

Public Defense Services Commission Service Delivery Plans for Lane County

1. February 2004 OPDS report to PDSC
2. December 2009 service delivery review
3. January, 2011 service delivery review and update

**OPDS's Report to the Public Defense Services Commission:
The Results of OPDS's Investigations in Service Delivery Region 4
(Benton, Lane, Lincoln & Linn Counties)**

**Part I: Lane County
(February 2004)**

Introduction

Since the completion of its Strategic Plan for 2003-05 late last year, the Public Defense Services Commission (PDSC) has focused on strategies and initiatives to accomplish its primary mission of ensuring the delivery of quality public defense services in the most cost-efficient manner possible. Recognizing that quality legal services promote cost-efficiency by reducing legal error and the resulting delays, appeals and other costly remedies, the Commission has concentrated on strategies that will improve the quality of the state's public defense delivery system and the legal services it delivers.

Foremost among those strategies is what the Commission refers to as its "service delivery planning process." This report represents an initial step in that process. It is the first part of a two-part report on the condition of the local public defense delivery systems in Service Delivery Region 4 of the state, which includes Benton, Lane, Lincoln and Linn Counties.

The Commission's next monthly meeting will be held in Eugene on February 12, 2004 for the purpose of hearing from all interested parties regarding the state of the public defense delivery system in Lane County. Therefore, this part of OPDS's report on Region 4 focuses on OPDS's findings and preliminary recommendations regarding Lane County. Part II of this report will be released in early March and will focus on the service delivery systems in Benton, Lincoln and Linn Counties, in preparation for a meeting in Corvallis that is tentatively scheduled for March 11, 2004.¹

PDSC's service delivery planning process has four steps. First, the Commission has identified seven Service Delivery Regions in the state for the purposes of reviewing local public defense delivery systems and the services they deliver in Oregon, and addressing significant issues of quality and cost-efficiency in those systems and services. Second, starting with preliminary investigations by its staff at the Office of Public Defense Services (OPDS) and a report like this, which will be provided to public defense attorneys, contractors and other interested members of the criminal justice system in the region under review, the Commission will review the condition and operation of local public defense delivery systems and services in a region, including holding public meetings in the region to provide opportunities for all interested parties to present their perspectives and concerns to the Commission. Third, after considering OPDS's report, any responses to the report and input from its meetings in the region, PDSC will develop a Service Delivery Plan for the region. That plan may simply confirm the quality and cost-efficiency of the

¹ This introductory section of Part I of OPDS's report on Region 4, along with the next two sections in Part I, will apply equally to Part II of this report.

public defense delivery system and services in that region. It may also take advantage of opportunities for change or for confronting specific challenges in the region in order to improve the quality and cost-efficiency of the region's public defense services. In any event, the Commission's Service Delivery Plans will (a) take into account local conditions, practices and resources unique to a 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, revise relevant terms and conditions in public defense form contracts. Finally, at the direction of PDSC, OPDS will implement the strategies or changes proposed in a plan on a specific timetable that will depend on the content of that plan.

Because critical steps in PDSC's service delivery planning process have yet to be completed, this report's findings and preliminary recommendations may be reconsidered or revised, depending upon new information presented to the Commission at its February meeting in Eugene or over the coming months, deliberations and decisions of PDSC following its meetings in Region 4, and any additional research and investigation that may be ordered by the Commission. Furthermore, any Service Delivery Plan that PDSC develops over the coming months in Region 4 will not be the "last word" on the service delivery systems in that region or on the quality and cost-efficiency of the region's public defense services. The state's current fiscal crisis and resulting limitations on PDSC's current budget, the existing personnel, level of resources and unique conditions in each county, the current contractual relationships between PDSC and public defense contractors, and the wisdom of not trying "to do everything at once," all place constraints on the scope of this first round of the planning process in Region 4, or in any other region of the state. Indeed, PDSC's planning process is an ongoing and dynamic 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 regions of the state on an expedited basis in order to take advantage of unique opportunities or address acute problems in the region.

Background

The 2001 legislation creating the Commission was premised on a policy, supported by most judges and the defense community, that the public defense function should be separated from the judicial function. This approach, considered by most commentators and authorities across the country as a "best practice," is intended to avoid the inherent conflict in roles when a judge, who serves as the neutral arbiter of legal disputes, also selects and evaluates one side in an adversarial proceeding. Thus, under the 2001 legislation, the Commission, not the courts, has the primary responsibility for the provision of competent public defense counsel. As a result, the Commission is committed to undertaking strategies and initiatives to ensure the competency of legal counsel.

