described by Judge Cramer and others is not new. In January of 2001 the Oregon State Bar Indigent Defense Task Force III report identified a number of problems in the delivery of public defense services in Oregon. It noted that in some districts it has been difficult to attract satisfactory candidates to handle indigent defense caseloads and that “[a] few districts have reached a crisis point in recent years, finding no attorneys available to accept appointments for the compensation offered.”

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. .... 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.

At its September 2003 retreat, the Commission identified a number of possible strategies for addressing the problem: offering longer contracts to providers who are willing to locate in or serve remote areas; supplementing insufficient trial-level caseloads with appellate work; law school recruitment and specialized apprenticeship training for new lawyers interested in relocating; and assisting with access to office space and initial capital needs.

The commission may want to review these recommendations and determine whether there are other strategies available to address the need for additional attorneys in the area. The Commission could consider, for example, whether it should issue an RFP for attorneys willing to relocate to the area for a specified period of time with a guaranteed income as an added incentive.

## 2. Representation in juvenile cases

In both delinquency and dependency cases, juvenile system representatives noted significant deficits in representation being provided to youth, children, and parents in Judicial District 24. As has been noted in previous staff reports, OPDS believes the training tools needed for high quality representation are available to lawyers in all parts of the state. There are frequent CLE events, some offered without cost, that focus on juvenile representation. There are websites and list serves. There is a bi-monthly newsletter sent to all OPDS contractors devoted to developments in juvenile law. OPDS's general counsel is available to work with providers to help them identify their particular training needs and available training options. In the most recent contract negotiation period, OPDS outlined for all contractors the expectations of attorneys representing children. (See Exhibit A, "Role of Counsel for Children.") Although as one commentator noted, additional compensation is going to be necessary to achieve any improvement in the quality of representation, assuming additional funds were available, how could the commission ensure that improvement would actually occur in the representation provided in these cases? Should it consider tying future rate increases to conformance with established performance standards? Should it consider mandatory CLE credits?

### **Summary of Testimony at August 14, 2008 Meeting of the Public Defense Services Commission in Baker City, Oregon**

At its August 14, 2008 meeting in Baker City the Commission received testimony relating to the delivery of public defense services in Grant and Harney Counties (Judicial District 24), Baker County and Malheur County. Although each judicial district is unique, many of the public defense providers serve more than one county and the comments of the witnesses tended to relate to practice in the entire region rather than in individual districts.

Chair Ellis opened the meeting by noting that the needs of each geographic region of the state are different and that the Commission welcomed comments and recommendations that would assist it in identifying a service delivery plan that met the needs of the local justice systems.

Judge Cramer provided written testimony. He said that the circumstances faced by public defense providers in Eastern Oregon are unique. Currently he believes that although public defense attorneys are overworked and stretched thin, indigent clients are receiving adequate representation in Grant and Harney Counties. Having only one primary contractor and one conflict contractor in each county creates scheduling issues for the court. Also the court is unable to use the pro temp time to which it is entitled because there are not enough attorneys to appear in two courtrooms at the same time. Both counties would be better served if there were more local attorneys available to handle conflicts and to take over when the current providers retire, in approximately five years. There is no

current pool from which to draw additional attorneys. He recommended that PDSC work with current contractors to allow them to hire associate attorneys who would be able to take cases now and be in a position to replace retiring attorneys in the future. He agreed that there would be a benefit to having an additional local office to handle conflict cases. Attorneys now have to travel a hundred miles or more to cover conflicts in the district. The court has been trying to get attorneys appointed for both parents and children at shelter hearings. That would be possible in more cases if there were more local attorneys. Attorneys are willing to come to Eastern Oregon to practice. The district attorney's office has been able to attract them because it provides better compensation than the defense does. In order to attract attorneys to defense practice in eastern Oregon adequate compensation would be necessary. If a law firm could count on a reliable income over an extended period of time it would be in a better position to hire one or more associates. Payment to contractors based solely on caseload causes a significant fluctuation in income from month to month. Of the possible approaches identified by the Commission in 2003, subsidizing firms that are willing to bring in additional attorneys appears to be the best.

Commissioner Welch inquired whether technological solutions are being evaluated. Judge Cramer noted that video appearances are sometimes possible. They can be used effectively only when the attorney and client have been able to meet and confer before the hearing.

Gary Kiyuna, a member and the administrator of the Baker County Consortium, said video equipment could be installed in a law office for the cost of approximately \$3,000 which would allow the attorney to appear in court or confer with clients in prison by means of an in-office video system. The circumstances in some cases require that the attorney be in the same location as the client.

He said there are four members of the consortium, all of whom are sole practitioners. Many new attorneys have significant educational loans but are ineligible, as consortium members, to benefit from many of the existing loan repayment, loan forgiveness provisions.

