

**Public Defense Services Commission**  
**Service Delivery Plan for Lincoln County**  
(Approved June 16, 2011)

**Introduction**

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems.

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

PDSC's investigations of local delivery systems in counties or judicial districts across the state serve another important function. They provide useful information to public officials and other stakeholders in a local justice system about the condition and effectiveness of that system. The Commission has discovered that "holding a mirror up" to local justice systems for all the community to see can, without any further action by the Commission, create momentum for local reassessments and improvements.

From 2004 through 2010, the Commission completed investigations of the local public defense systems in thirty Oregon counties.

**Lincoln County Reviews**

PDSC's first service delivery plan was developed for a region that included Lane, Lincoln, Linn and Benton Counties in 2004. At that time although PDSC contracted with a single entity in Lincoln County, the Lincoln Defense

Consortium, consortium members regarded themselves as individual attorneys and law firms in competition for the caseload. Consortium members even submitted individual RFP responses as alternatives to the Lincoln Defense Consortium proposal. Prior to 2001, PDSC's predecessor, the Indigent Defense Services Division (IDSD) determined the percentage of caseload for each consortium member and incorporated those percentages into the contract. By 2001, IDSD convinced the Lincoln Defense Consortium that, as a consortium, they should be able to reach agreement among themselves as to how caseload should be distributed.

In 2004, at the time of PDSC's service delivery review, the Lincoln County contractors expressed satisfaction with the operation of the system then in place. OPDS was concerned about the ability of this group to recruit and train new public defense attorneys but it was represented that the law firms in the group could bring in new attorneys as needed. Judges and the District Attorney expressed satisfaction with the work of the group and appreciation for the experience and skill of the attorneys. OPDS did not recommend that PDSC make any changes to the public defense delivery system in Lincoln County in 2004.

Since that time a Quality Assurance Task Force (QATF) site team, comprised of volunteer lawyers from around the state, conducted a thorough review of the quality of services provided by the Lincoln Defense Consortium. That evaluation occurred in September of 2006. A final report was presented to the consortium in January of 2007. Since QATF evaluations are confidential, with the final report being provided only to the contractor and OPDS, no conclusions from that evaluation are included in this report.

In 2010 PDSC identified Lincoln County as one of the counties it would visit in 2011 in order to update its earlier service delivery plan.

### **OPDS's 2011 Preliminary Investigation in Lincoln County**

To prepare for the March 10, 2011 Commission hearing in Newport, OPDS staff conducted a preliminary investigation into the current functioning of the public defense system in Lincoln County and submitted the initial version of this report.

On February 9 and 10, 2011 OPDS Executive Director Ingrid Swenson, Public Defense Services Commissioner John Potter and OPDS Contract Analyst Shelley Winn visited with stakeholders in Lincoln County, including Presiding Circuit Court Judge Charles P. Littlehales, Judge Thomas O. Branford, Judge Sheryl Bachart, Pro Tem Judge Paulette Sanders, former Pro Tem Judge Frederick Bennett, District Attorney Rob Bovett, Senior Juvenile Department Officer Larry Ballinger, CASA Executive Director Betsy Henderson, CASA Program Manager Carol James, consortium administrator Guy Greco, Jeff

Pridgeon of Pridgeon, Bjornsen & McCrum LLC, and sole practitioner Daniel Taylor.

In addition Ingrid Swenson met or spoke by phone with the Trial Court Administrator Bonnie Savage and CRB coordinator Walt Gullett.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in a particular judicial district turns out to be the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for a particular area and OPDS is grateful to the stakeholders in Lincoln County for their much appreciated contributions to this report.

### **Lincoln County Criminal and Juvenile Court Systems**

The Lincoln County Circuit Court is located in Newport. Many county offices and facilities are located in the general vicinity of the courthouse, including the juvenile department, community corrections, the sheriff's office, the jail and the detention facility.

The court has three elected Circuit Court Judges and one pro tem judge. Charles P. Littlehales is the presiding judge. The other two elected judges are Thomas O. Branford and Sheryl Bachart. Paulette Sanders is the pro tem judge. In addition to other duties, she handles most of the juvenile cases. Bonnie Savage is the trial court administrator. Five staff positions have been lost to the court over the course of the current biennium<sup>1</sup>.