However, in the Commission's view, minimum competency of public defense counsel is not enough. As it declared in its mission statement, PDSC is 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.

PDSC's range of strategies to promote quality and cost-efficiency. Service delivery planning is one of the most important strategies that PDSC has undertaken in recent months to promote quality and cost-efficiency in the delivery of public defense services. However, it is by no means the only strategy.

In December 2003, the Commission directed OPDS to form a Contractors Advisory Group, made up of the heads of public defense contractors from across the state. The group is advising OPDS on the development of standards and evaluation methods to ensure the ongoing quality and cost-efficiency of the services and operations of public defense contractors, and to improve those services and operations through peer review and technical assistance processes. The Contractors Advisory Group is also participating in the development of a new process for qualifying individual attorneys throughout the state who wish to provide public defense services.

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations, management practices and legal services of those offices.

Indigent defense task forces of the Oregon State Bar have repeatedly highlighted unacceptable variations across the state in the quality of public defense services in juvenile cases. As a result, PDSC has commenced a statewide initiative to improve juvenile law practice, in collaboration with the state courts. The Commission recruited an experienced juvenile defense attorney to serve as OPDS's General Counsel and to take the lead in this initiative.

OPDS, in accordance with PDSC's Strategic Plan, is examining options for a systematic process to address complaints about the performance of contractors and the legal representation of attorneys, as well as for a new organizational structure to deliver legal services in Post-Conviction Relief cases.

The Commission is also concerned about the "graying" of the public defense bar in Oregon. Due to the commitment of those engaged in this work and an increasingly competitive legal market over the past several decades, more and more lawyers are spending their entire careers in public defense law practice and in the private practice of criminal, juvenile and family law. In some areas of the state, most members of the defense bar are approaching retirement, with no process in place for finding replacements. As a result, PDSC is seeking ways throughout the state to attract and train younger lawyers in public defense practice.

"Structure" versus "performance" in the delivery of public defense services. OPDS submits that PDSC's service delivery planning process is aimed primarily at reviewing and improving the "structure" for delivering public defense services by selecting the most effective combination of organizations in a county to provide those services. On the other hand, most of the Commission's other quality assurance strategies and processes,

described above, focus primarily on “performance” in the delivery of legal services in order to ensure that lawyers and managers in public defense organizations are delivering those services efficiently and effectively. This distinction is not always easy to make, since the concepts obviously overlap and influence each other. For example, nearly everyone agrees that the quality and cost-efficiency of public defense services depend primarily on the skills and commitment of the attorneys and staff who perform those services, as well as on the provision of sufficient public resources to attract such talent. However, experienced public defense managers and practitioners and the research literature on “best practices” recognize that attention to the structure of service delivery systems contributes significantly to the quality and effectiveness of public defense services.²

Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles and responsibilities of PDSC, OPDS and public defense service providers in this planning process—and in the overall management and operation of Oregon’s public defense system. A collegial, volunteer “board of directors” like PDSC, whose members are chosen for the variety and depth of their experience and sound judgment, and who conduct their business in public meetings with the support of professional staff, is best able to address systemic, “macro” policy issues, like the proper structure of state and local service delivery systems. OPDS, on the other hand, is frequently in the best position to address performance issues, under the direction of the Commission. Performance issues usually involve individual lawyers and contractors, specific management practices and unique circumstances that raise operational and management questions, rather than policy issues. Public defense providers have committed themselves to assisting OPDS and the Commission in the development and implementation of credible standards and processes to ensure performance. As independent contractors, they are in the best position to manage their offices’ specific methods of service delivery and ensure the quality of the legal services they provide.

Because of the significance of the distinction between structure and performance, and the differing capacities of PDSC, OPDS and contractors to resolve questions involving the two concepts, this report will usually recommend assigning PDSC the task of addressing structural issues with policy implications and assigning OPDS the task of addressing performance issues with operational implications. The report will also identify the issues that call for the input and assistance of contractors and practitioners.

The organizations operating within the structure of local 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 emphasized that it has no interest in joining this debate. Instead, it wishes to concentrate on finding the most effective combination of organizations for each region of the state from among those types of organizations already established and tested in Oregon.

² Indeed, debates over the relative effectiveness of public defender offices and “private appointment” systems have gone on for years. See, e.g., Spangenberg and Beeman, “Indigent Defense Systems in the United States,” 58 Law and Contemporary Problems 31-49 (1995).

The Commission is also not interested in developing a “one size fits all” model for organizing the delivery of public defense services in Oregon. Instead, 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 often been struck locally among the available options for delivering public defense services.