Gordon Mallon testified that his firm had lost a shareholder because of inadequate income. Both he and the other remaining shareholder expect to retire in approximately six to seven years, which would leave one public defense provider in Judicial District 24. It would be difficult to start a new law office in the area in view of the limited caseload and there are not a sufficient number of conflict cases to warrant an additional office. His recommendation to the Commission would be that it provide sufficient compensation to existing offices to permit them to hire an additional person or persons. In the most recent contract negotiations he proposed that PDSC pay a flat amount for public defense cases, regardless of the number of cases. Payment according to the number of cases per month makes the income vary significantly from month to month. The costs of operating an office are fixed costs and cannot be adjusted in accordance with

a fluctuating caseload. A number of eastern Oregon providers have reported that case-based funding has not worked well for them either. His firm's proposal was not accepted because the Commission had not approved a flat rate system. The Mallon and Lamborn firm is not currently seeking to add any attorneys. It had sought to do so for approximately eight months but could not attract an associate with the salary it could offer.

Dan Cronin testified that he is currently a sole practitioner who handles public defense cases principally in Baker County. He has practiced law in the area for twenty-seven years. Over that period of time he has seen an erosion of the services provided to public defense clients. There should be at least three providers in each county. It would be financially impossible for him to hire another attorney in his office. Attorneys have to handle civil cases in order to be able to hire associates. That means that they cannot specialize in criminal law. Despite his deep commitment to public defense he plans to take fewer and fewer public defense cases in the future.

Matt Shirtcliff, the Baker County District Attorney, said that public defense attorneys in the area do good work. The court, the district attorney's office and the public defense attorneys all work hard and they all get along with each other. They meet together to resolve any issues relating to the operation of the criminal and juvenile court systems. His office is able to recruit new lawyers who spend a couple of years there before moving on. He would prefer to keep them longer but he and other district attorneys offices are not able to pay a high enough salary. His office has a strong relationship with the Department of Justice. He can get help on research issues and on some types of cases. The state benefits from good representation for defendants. It would be good for defense attorneys to be able to specialize. They do better work if they handle only criminal cases and this benefits the attorneys, the clients and the system. In Baker County the district attorney's office files most misdemeanors in the county justice court, excluding domestic violence and DUI cases. He tries to use the courts efficiently. Diversion eligible cases and non-chronic offender cases are offered early disposition treatment in the justice court. Ideally, however, there would be two courts of record in the county. His office has one fewer deputy than usual and as a result they currently have a backlog of cases. In Baker County, all cases are filed, even "bad check" cases, which are not prosecuted in some jurisdictions.

Judge Burdette Pratt testified that the attorneys in Malheur County and in the other eastern Oregon counties do good work under the circumstances. Attorneys must travel significant distances and, in Malheur County, there is the added challenge of handling a significant number of cases arising within the Snake River Correctional Institution. It takes time for attorneys to get into the prison to see their clients, especially if the client is in administrative segregation. Often the witnesses are also incarcerated. Prison cases go to trial more often than other cases. Attorneys have to handle too many cases in order to make it

feasible for them to take public defense cases. Attorneys are constantly scrambling from one case to another without being able to spend the time they would like, and need, to on these cases. The best solution is to increase compensation.

Dennis Byer testified that, although he has been an investigator with the Coughlin, Leuenberger & Moon firm in Baker City for ten years, he only recently investigated some public defense cases. He has found the OPDS staff to be helpful in answering his questions. He charges \$90 per hour for private cases and is paid \$28 per hour on public defense cases. Most investigators charge between \$65 and \$75 per hour in private cases.

Mark Rader, a shareholder in the Rader, Stoddard and Perez firm, testified that his firm is the primary public defense contractor in Malheur County where he has practiced since 1988. The firm has two associates who were hired directly out of law school. Both of them live in Idaho as do two of the shareholders in the firm. For each of them it is an hour's drive each way between home and the office. He worries that his associates will decide to practice in Idaho where the counties pay a higher hourly rate than PDSC does. Unlike the situation in Grant and Harney Counties, the caseload in Malheur County does not fluctuate dramatically. He suggested that the Commission consider assisting public defense providers in two ways: with the cost of health care coverage for employees and with educational loan repayment assistance for attorneys. Mr. Rader said that cases arising in the prison are significantly more time consuming than other cases. The Malheur County District Attorney prosecutes all prison felonies in the circuit court. The prison handles only misdemeanor matters internally. The additional time it takes to represent imprisoned clients may affect the relationship with the client and result in more bar complaints and post conviction relief petitions. Responding to these allegations in turn consumes even more of the attorney's time. In order to meet with imprisoned clients it generally takes an hour to get from his office into the area where the interview occurs. It takes approximately an hour to get out of the prison and back to the office once the interview has occurred. Witnesses are often inmates as well so it requires a similar amount of time to meet with them if they are in the same institution. Very often, however witness inmates are moved to prisons in other parts of the state. Prisoners also receive a lot of advice from other prisoners which is contrary to the advice from their attorneys. More of the attorney's time is required to counter the advice received from others. Currently, Rader Stoddard and Perez is receiving a higher rate for prison cases but a much higher rate is needed.