Rob Bovett is the elected District Attorney who replaced two-term Lincoln County District Attorney Bernice Barnett. Mr. Bovett, who was previously with the Lincoln County Counsel's office, served as the chair of Oregon's Methamphetamine Task Force and is the primary author of the state's methamphetamine lab control laws. He has a chief deputy and eight deputy district attorneys. The office also has seven legal assistants but, like the courts, has lost five positions due to budget cuts in the last two years. Mr. Bovett has been skillful in obtaining grant funding to retain additional positions that otherwise would have been cut. Commentators note that relations between the District Attorney's office and the defense bar have improved significantly over the relations that existed under his predecessor.

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<sup>1</sup> The state trial courts' report on judicial resources indicates that during the six month period ending June 30, 2010 there were 1,461 cases filed in the Lincoln County Circuit Court, 1500 cases terminated and 1,189 cases pending per Lincoln County Circuit Court Judge position. Statewide averages were 1,670, 1,663 and 1,374.

## Criminal Court System

The Lincoln County Circuit Court does not use a central docketing system. Individual judges manage their own dockets. Each criminal case is assigned to a particular judge at arraignment. All future hearings in the case are held before the same judge unless that judge is unavailable on the assigned trial date due to a conflict. The case may then be assigned to another judge for trial if one is available. Measure 11 cases, however, are assigned by rotation in order that all of the judges have a similar number of them. Hearings on motions must be scheduled with the individual judge's staff. Out-of-custody cases are assigned an Early Resolution Conference (ERC) hearing date approximately six weeks after arraignment. It is expected that discovery will have been provided by this date and that attorneys will be able to report on whether the matter will be scheduled for a Final Resolution Conference (FRC) date or for trial. A Trial Report Hearing is held three weeks before trial to confirm whether the matter will remain on the trial docket.

For in-custody matters there is usually only an FRC date scheduled and it is set approximately three weeks after arraignment.

Monday is the principal criminal court day. Trials are scheduled on Tuesdays through Fridays. In-custody arraignments occur daily at 1:15 pm. Out-of-custody arraignments are held on Mondays.

Court staff interviews in-custody clients prior to arraignment and makes a preliminary determination of financial eligibility for court-appointed counsel. Out-of-custody defendants who seek appointed counsel have counsel provisionally appointed until eligibility can be determined. The LDC administrator notifies the court in advance which attorneys are scheduled to pick up new cases. Court staff contacts the attorneys to advise them of the need to appear in court for arraignment.

An LDC attorney is present for all arraignments.

Currently there is no early disposition program in Lincoln County. Planning for such a program is underway, however. The district attorney is currently outlining his criteria for eligibility for "rocket docket" treatment.

There are four specialty courts in Lincoln County: a drug court, a domestic violence court, a mental health court and a "HOPE" court. The oldest of these is the drug court, which has been in place for approximately five years. Judge Branford serves as the drug court judge. The Lincoln County drug court has implemented the Ten Key Components of Drug Court recommended by the

National Association of Drug Court Professionals. If a defendant in a criminal case is determined by the state to be eligible for drug court participation, the defendant discusses the program with the attorney who is initially appointed to represent him/her and makes a decision whether to participate in the court. Most participants are eligible for a conditional discharge upon successful completion but some defendants who are on probation volunteer to participate in order to achieve sobriety. In the past drug court participants were not represented once they were accepted into the program. For the last two years, however, representation has been provided by consortium attorney Dan Taylor. There are currently 18 to 20 people participating in the court. Initially they are required to appear weekly, then bi-monthly and then monthly until graduation after participating for a year or more. The court continues to work with participants who are struggling with sobriety.

There is a Domestic Violence Court (DV Court), which emphasizes speedy resolution of the charges and regular compliance review hearings during the course of supervision. This court has been in place for approximately a year. The state is expected to provide full discovery at arraignment, including police reports. The consortium administrator, Guy Greco, indicates that the court is not operating as efficiently as it could because discovery is not always being provided at arraignment. Most cases involve deferred sentencing agreements but for those who contest the charges and are found guilty it is also available as part of a probationary sentence. Compliance reviews are scheduled after 60, 120 and 365 days. No contact is usually permitted between the defendant and the victim until after the first compliance hearing. There are approximately 100 people in the program. The rate of compliance with program requirements has been high. All of the criminal lawyers participate when they have clients in the program. The program is partially grant funded. Judge Bachart presides over DV Court cases.