On the other hand, PDSC is responsible for the wise expenditure of scarce taxpayer dollars for public defense services. Therefore, the Commission believes that it must engage in meaningful planning, rather than simply issuing requests for proposals (RFPs) and responding to proposals. As one of the largest purchasers and administrators of legal services in the state, the Commission is committed to ensuring that both PDSC and the taxpayer are getting competent legal services at a fair price. The Commission does not see its role as simply continuing to invest public funds in whatever local delivery system happens to exist.

Therefore, PDSC intends, first, to review the service delivery system in each county and develop its Service Delivery Plans with local conditions, resources, history and practices in mind. Second, in conducting these reviews and developing plans that might change local delivery systems, the Commission is prepared to recognize the efficacy of the local organizations that have 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 may be. 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 a county or region is necessary to advance the mission of Oregon public defense, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering potential changes in a local service delivery system.

The following discussion outlines the prominent features of each type of public defense organization in Oregon, along with some of the relative advantages and disadvantages. This discussion of the relative features of these organizations is by no means exhaustive. It is simply intended to highlight the kinds of factors that the Commission is likely to take into account in reviewing the structure of any local service delivery system.³

³ Although OPDS solicited input regarding these descriptions of public defense organizations from our Contractors Advisory Group, we did not receive that input in time to include it in this report prior to the release of Part I of the report. OPDS expects that members of the Advisory Group and others in the defense community will have additions or amendments to these descriptions to propose, which can be included before the release of Part II of this report.

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 or the offices in which they work are independent contractors operating under contracts with PDSC, including the following types of public defense organizations:

- 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 its public defense services. The offices share many of the attributes one normally thinks of as a "Public Defender Office," especially the "defining characteristic" of a public defender office: an employment relationship between the attorneys and the office.⁴ The attorneys in these offices in Oregon are full-time specialists in public defense, who are dependent on this work and not allowed to engage in any other form of law practice. However, the state's public defender offices are not government agencies staffed by public employees. They are not-for-profit corporations overseen by boards of directors and managed by administrators who serve at the pleasure of their boards.

While some of Oregon's public defender offices operate in populous counties of the state, others are located in less populous counties. In either case, OPDS expects the administrator or executive director of these offices to manage their operations and personnel in a professional manner, and to administer specialized internal training and supervision programs for attorneys and staff and provide effective defense representation in each forum in which they practice, including specialized court programs such as Drug Courts and Early Disposition Programs. As a result of these 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 in their counties, including paralegals, investigators, automated office systems or personnel hiring and management processes.

Because of the professional management structure and specialized management staff in most public defender offices, PDSC looks to the administrators of the offices as well as to others 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, offer PDSC another effective means to (a) communicate with local communities, (b) enhance the Commission's policy development and administrative processes through access to the expertise on the boards and (c) ensure the 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 resulting from cases with multiple defendants, involving former clients or for other reasons, no county can operate with a public defender office alone.⁵ As

⁴ Spangenberg and Beeman, *supra* note 2, at 36.

⁵ *Id.*

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 providers who must operate effectively in their counties.

- Consortia. A “consortium” refers to a group of attorneys or law firms who agree to submit a proposal to OPDS in response to an RFP and to handle a public defense caseload together if they are awarded a contract with PDSC. The size of consortia in the state varies from a few lawyers or law firms to 30 lawyers or more. The organizational structure of these consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with group practice, without the interdependence and conflicts of interest that arise from membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for membership, (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 provisional 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 wish to continue practicing criminal law under contract with PDSC. Many of them received their training and gained their experience in public defender or district attorney offices and larger law firms.

In addition to this access to experienced public defense lawyers, consortia offer OPDS and PDSC several administrative advantages. If the consortium is reasonably well-organized and managed, OPDS has fewer contractors or attorneys to deal with and, therefore, 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 efficiently distributed internally among consortium members by the consortium’s administrator. Otherwise, OPDS is required to conduct a search for individual attorneys in the county who can handle the cases. Finally, if a consortium has a board of directors, particularly with members who possess the independence and expertise of directors on public defender boards, then PDSC can realize the same benefits described above, including more opportunities to communicate with local communities and access to additional management expertise and quality assurance processes.

The participation of law firms in a consortium may make it more difficult for an administrator or members of a consortium to monitor and manage cases and the performance of lawyers in the consortium. This potential difficulty stems from the

fact that internal assignments of a portion of a consortium's workload among attorneys in a law firm may not be evident to the consortium or within its ability to influence. Finally, to the extent that a consortium lacks 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 a consortium delivers, such as (i) external training programs, (ii) professional standards, (iii) support and disciplinary programs of the State Bar and (iv) PDSC's certification process to qualify for court appointments.