Paul Lipscomb said that in Marion County the most serious prison cases are prosecuted in circuit court but most cases are handled within the institution. Marion County attorneys also report that prison cases require more time.

Krishelle Hampton, a member of the Baker County Consortium, testified that she opened her own law practice in Baker City immediately after graduating from law

school. Another local attorney, Bob Whitnah, provided office space for her without charge and he and the other lawyers in town were willing to mentor her. She would like to be able to afford better legal research tools and insurance for her staff. She spends more than 50% of her time on public defense cases but receives less than 30% of her income from those cases. In juvenile cases she attends team meetings with her clients and in DUI cases she appears at DMV hearings on her client's behalf. She loves doing public defense work but may not be able to afford it in the future. If PDSC could help with employee benefits it might be more feasible. Last month her income from public defense cases was \$1,903. Insurance coverage for her employee would have cost her \$700. She knows other young attorneys who would be interested in practicing in eastern Oregon if the conditions were right. She does not believe that PDSC should have a policy against paying twice in conflict cases. It is an inappropriate incentive for lawyers to remain on cases in which they have an ethical obligation to withdraw. Mr. Cronin agreed with Ms. Hampton on this issue and said that the attorney who withdraws should at least get paid some compensation. Ken Bardizian, another member of the Baker County Consortium, said that in Baker County conflicts are not often identified early in the case because discovery is not provided until after an indictment has issued. The attorney can't wait until then to begin work on the case. In addition, in some cases the district attorney doesn't identify some witnesses until just before the trial date. Both Mr. Whitnah and Mr. Bardizian indicated that they had not been free to bargain for the contract terms they wanted because there were attorneys from another county who would have used the opportunity to contract for Baker County cases. Mr. Bardizian contracted with PDSC to handle Measure 11 cases on an hourly basis because he can bill for the actual number of hours each case required.

Bob Whitnah said he grew up in Baker City. He started practice at District Attorney Matt Shirtcliff's office in 2001. After four and a half years in that office he opened his own practice and began handling public defense cases. He likes doing these cases but the compensation is a significant issue. If better legal research tools were available to the defense they could be more efficient. In the district attorney's office he had approximately 150 open cases at a time. For the defense the caseload has to be a lot smaller because they don't have the same advantages and tools that the state has. The search and seizure manual prepared by Department of Justice attorneys is well organized and thorough. Defense publications are prepared by volunteers and are not as thorough as the state's material. OPDS Appellate Division attorneys provide information in response to questions forwarded to them. Mr. Whitnah would like the Commission to assist attorneys in accessing better legal research tools and in finding a way to make health insurance affordable. If compensation is not increased he may not be able to afford to do public defense cases any longer.

Commissioner Potter said that the Oregon Criminal Defense Lawyers Association had explored the possibility of insurance pooling for members in the

past and at that time found that it was not feasible but that it might be appropriate to look into it again in the future.

Chris Zuercher, an associate of Coughlin, Leuenberger and Moon was a deputy district attorney in the county before going into private practice. He likes doing public defense work and finds that he spends a higher percentage of his time on these cases than on his private cases. Mr. Moon has always had a commitment to criminal defense which he sees as a kind of community service. Now would be the best time to start bringing in new lawyers to replace the older attorneys as they leave practice over the next several years.

### **Summary of PDSC Discussion at September 11, 2008 Meeting**

The Commission's discussion at its September meeting focused on four potential strategies for supporting its eastern Oregon providers: (1) promoting the increased use of technology as a means of improving communication and facilitating participation in court hearings, (2) exploring opportunities for insurance pooling among public defense contractors, (3) creating a resource center for defense attorneys that would offer materials and support services similar to those provided to district attorneys by the Department of Justice, and (4) increasing recruitment efforts and providing financial incentives to attorneys willing to practice in the area.

Chief Justice Paul De Muniz offered to convene a meeting of interested groups, including the courts, the Department of Corrections, local sheriff's offices, defense providers, district attorneys and others to explore improvements to and expansion of the use of video equipment for court appearances and communication with incarcerated clients.<sup>9</sup>

John Potter reported that OCDLA had previously explored the possibility of insurance pooling for its members. He had not been able to locate the research previously done but was willing to discuss the issue again with his board of directors.