Help and Opportunity through Probation with Enforcement (HOPE) Court is a prison diversion program funded by a Department of Corrections grant. It is directed at repeat property offenders who are facing presumptive prison sentences. It is modeled after the drug court but the focus is on victim restitution. Judge Branford presides over the Hope court.

A Mental Health Court was started very recently by Judge Littlehales working with the Mental Health Subcommittee of the Local Public Safety Coordinating Council. It is designed to divert offenders driven principally by mental health disorders from the criminal justice system into appropriate treatment, using regular court hearings to support compliance. This is designed to be a small program serving between four and six chronic offender clients.

There has been some discussion about a possible veteran's court but the demands on court staff may be too great to permit another specialty court.

Lincoln County currently has adequate jail space. There are 170 beds available which means that when the court imposes a local sentence, it is usually served in full. The jail administers a community service program and supervises inmate work crews.

### The Juvenile Delinquency System

There are three juvenile court counselors and one supervisor in the Lincoln County Juvenile Department. Positions have recently been lost both in the detention facility and in the juvenile department. The department uses Formal Accountability Agreements with many first-time offenders and in most misdemeanors. Under an agreement with the District Attorney's office the juvenile counselors prepare most of the petitions. The county has an 8-bed detention facility and a 12-bed shelter which is used for both delinquent and dependent youth. Most other placement resources are through the Oregon Youth Authority. Measure 11 youth (16 and older) are held in the county jail. Alternative approaches to the handling of juvenile sexual offenses has permitted some youth to expunge their records and be relieved of the obligation to register as sexual offenders.

Delinquency preliminary hearings are held immediately after adult in-custody arraignments. Attorneys are appointed in virtually all cases. Most delinquency court hearings are on Friday. The court seeks to group juvenile cases by case type in order to minimize the amount of time attorneys, clients and caseworkers need to spend in court waiting for their hearings to begin.

The juvenile court schedules "compliance hearings" for some probationers in an effort to prevent violations. Once an attorney is appointed for a youth, the court does not terminate the appointment. When probation violations are filed the court is now appointing the same attorney who represented the youth on the original petition.<sup>2</sup>

### The Juvenile Dependency System

Attorneys are appointed for parents at shelter hearings. Court staff notifies attorneys several hours in advance that they will need to be present. They receive the petition and the DHS shelter summary and sometimes a police report before going to court and usually have a few minutes to meet with the client before the hearing. Attorneys are rarely appointed for children except at the request of another party to the action. CASAs are appointed in most cases however. (There are currently 38 CASA volunteers in the county.) Since Paulette Sanders became the pro tem judge, there have been more review hearings than in the past. She usually schedules reviews 90 days and six

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<sup>2</sup> This approach is considered a best practice. Youth offenders benefit from having continuity of representation and being able to contact "their attorney" with questions and concerns during the probation period.

months after jurisdiction. A pre-permanency hearing is scheduled to determine what the agency's permanent plan will be so that parties can be prepared to litigate the issue at the permanency hearing if necessary.

The Lincoln County District Attorney's office participates in dependency cases in the early stages. They appear at shelter hearings and remain until jurisdiction has been established. They do not appear at post-dispositional review hearings or permanency hearings.

The court currently has a family court specialist who assists clients with domestic relations actions. This position may be in jeopardy if there are further Judicial Department budget cuts.

Lincoln County has a Juvenile Court Improvement Project Model Court program with participants from all involved agencies, including LDC.

The Confederated Tribes of Siletz Indians of Oregon is the largest tribe in the area. No tribal representative participates in the Model Court team or other policy making bodies. Tribal experts are available to testify in Indian Child Welfare Act cases but local juvenile court system representatives said that the tribe rarely intervenes in these cases, never seeks transfer of cases to the tribal court and rarely has services to offer to native families involved in state juvenile court dependency matters although the tribe does have a social services department and a number of caseworkers. Cathern Tufts, counsel to the Siletz Tribe, said that tribal law requires the tribe to intervene in all cases involving Siletz children. The tribe also offers services to children and families, including alcohol and drug treatment services, self-sufficiency services, housing, mental health counseling, medical and educational services. The tribe has a Women's Transitional Living Center (where members can have their children placed with them). Tribal caseworkers also participate in family decision meetings. Ms. Tufts believed there might be a misperception on the part of providers and advocates in Lincoln County about the role of the tribe and said she would be contacting DHS, the court and the attorneys to make sure they had current information.