- Law firms. In addition to participation in consortia, law firms handle public defense caseloads across the state directly under contract with PDSC. In contrast to public defenders 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 to OPDS in response to an RFP. Furthermore, law firms generally lack features of public accountability, like a public defender office's board of directors or the more arms-length relationships between independent consortium members. Thus, PDSC may have to rely solely on its own assessments of the skills and experience of individual law firm members, along with the external methods of training, standards and certification mentioned above, because the management structures, organization and operations of law firms are relatively inaccessible to public scrutiny.

The foregoing observations are not meant to suggest that law firms cannot provide quality, cost-efficient public defense services under contract with PDSC. The observations simply suggest that PDSC may have less influence on the organization and structure of this type of provider for the purposes of ensuring quality and cost-efficiency as easily as with public defender offices and 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.

- Individual attorneys under contract. Individual attorneys efficiently provide a variety of quality public defense services under contract with PDSC, including in specialty areas of practice like aggravated murder cases and in geographic areas of the state with limited supplies of qualified attorneys. Given the potential influence stemming from the power to evaluate and select attorneys individually, and the one-on-one relationship and direct lines of communications between the attorney and OPDS inherent in this contractual arrangement, the Commission can ensure meaningful administrative oversight and quality control over individual attorneys under contract. Those advantages obviously diminish as the number of attorneys under contract with PDSC increases.

This type of provider 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.

- 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. However, the only meaningful assurance of quality and cost-efficiency, albeit a potentially significant one, is a rigorous, closely monitored and administered qualification process for court appointments, which is capable of verifying the attorneys’ satisfaction of requirements for relevant training and experience.

OPDS’s General Observations in Region 4

During December 2003 and January and February 2004, OPDS visited all of the counties in Region 4 at least twice, Benton County three times and Lane County five times. Members of OPDS’s staff met with virtually all of the public defense contractors and other interested public defense attorneys in each county of the region. Since PDSC’s foremost obligation is to ensure the cost-efficient delivery of competent legal services to public defense clients, OPDS also sought relevant information in each county from as many credible sources as possible, including judges of the Circuit Court, attorneys in District Attorney’s Offices, staff of local probation or community corrections offices and representatives of Citizens’ Review Boards.

As a result of those visits, OPDS is able to offer the following general, though not particularly surprising, observations:

- Public defense caseloads, with increasing numbers of more serious felony cases, have become more demanding and complex over the past several years,⁶ making public defense practice an increasingly difficult way to support a law practice.
- Prosecutors’ charging and negotiation policies and practices vary widely from county to county, making the level and variations in public defense expenditures dependent on these policies and practices, as well as on crime and arrest rates.
- The nature and extent of the courts’ docket management practices vary from county to county, affecting the time and expense involved in handling public defense cases.
- Everyone we interviewed in the four counties of Region 4 expressed appreciation for the visits by OPDS and the special attention from the Commission that those visits represented, making this effort worthwhile for its own sake.

⁶ This trend, reported by most public defense attorneys in the region, is independent of a similar development caused by cuts to the 2001-03 indigent defense budget and the resulting actions by the Chief Justice and his Budget Reduction Advisory Committee during the last four months of the 2001-03 biennium.

A Demographic Snapshot of Lane County

With a 2001 population of approximately 326,000, Lane County is the fourth largest county among Oregon's 36 counties.⁷ As the home of the University of Oregon, the county's residents are relatively well-educated, with 16 percent of its adults over 25 years old possessing a Bachelor's Degree, 10 percent with post-graduate degrees and 46 percent of its high school graduates enrolling in college. As a result, Lane County has had a relatively low unemployment rate over recent years, comparable to Multnomah County's and the state average in 2000, and below the unemployment rates of 26 other Oregon counties. It also has a relatively high proportion of professional, scientific and management workers in its workforce (8.7 percent, compared to Washington and Multnomah Counties with 11.9 and 11.4 percent, respectively) and the seventh highest per capita income in Oregon (at \$19,681, compared to Washington County at \$25,973 and Multnomah at \$22,606).

Lane County's population is not particularly diverse, with non-white and Hispanic residents making up 11.4 percent of its population, compared to 16.5 percent for Oregon and 23.5 percent for Multnomah County. However, the county has a relatively high percentage of individual residents living in poverty (14.4 percent, compared to 11.6 percent in all of Oregon and 12.4 percent in the United States).