Rebecca Duncan described the services that are provided by the Department of Justice to district attorney offices throughout the state and noted that OPDS's Appellate Division responds to telephone and email inquiries and makes presentations at numerous seminars but is not funded to provide the same level of services as the Department of Justice. Commission members discussed some of the resources that are available to defense attorneys, including the OCDLA list serve, its Criminal Law Reporter and other publications, and Willamette University's advance sheets.

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<sup>9</sup> After a copy of the final draft report was provided to Christine Phillips, the Child Welfare Program Manager for Grant and Harney Counties, she suggested exploration of another potential technological improvement – a paperless discovery system in child welfare cases.

With respect to recruiting additional attorneys to practice in eastern Oregon, Commissioners discussed a number of possible approaches, including increasing recruitment efforts at the law schools. Commissioner Stevens noted that there are additional challenges involved in recruiting attorneys to practice in less populated areas of the state and that some kind of special incentive might be needed. Jack Morris commented that there also have to be retention incentives to prevent lawyers from coming to the area for training and then leaving after they have become experienced. Bert Putney concurred and said that in southern Oregon he has experienced similar losses. Proposed incentives included a scholarship fund for law students who would commit to spending a specified number of years in one of these areas, increased rates of compensation (particularly in prison counties where providers have to spend significant amounts of time getting into and out of prison facilities to visit clients and interview witnesses), a specified minimum level of compensation to cover overhead regardless of fluctuations in the caseload, a single rate for all case types, continued flexibility in carrying over caseload shortages and overages, and providing a guaranteed income for a period of years in order to persuade experienced attorneys from the more populated areas of the state to relocate their practices to less populated areas.

Of the three judicial districts discussed by the Commission, it appeared that Judicial District 24 was experiencing the most severe attorney shortage of the three and probably needed an additional attorney in the immediate future to cover the existing caseload. The service delivery systems in Baker and Malheur Counties appeared to be appropriate for these counties.

### **A Service Delivery Plan for Judicial District 24**

1. Structural and funding issues. The current service delivery system consists of two contract providers, with individual attorneys from other counties handling overflow and conflict cases as needed. While an additional independent provider might be an ideal solution, the current caseload in the district would not support a third provider. The consensus in the community is that there is, however, a need for at least one more attorney to assist one of the existing contractors and potentially be in a position to take over the contract upon the retirement of the current contractor.

There are two major obstacles to having either existing contractor add an associate at this time. Current case rates do not provide sufficient income to allow either contractor to do so and even if they did, it has been difficult to find attorneys willing to practice in the area.

At its September 2003 retreat and at the September 11, 2008 meeting, Commissioners identified a number of possible strategies for attracting, supporting and retaining new attorneys in lower population areas of the state,

including eastern Oregon. The possible strategies identified at the September 2008 meeting included increased use of video technology, insurance pooling, access to legal research tools and attorney recruitment and retention.

One of the challenges faced by many providers in less populated areas of the state is the fluctuating caseload<sup>10</sup>. To permit these providers to continue to operate and to allow them to hire additional attorneys, OPDS may need to “share the risk” that the caseload will not fully support necessary operations. Some contractors, such as those in Judicial District 24, already receive the same rate for all cases in a particular county regardless of seriousness. Even this approach, however, has not put either Judicial District 24 provider in a position to hire an associate because of the limited caseload. While some have urged OPDS to consider the use of “output” contracts that would guarantee a monthly payment regardless of how many cases were assigned, the office has opposed use of these contracts. Rather than an output contract, PDSC could approve payment of a fixed monthly amount to cover overhead and a per case rate that would be less than average case rates statewide but would vary with the actual number of cases assigned.

When it establishes its priorities for 2009 -11, PDSC may want to direct additional resources to providers in this district if it determines that the need here outweighs the needs in other areas that have already been or will be brought to the Commission’s attention. PDSC urges its contractors in Judicial District 24 to consider all available options and, as part of their contract proposals in 2009, to present OPDS with a business plan that would ensure that an appropriate number of providers are available to meet the needs of public defense clients in the district.

2. Quality of representation issues. The quality of representation issues that were identified in the report, especially in regard to juvenile cases, may well be a reflection of the lack of sufficient resources, and to this extent, might be partially addressed by Policy Option Package 100 in PDSC’s 2009-11 budget proposal.<sup>11</sup>

The extent of the concerns raised, however, suggests the need for an in depth inquiry. OPDS has referred these concerns to the Quality Assurance Task Force for its recommendation about the best means of assessing and correcting any significant deficits in representation. That group will meet on December 4, 2008.

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<sup>10</sup> John Lamborn reported that the number of misdemeanors being filed in the Grant County Justice Court is increasing. This means that the number of misdemeanors filed in state court will be declining and that lawyers will have to be spending more of their time in the justice court, limiting their availability in Circuit Court matters even further.

<sup>11</sup> This package seeks \$17 million in additional funding to permit PDSC to reduce juvenile dependency caseloads by 30% statewide.