### Civil Commitment Hearings

Judge Bachart and Judge Littlehales hear most of these cases. Attorney appointments are on a rotational basis.

### Public Defense Provider

PDSC contracts with a single provider for representation in all public defense cases excluding murder and aggravated murder cases and post-conviction relief and habeas corpus cases in Lincoln County, the Lincoln Defense Consortium. Guy Greco is the administrator of the consortium. The consortium contracts to handle 3,108 cases per year. The group includes five individual attorneys and

two law firms. The law firms are Ouderkirk and Hollen and Pridgeon, Bjornsen and McCrum. Senior members of both firms handle some public defense cases and each firm currently has two associates who also handle public defense cases.

LDC has no formal by-laws or written operating policies or procedures. It has a board comprised of consortium members. There is no formal process for evaluating the work of the consortium administrator or the quality of services provided by members of the consortium. There are several consortium meetings held each year but attendance is not mandatory. The consortium does not offer any services to its members other than management of the OPDS contract.

There is no mechanism in place for regular communication between members. When contract or system issues arise, however, the administrator contacts members, usually by e-mail. If a judge has a problem with the performance of an attorney, the judge usually contacts the attorney directly or the consortium administrator. Recently the consortium administrator sent a questionnaire to the judges regarding performance of the attorneys. At the time of OPDS's visit to the county, the results had not yet been reviewed.

New consortium attorneys are added either by being hired by one of the member firms or with approval from OPDS. The consortium provides no orientation or training to members. Each firm has very experienced senior members. The consortium administrator is a highly regarded criminal defense lawyer who is available to provide advice and assistance upon request. The consortium does not monitor the caseloads of individual attorneys. Such monitoring is deemed a function of the law firm rather than the consortium. Similarly, training and oversight of the work of these attorneys is not considered a consortium function in Lincoln County although the administrator has recently taken a more active role in identifying concerns about performance and seeking to resolve them.

#### Case distribution within the consortium

Each of the firms and each individual attorney member receives a specific percentage of the contract caseload. The administrator determines which office will pick up new cases each week in order to maintain the appropriate distribution of cases. Except for termination of parental rights cases for which the assigned office is paid \$2300 per case, the amount of compensation received by each office is based on the percentage of contract cases the office has agreed to handle. Cases are not weighted but are assigned at random on the assumption that the more time consuming cases will balance out over time. Each office receives a fixed amount per month based on their percentage of the total caseload. The consortium maintains a reserve in case the caseload falls short and they must reimburse OPDS.

## Comments from Lincoln County Stakeholders regarding Provider

### Dependency Representation

Reports received from a number of sources indicated that the dependency system in Lincoln County is being significantly affected by the performance of DHS management and staff. Staffing levels are seen as insufficient making communication very difficult. Caseworkers keep changing. Two workers who just completed their training are already gone. One of the permanency workers is also leaving. When the agency has to use interim staff they are often not adequately trained. The agency cannot provide staff to accommodate family meetings, which can be very productive in some cases. Family resources are often not identified until late in the case. The agency is sometimes too slow to remove some children, causing additional damage. There are not enough foster homes in the county and only two visitation supervisors. Judge Sanders is working with charitable organizations to identify potential lay supervisors who could facilitate more family visits.

With respect to the work of the lawyers, several lawyers are said to provide very good to excellent (or in one case “stellar”) representation in juvenile dependency cases. Several other attorneys were described as generally doing very good work but at times seeming overwhelmed. One of the newer attorneys was described as very eager and promising. It was noted that some children’s attorneys do not have sufficient contact with their clients. A small group of attorneys fail to explain juvenile court jurisdiction and its implications to parent clients and none of the attorneys are very active in identifying family resources for placement, visit supervision and the like.<sup>3</sup> There is a high level of competence in termination cases.

### Representation in Criminal Cases

One attorney is described as providing “superb” representation and always being on top of the issues in his cases. Several other attorneys were described as very good and others as competent. Three of the senior public defense lawyers who could provide excellent representation in all case types, including Measure 11 cases, never appear in criminal court. Two of the experienced lawyers who do appear seem apathetic and one of them provides obviously better representation to retained clients than to public defense clients. Neither of these latter two attorneys files motions or takes cases to trial<sup>4</sup>.