With 23 percent of its population 18 years or younger (compared to 24.7 percent for the state as a whole), Lane County's "at risk" population, which tends to commit more criminal and juvenile offenses, is not particularly large. On the other hand, the county had the third highest index crime rate in the state in 2000 (with 57.9 index crimes per 1,000 residents, compared to Multnomah County at 74.8, Marion County at 58.5 and the state at 49.2 per 1,000).⁸

The public defense caseload in Lane County is approximately 10% of the statewide total.

OPDS's Findings in Lane County

The Public Defender's Office. Public Defender Services of Lane County, Inc. is recognized across the state and by the Commission as one of the outstanding public defense contractors in Oregon. During OPDS's investigations for this report, nearly everyone we spoke with had positive things to say about the office, the competence of its attorneys and the quality of its legal services. The Public Defender's Office's reputation for providing

⁷ This demographic information was compiled by Southern Oregon University's Southern Oregon Regional Services Institute and appears in its Oregon: A Statistical Overview (May 2002) and Oregon: A Demographic Profile (May 2003).

⁸ For the purposes of this statistic, "index crimes" are those crimes reported by the Oregon State Police as part of its Oregon Uniform Crime Reports, and include murder, rape and other sex offenses, robbery, aggravated assault, burglary, theft, including auto theft, and arson. Oregon: A Statistical Overview at p. 122.

high quality legal services was recently confirmed by a positive evaluation from the National Legal Aid and Defenders' Association.

While there is always room for improvement in any law office, OPDS has no reason to recommend a review of, or any changes in, the organization or operation of the Public Defender's Office during this planning cycle. Moreover, any room for improvement in the office will be addressed during the assessment and technical assistance process currently under development by OPDS's Quality Assurance Task Force. The Director of the Public Defender's Office is a member of that task force and has volunteered to be among the first offices to participate in the task force's assessment and technical assistance process.

Juvenile law practice in Lane County. PDSC contracts with two public defense providers in juvenile proceedings in Lane County, the Public Defender's Office and the Lane Juvenile Lawyers Association. The Association is a consortium of 12 lawyers. Members of the private bar are occasionally appointed by the court from a list of qualified attorneys when the need arises.

The consortium and the Public Defender's Office received high praise from both the Juvenile Court Judge and attorneys in the District Attorney's Office. Attorneys in both providers' offices were described as highly skilled, result-oriented and not unduly adversarial. From the reports that OPDS gathered, it appears that the consortium is made up of qualified, experienced lawyers who monitor each other's work effectively.

OPDS concludes that the delivery system for public defense services in juvenile cases in Lane County is currently operating cost-efficiently and providing quality legal services. Therefore, no structural changes to this system are recommended during this planning cycle.

Public defense representation by the private bar. Most of OPDS's discussions with the criminal defense bar, judges, prosecutors and other interested parties in Lane County centered on the organization, operation and effectiveness of the process for appointing public defense attorneys in cases that the Public Defender's Office cannot handle, and the quality of the legal services that court-appointed attorneys provide. Apparently, those attorneys are ordinarily appointed from a list administered by court staff to whom the Circuit Court has delegated its authority to appoint public defense attorneys, as well as its authority to determine the terms and conditions of release from custody. However, it is not uncommon for lawyers to be appointed directly by judges as well.

During our first meeting with the defense bar in Lane County, with over 30 defense attorneys who are or have been on the court-appointment list in attendance, OPDS was informed that (1) the principal court-appointment list contains the names of anywhere from 30 to 60 lawyers, some of whom no longer practice criminal law in the county, (2) apparently, there is more than one list, (3) lawyers are uncertain about whether they are on a list, and which ones, (4) appointments from the list or lists appear to be neither random nor systematic, causing suspicion that some lawyers on the list are favored or ignored in the process, and (5) the list worked better in the past when the release officer appointed

attorneys from the list. The county's Trial Court Administrator, who was also in attendance at this meeting, voiced skepticism about some of the lawyer's observations and disagreement with others. He indicated that he would conduct his own investigation of the county's court-appointment process and report the results to the Commission. By its February 12th meeting in Eugene, the Commission should have a clearer picture of how Lane County's court-appointment process currently operates.