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<sup>3</sup> Non-routine expense authorizations have been approved for requests from some attorneys to use investigators to assist in finding relatives who may not be responsive to inquiries from DHS.

<sup>4</sup> Felony trial rates in Lincoln County are below the statewide average but trial rates in misdemeanor cases are higher. The state trial courts’ “Cases Tried Analysis” indicates that during the six month period ending June 30, 2010, 256 felonies and 806 misdemeanor cases were closed. Of those cases, 2.7% of felonies were tried (six to a jury and one to the court); and 6.6 percent of the misdemeanors were tried (23 to a jury and 30 to the court). Statewide for the same period 4.2% of felonies were tried and 3.6% of misdemeanors.

There are not enough experienced lawyers to handle the most challenging cases. The law firms tend to hire inexperienced lawyers and fail to provide them with training and mentoring. Even though some of the new lawyers are very promising and could become excellent advocates, they are overworked and underpaid and left completely on their own when they begin practice. There is no senior attorney present at their initial appearances or even at their first trials. The new lawyers don't know how to prepare a trial notebook, for example. Some come to trial with no plan for what questions they will ask on direct or cross examination and sometimes ramble ineffectively.

Commentators noted that the District Attorney's office faces similar challenges in the training of new lawyers. Some kind of mock trial training would be helpful for both the defense bar and district attorneys. Both appear to be in need of a training plan and a checklist of things new lawyers need to know.

One suggestion to PDSC was that it contract directly with the attorneys who do the work. It was said that PDSC could attract and retain well qualified attorneys if it used such an approach instead of the current "franchise" approach. Another commentator said that consortium members have gotten into the habit of believing they own a piece of the public defense contract pie and can do with it what they want.

The judges said they would be happy to meet with individual lawyers after cases are closed and talk to them about their observations and suggestions for handling cases. They are rarely asked to do so.

#### Issues for Possible Consideration by Commissioners at March 10, 2011 Public Hearing

##### *Measure 11 cases, training and mentoring:*

While the PDSC's structural review of a public defense delivery system is not intended to focus primarily on the quality of services being provided, in some cases quality issues may be directly related to the structure in place. That appears to be the case in Lincoln County. While the quality of representation in juvenile cases appears to be very good, significant concerns were expressed about the quality of representation in criminal cases, particularly the more serious categories of criminal cases. These problems were seen as primarily twofold: (1) there are an insufficient number of highly experienced lawyers willing to handle Measure 11 cases; and (2) new lawyers are not being provided adequate training and mentoring, are generally overburdened and underpaid<sup>5</sup> and are

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<sup>5</sup> Jeff Pridgeon said that Pridgeon, Bjornsen & McCrum had never lost an associate because of undercompensation. He said that new associates receive a lean but adequate salary and the firm provides a generous health care plan.

therefore not likely to remain long enough to develop into highly skilled criminal defense attorneys.

*Role of compensation:*

Prior to 2008, the Lincoln Defense Consortium's contract established a single flat rate for all case types with the exception of TPR cases and included a provision for hourly billing on Measure 11 cases after a certain number of hours. During every contract negotiation prior to 2008, OPDS's Contract and Business Services Division (CBS) tried to persuade the consortium to move to individual case rates. Finally in 2008, CBS insisted that cases be weighted according to seriousness. However it appears that while agreeing to a contract that valued cases appropriately, the consortium decided to continue the single rate model internally. Since under their internal model attorneys receive no more compensation for handling Measure 11 cases than they do for handling misdemeanors, it may not be surprising that some lawyers prefer not to handle the more serious cases and assign them instead to associates in their firms<sup>6</sup>. Attorneys handling termination of parental rights cases do receive a fixed amount for those cases and the quality of representation in those cases is considered to be very good<sup>7</sup>.

*Weaknesses of the consortium model:*

In earlier service delivery reports, OPDS has described the types of entities with which it contracts and noted the relative strengths and weaknesses of each type. That information is set forth in Appendix A to this report. As the Commission has found in other counties the organizational structure of consortia varies from one county to another. When a consortium is the sole provider in a county some of the traditional weaknesses of loosely organized consortia may not be offset by the presence of other providers.

In Lincoln County there is no local public defender office that could perform the functions of recruiting new lawyers to the area, training them under the direction and supervision of more experienced lawyers, providing county-wide training and other services provided by some of the state's non-profit public defender offices.

*Qualification standards:*

The law firms clearly have senior members who are experienced and capable of doing all of the necessary training and monitoring but currently do not perform this function. The senior partner in one firm, when informed about the comments regarding the lack of training and monitoring, noted that the firm never assigns lawyers to handle cases for which they are not qualified under PDSC's own qualification standards. While these standards are intended to express the

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<sup>6</sup> Some of the law firm associates are described as offering excellent representation, others as needing more training.

<sup>7</sup> Lawyers in these cases were described as "being on full alert."

minimum qualifications attorneys must have in order to be approved to handle particular case types, they are not meant to serve as a substitute for comprehensive quality assurance systems which contractors should have in place, and which they will be required to have in place for contracts beginning in January of 2012. Nevertheless, PDSC could expand the qualification standards to include specific categories of training and preparation that would have to be demonstrated before attorneys could appear at particular types of hearings without a supervisor or mentor.

*Special contract terms:*

Since the standards appear to be serving their intended function in most parts of the state, however, it would probably be more appropriate for PDSC to simply include specific requirements regarding the training and oversight function in its contract with LDC.

PDSC could also, as suggested by one commentator, consider contracting directly with individual attorneys rather than with law firms that then assign the cases within the firm. This approach would involve OPDS more directly in the selection and monitoring of attorneys, and in the assignment of cases.

*Restoration of court appointed list:*

Although, as noted in the Appendix below, the use of a court appointed list does not involve a contractual relationship or provide for any meaningful assurance of quality and cost-efficiency, neither the consortium's current quality assurance system nor its internal compensation system provide a sufficient incentive for attorneys to expend the time and skill required for adequate representation in the most serious cases. Using a rigorous, carefully administered qualification process for a court appointment list in Lincoln County might result in improved representation in Measure 11 and other serious cases.

*Outside training resources:*

The Metropolitan Public Defender office has offered to provide its mock trial training to public defense attorneys from other parts of the state on an as needed basis and without cost. OCDLA provides an annual new lawyers' seminar and a trial skills training program. These resources are currently available and would address at least some of the concerns about new lawyers who lack basic courtroom skills. They would not substitute however, for ongoing mentoring, training and monitoring within the firm or contract entity.

*Statewide mentor attorney program:*

There are many areas of the state in which training for new attorneys is not as comprehensive as it should be. One approach to meeting the need for training

statewide would be to use skilled attorneys who want to devote a portion of their time to the training of new lawyers as traveling mentors. At least one of these attorneys has indicated a willingness to provide such assistance. OPDS would need to either compensate these trainers for their time or provide adequate contract funds to allow providers to retain their services.

While the Oregon State Bar is in the process of implementing a new attorney mentoring program statewide beginning with new admittees in 2010, this program will focus more on professionalism and attorney ethics than on practice issues although each mentor and new attorney will be involved in the design of the mentoring plan for the new attorney.

#### Testimony at March 10, 2011 PDSC Meeting in Newport, Oregon

Chair Ellis provided a brief history of the Commission and its legislative charge to develop a high quality, cost efficient system. He described the Commission's service delivery planning process and some of the changes it had implemented in the public defense systems in Lane and Marion Counties. He said the Commission was not in Lincoln County to impose a system of the Commission's choosing but was there to work with the community to jointly develop the best system for the county. He described the mixture of service providers in other areas of the state. After receiving an initial report and conducting a public hearing he said Commissioners would continue to discuss the circumstances in the county and what the most suitable service delivery system for the area might be.

Guy Greco testified that he had been doing public defense work in Lincoln County since 1977. In those days there were a lot of attorneys who accepted court appointments. The Indigent Defense Services Division introduced contracts and two groups successfully bid for the initial contracts. PDSC later recommended formation of a single contract entity consisting of the two law firms and five individual attorneys.

Jeff Pridgeon said he is one of the partners in a five-person firm, four of whom handle public defense cases. One of the associates in his firm has a year of criminal law experience and the other has two.

The other law firm member of the consortium is Ouderkirk and Hollen which has four attorneys. Guy Greco said that most of the public defense cases are handled by two experienced associates in the firm, even though the partners have more experience than the associates.