In any event, most of the defense attorneys we met in Lane County support the continuation of the county's court-appointment list or lists and the accompanying process. They also oppose the formation of consortia to handle some or all of the same caseload. Those attorneys did acknowledge the need for improvements in the current appointment process, including a more systematic, consistent and transparent selection process and more rigorous and verifiable qualification requirements to receive court appointments. They opposed consortia on the grounds that (a) opportunities for attorneys in the county to practice criminal defense law would be unfairly reduced, (b) the process of establishing and maintaining consortia would breed unnecessary competition among the county's criminal defense lawyers, pitting them against each other and destroying the unique "culture of collaboration" in Lane County, (c) the opportunity for fewer attorneys to practice criminal law would block the state's access to new legal talent and reduce the depth of legal talent currently available in the county, and (d) the current system has worked well for years, if not decades.

On the other hand, the judges and prosecutors we spoke to, without exception, supported the elimination of the current court-appointment process, along with the establishment of a consortium made up of a smaller, more qualified group of attorneys to handle the cases. The two groups' observations and reasons in support of their positions were nearly identical: The Public Defender's Office, in general, provides high-quality legal services efficiently. By comparison, a substantial number of the attorneys on the appointment list are ineffective and appear to spend too much time and energy on routine or inconsequential matters. From the perspective of these two groups, a few attorneys who currently receive court appointments in the county do not possess the necessary experience or legal skills to practice criminal law.

Years ago in Lane County, an attorney apparently prosecuted a successful lawsuit, claiming he was unlawfully removed from the court's appointment list. As a result, the Circuit Court is reluctant to remove any attorney from the list, even for incompetence, unless an attorney has failed to establish his or her qualifications in accordance with Oregon's "Qualification Standards for Court-Appointed Counsel to Represent Indigent Persons at State Expense" (January 15, 2003).

During the fourth quarter of 2003, OPDS received proposals from Lane County attorneys to establish consortia in response to OPDS's standard RFP. However, consideration of those proposals was postponed until the Commission completed this review and developed a Service Delivery Plan for Lane County.

OPDS's contract negotiation process. During PDSC's December 2003 and January 2004 meetings, the Director of Public Defender Services of Lane County, Inc. expressed concern over his office's lack of access to information concerning OPDS's ongoing contract negotiations with another contractor in Lane County who was apparently competing with the Public Defender's Office for part of the same caseload. His point was that, in light of PDSC's commitment to a fair, open and consistent public defense contracting system, all contractors in the county should have access to the status of each other's ongoing contract negotiations with OPDS in order to ensure an equitable allocation of the county's public defense caseload. In response, the Commission's Chair and OPDS's staff confirmed that this current planning process would result in a Service Delivery Plan for Lane County that identifies the roles and responsibilities of the county's public defense contractors and the general nature and extent of their anticipated caseloads. However, they also expressed uncertainty about how individual contract negotiations could be conducted and managed, while providing other contractors access to the substance of those negotiations and the opportunity for input. OPDS asked the Lane County Public Defender's Office to present its concerns and recommendations in writing to OPDS in time for the Commission to consider them at its February 12th meeting in Eugene.

The delivery of public defense services in aggravated murder and murder cases. In years past, public defense attorneys in Lane County were appointed in aggravated murder and murder cases by the presiding judge from a list of uncertain length and content, and paid by the state on an hourly rate. More recently, OPDS's predecessor agency, the Indigent Defense Services Division (IDSD) of the State Court Administrator's Office, entered into a contract for aggravated murder and murder cases with a qualified and experienced defense attorney in Lane County. IDSD concluded that handling aggravated murder cases compromised an attorney's ability to maintain any other kind of law practice. As a result, IDSD decided that supporting specialized aggravated murder and murder caseloads under contract would permit qualified attorneys to deliver these services effectively without the distraction of maintaining a collateral or supplemental law practice.

During OPDS's meeting with Lane County's defense bar, several attorneys voiced objections to PDSC's contracting process for aggravated murder and murder cases, for reasons similar to the ones expressed in support of the county's current court-appointment list. While no one criticized the qualifications or abilities of IDSD's or OPDS's contractors in the county, the attorneys who voiced objections to murder contracts expressed a preference for the old court-appointment list administered by the presiding judge. They stated their belief that the aggravated murder contract in Lane County blocked access to exceptionally qualified local legal talent and promoted rivalry and hard feelings within the county's defense bar. OPDS has also heard rumors and complaints that IDSD or OPDS had to recruit defense attorneys from other counties to handle Lane County murder cases due to the limited capacity of their local contractors, and in spite of the depth of available local talent in the county.

OPDS's Preliminary Recommendations

1. A court-appointment list, a consortium or both? The primary opportunity to improve the quality and cost-efficiency of public defense services in Lane County arises from the county's current court-appointment process for handling cases that the Public Defender's Office is unable to because of conflicts of interest or limitations on its capacity and resources. As the Oregon State Bar and the American Bar Association have recognized, participation by the private bar in public defense representation results in significant benefits for any jurisdiction, including a deeper pool of talent to draw upon and wider support within the legal community for the mission of public defense. However, the Commission must balance the benefits of widespread participation by the private bar with its interests in quality and cost-efficiency that may be served by narrower and more tightly managed participation by the bar.

With those considerations in mind, OPDS believes that the Commission has three options to address this issue: (1) replace the current appointment system with one or more well-organized, tightly managed consortia, made up of the most qualified criminal defense attorneys available, and overseen by an administrator who can effectively manage the consortium's quality assurance, training and business operations; (2) establish a court-appointment list or panel that is predictable, consistent and transparent, with a rigorous and verifiable certification process to qualify for participation; or (3) a combination of the foregoing options, with a plan to evaluate their relative effectiveness and revisit the options in future biennia.

2. Reconsider OPDS's contract negotiation process with contractors? OPDS anticipates that the Commission will receive written comments from the Lane County Public Defender's Office at its February 12th meeting regarding that office's concerns over access to information about ongoing contract negotiations with other contractors in the county. OPDS is committed to the Commission's goal of providing as much relevant information as possible to all contractors in every county about their respective roles, responsibilities, methods of compensation and caseloads through PDSC's service delivery planning process. However, we do not currently understand how OPDS's contract negotiations with competing contractors in a county can be conducted fairly and efficiently if those contractors are granted ongoing access to each other's negotiations and encouraged to give input during the course of those negotiations. Nevertheless, OPDS recommends that the Commission consider any feasible proposal by the Public Defender's Office that is likely to advance PDSC's commitment to fair, open and consistent business dealings between OPDS and its contractors.

3. Reexamine the contracting process for death penalty cases in Lane County? Based on the limited input received on this subject, it is difficult for OPDS to determine whether this is a "structural" issue (such as the choice between a court-appointment list and a consortium), which is appropriate for the Commission to address; or an "operational" issue, which should be left to the sound discretion of OPDS in the course of administering the state contracting process (such as taking into account the size of the county's death

penalty caseload, the availability of qualified counsel, and the cost-efficiencies involved in administering contracts as opposed to appointment lists).

In response to its inquiries into the reasons other qualified (and complaining) attorneys in the county had not submitted proposals in response to previous RFPs for a death penalty contract, OPDS was told that the RFPs weren't publicized, or that the contracts were an "inside deal." Whether or not there is any substance to these claims, the point for present purposes is that OPDS can avoid such claims in the future by administering the state's contracting process openly and consistently.

However, in the interest of confirming the Commission's commitment to maintaining open channels of communication with the criminal defense community, OPDS recommends that the Commission receive testimony from those Lane County attorneys who support changes in the process of delivering public defense services in death penalty cases. To the extent that this testimony presents persuasive and feasible alternatives, PDSC can reexamine the contracting process in Lane County and direct OPDS to identify available options for the Commission's consideration in the future.

LANE COUNTY SERVICE DELIVERY REVIEW

December 10, 2009

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

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

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

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

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

History and Description of the Lane County Public Defense Panel

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

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

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

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

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

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

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

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

Administration and Structure

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

³ For the list of best practices, see:

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

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

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

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

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

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

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

Case intake and distribution

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

Case Management and Support

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

Community Involvement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Service delivery plan for Lane County

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

LANE COUNTY SERVICE DELIVERY REVIEW

JANUARY 2011 UPDATE

Background:

On October 23, 2009 the Public Defense Services Commission met in Bend, Oregon and continued a review begun in September 2009 of the delivery of services by the Lane County Public Defense Panel, the conflict provider for criminal cases in Lane County.

In response to information received in written reports and the testimony of witnesses, Commissioners determined that the existing delivery structure was not working satisfactorily and that the “panel” approach to handling the conflict caseload would not be continued. OPDS staff was instructed to meet with Lane County Commissioners and other interested persons to discuss alternatives to the existing structure. PDSC had received a proposal from a small group of lawyers to provide representation for part of the conflict caseload. Ross Shepard agreed to convene a series of meetings and discussions in Lane County to explore other possible options. As a result of those meetings a proposal was received from a group of attorneys that included those who had submitted the earlier proposal, and at their December 10, 2009 meeting Commissioners unanimously approved a revision to the Lane County service delivery plan authorizing OPDS to negotiate a contract with the new group. OPDS entered into a preliminary agreement with the Lane County Defense Consortium on January 1, 2010. Commissioners approved the proposed contract on January 28, 2010 and the consortium began accepting cases on February 1, 2010.