He said that consortium members don't compete with each other for public defense cases. They have agreed among themselves how the cases are to be distributed. Some lawyers prefer to handle juvenile matters and others prefer to focus on criminal cases. Members devote varying percentages of their time to

public defense. Mr. Greco devotes approximately 10% of his time to consortium management. Jeff Pridgeon said that three of the independent attorney members of the consortium were associates in one of the firms before establishing their own offices. Other associates and one of the firm partners left the area seeking a drier climate or a more prosperous community in which to practice.

Chair Ellis inquired about the training of attorneys in the Pridgeon firm. Jeff Pridgeon said that there is no formal training system but that the firm has an open door policy and new lawyers tag along with senior lawyers. He said that he and Guy Greco have started working on a training process and plan to meet monthly to discuss training issues. Guy Greco said they would follow the Lane County example of holding monthly meetings where lawyers can discuss training and practice issues. Mr. Greco is not available to observe new lawyers in court but he recently surveyed the judges about their observations. They raised a couple of red flags for him to follow up on. He plans to meet with the judges more often. He will take the time to mentor lawyers who appear to need it. Chair Ellis asked about the report that one attorney provided far better representation to his retained clients than to his public defense clients, which he said was unacceptable to the Commission. Jeff Pridgeon agreed and Guy Greco said he would talk to the attorney.

Guy Greco said that the consortium has a board of directors that includes one member per office and meets approximately every six months. The focus of board meetings has been on controlling the flow of funds to each firm so that there will be sufficient funds available to repay OPDS if the group is under its contract quota. Last biennium they had to repay \$136,000. Their caseload, like Lane County's, fluctuates wildly. One reason for the fluctuation is the influx of tourists in the summer months. There are an additional 100,000 people in the county in August and September. With regard to the Commission's requirement for contracts beginning in 2012 that contractors have a board with outside members, Mr. Greco said that lawyers in private criminal practice and possibly an accountant could make a contribution to the board. The consortium has largely been trying to meet the needs of the court and responding to the court's requirements that they be present for all hearings. The consortium could develop bylaws but it has seen itself as largely just responding to the court's demands. The firms have had the obligation to mentor and train their own attorneys.

Jeff Pridgeon said that none of the current public defense providers came to the county for the purpose of handling public defense cases. People came to the firms and then went out on their own. Chair Ellis said that public defender offices are working well in other counties and the training and supervision offered by these offices is one of their strengths. Jeff Pridgeon said that no one had considered starting a public defender office in Lincoln County and if one were started there would be a loss of the senior people. He would not be

interested in working in such an office. His impression is that there is a high level of turnover in public defender offices. In Lincoln County the same lawyers have represented members of multiple generations of the same families over the years. The lawyers know the county and are part of the community. Chair Ellis inquired whether training was an issue first raised by the Commission. Mr. Pridgeon said that it was. Guy Greco said that lawyers are expected to fulfill their own training obligations. Jeff Pridgeon said that attorneys do receive CLE training but the questions may be more about training on local practice issues. This is an area of weakness.

Chair Ellis said that the Ouderkirk, Hollen firm appears to have senior partners that do very few public defense cases and associates who spend 90-95% of their time on these cases. He said that that model is very different from some of the other firms with whom PDSC contracts such as the Jack Morris firm and the Jim Arneson firm. The senior partners in those firms are very engaged in public defense and in their local criminal justice systems.

Guy Greco said that those firms may be doing mostly public defense work, like the Crabtree, Rahmsdorff firm in Bend, but Lincoln County has never had firms that dedicated 100% of their time to public defense. Jeff Pridgeon said that PDSC's predecessor had encouraged Lincoln County lawyers to spread out the public defense caseload in order to cover conflicts. Guy Greco said that the Ouderkirk, Hollen firm covers the overhead expenses for the associates and is devoting two FTE to public defense work. He understands that one of the judges' concerns is that there is a need for more experienced attorneys on Measure 11 cases and the senior partners in the firms could do some of this work but choose not to. The other concern is that the associates may be handling too many cases.