Stakeholder reports:

The consortium has now been functioning for approximately one year. In order to assess the performance of the new group, OPDS’s executive director and its contract analyst for Lane County (1) met with a number of stakeholders in the Lane County criminal justice system, and (2) reviewed the results of the annual OPDS survey on performance completed in January 2011.

On the whole the comments received about the performance of the new consortium were excellent. One judge said there had been a “ten-fold improvement” in quality and that one doesn’t need to feel sorry for defendants any more. The lawyers have also responded to the court’s invitation to meet with attorneys and review their performance in particular cases. Even experienced lawyers are taking advantage of this opportunity. Contract administrator Brad Cascagnette is reported to be “the right guy for the job.” He checks in regularly with the judges and promptly resolves any issues that are brought to his attention. One judge reported that the management issues that existed with the

panel have been resolved. Peer review is now occurring. It was also noted that without a financial incentive to make multiple court appearances, lawyers are now more thoughtful about setting cases over to days when they will actually be available and setting appearances on multiple cases at the same time. This has relieved some overcrowding on the court's 35-day call docket.

Two commentators said that there were still one or two lawyers in the group who should not have been included. One survey respondent said that he/she questioned the preparation of some public defense attorneys who appeared not to have met with their clients (without indicating whether they were with the public defender's office or the consortium). Three survey respondents said that overall the quality of defense had not changed in the past year. Two respondents said that it had improved somewhat. One of the latter noted that, "The consortium is a huge improvement over the former system. A lot of the less competent lawyers got weeded out. I feel badly for them, but not for the folks who need their services."

Operation of the consortium:

Brad Cascagnette said that the consortium is functioning well. It has a board of directors with five current members (3 to 15 are authorized.) The initial board members were President Don Diment, Secretary Mike Buseman, Treasurer Kevin Merwin and members Dan Koenig and Rebecca Davis all of whom were appointed for one-year renewable terms. Future board members will be elected by the board. There is no outside appointing authority¹. The board appoints the executive director and is required to perform an annual evaluation of his work; the board also appoints members of a fiscal oversight committee which performs an annual audit of the organization.

Mr. Cascagnette tries to accommodate member lawyers' preferences for the portion of their professional time they wish to spend on public defense cases. The consortium now has its own website (<http://www.lanecountydefense.com>). It has already sponsored one CLE event and plans another in the near future. Consortium attorneys meet monthly to talk about cases. All of the attorneys are now Measure 11 qualified. Two who were not were gradually introduced to more serious cases. Mr. Cascagnette personally mentored them by reviewing the facts of cases with them, discussing the law and helping them prepare for court hearings.

System changes:

Defense attorneys are no longer routinely waiving grand jury indictments in Lane County. In a change supported by the new consortium, the District Attorney's office is now convening grand juries in most felony cases. Commentators had

¹ The group created its board before the Commission established the requirement, applicable to contracts beginning in January of 2012, that boards include outside directors.

different opinions about whether demanding indictments actually benefited clients.

Public Defender Services of Lane County:

The work of the Lane County public defender's office was also praised. One survey respondent said that the work of its lawyers was "truly outstanding." It was noted that the office had recently been able to hire some new attorneys, replacing one attorney who had been appointed to the bench and one who had moved out of the area. As Commissioners will recall the lawyer retention rate at the public defender's office has been very high over the years. The training of new lawyers would be a natural role for the public defender office but one of the reasons that the panel approach was approved in 2004 was that the local legal community wanted to maintain an avenue for new lawyers to enter the system and there were only rare openings in the public defender's office. With more public defenders nearing retirement age it may be possible for the office to hire and train more new attorneys and thus fulfill this important role in the Lane County legal community.

Civil commitment cases:

Several judges mentioned that there did not appear to be sufficient number of qualified attorneys to represent clients in civil commitment cases. These comments have been provided to the contract analyst for the county.

Juvenile cases:

It is not the purpose of this report to discuss service delivery in juvenile cases but it should be noted that in a recent spot survey regarding the caseloads of public defense attorneys who handle only juvenile cases, the Lane County providers had the highest number of current clients per attorney of any provider in the state, in some cases having twice as many clients as their counterparts in other jurisdictions. OPDS will be exploring the reasons for these high caseloads and their impact on the quality of representation being provided in Lane County.

Conclusion:

The current public defense delivery system for criminal cases in Lane County appears to be functioning well for clients, for the defense providers and for the system as a whole.