Commissioner Ozanne said that PDSC cannot control how a firm manages its associates and whether a profit is going to the firm. Guy Greco said that Jeff Hollen and his partner were willing to take caseload overflow but the associates had not indicated that they were overloaded. Chair Ellis asked whether Lincoln County might not be better served by a public defender model than the current model where the partners become a kind of pass through. Richard Scholl said he had practiced in Lincoln County for 20 years and that there are five or six sole practitioners who would not be part of a public defender office. Chair Ellis said that even with a public defender officer there would need to be a consortium to handle conflicts. Mr. Scholl said lawyers obtain their training from OCDLA-sponsored events, from the MPD trainer and by exchanging information with each other. The only thing that might be missing is mentoring for the new associates.

Guy Greco said that the system is not broken, why fix it? Chair Ellis read a passage from the initial report about senior partners not handling Measure 11 cases and two senior attorneys who appear apathetic and who fail to file motions

or take cases to trial. Chair Ellis asked Guy Greco whether the consortium's decision to continue using a single rate model internally despite a contract that values cases by seriousness level didn't make Measure 11 cases less attractive. Guy Greco said that the lawyers don't think in terms of case weight but only in terms of volume and assume that the heavier cases will average out. He, for example, would rather do Measure 11 cases than juvenile cases even though they take more time. Each firm receives a fixed amount per month regardless of the case mix. He does not see any cherry picking occurring.

Lincoln County Presiding Circuit Court Judge Charles P. Littlehales said that overall public defenders have been doing an adequate job. The judge's main concern is that there are attorneys who aren't familiar with the Evidence Code. The experienced law firm partners don't come to court. It is the new associates who come. He would like to seek more mentoring. The same is true of the district attorney's office. A lot of cases that shouldn't go to trial are going to trial. He had a number of cases in the last three to four years where cases went to trial even when it wasn't in the best interest of the client. The trial judge hears more of the details of the case and this does not benefit the client when it comes to sentencing. Guy Greco said that the judges are good about not punishing people for going to trial but Judge Littlehales said that more negative information comes out in trial that the court does consider when it comes to sentencing. There is not enough effort by either the defense or the state to really evaluate their cases.

Chair Ellis asked whether conflicts are being identified in a timely manner. Judge Littlehales said it is not an issue in Lincoln County. Some mentally ill clients "fire" their lawyers but the court has not seen a major problem. Guy Greco said that conflicts are often Measure 11 driven. Clients don't like to hear what their choices are. Conflict cases are reassigned within the consortium. There are no double payments for these cases.

Judge Littlehales said the system could be improved by adding more attorneys qualified to handle Measure 11 and other serious cases. He said he is concerned with the effort by some defenders to "judge shop." The newest circuit court judge is a former prosecutor, like all the other judges, and the defense sometimes claims that their clients can't get a fair trial from her even though the defendants are personally unfamiliar with the judge. She is an excellent judge. Judges shouldn't be severe towards anyone. They should follow the law. Guy Greco asked Judge Littlehales whether he thought a public defender office would be a good fit for Lincoln County. He said there would be a lot of conflicts and there would need to be five to seven other lawyers to handle those. A public defender would not be the best fit. The current system would work better if the judges monitored it more closely.

With respect to the use of non-routine expense funds Guy Greco said that he regrets that he may get only seven to nine hundred dollars for handling a murder

case when the expert witness he uses may be paid six or seven thousand dollars.

Jeff Hollen said one of the two associates in his firm is a very experienced attorney and the other just became Measure 11 qualified. Although at one time he devoted 95% of his time to public defense work, he and his partner do very few public defense cases any more but they are available to accept them when their associates can't. He said lawyers can't dabble in these cases. The firm has two offices, one of which does exclusively court appointed work. Chair Ellis said that when PDSC contracts with law firms the senior partners usually do full time public defense work themselves and they train, supervise and mentor the younger lawyers. Jeff Hollen said the partners in his firm are available to mentor the associates when necessary and he stays current on criminal law issues. The office has a database that includes all the current cases. He said there is not a lot of retained criminal work in the county. Chair Ellis asked why the firm continued to have its associates handle public defense cases. Jeff Hollen said he had been involved in public defense since 1976. The firm is offering a service. The firm handles a variety of case types. It has a building and a system set up for doing public defense cases. All the support is provided so that the lawyers are free to focus on their cases. Without the firm the associates who do the public defense cases wouldn't be in the county. Attorneys can't afford to come to the county and open a public defender office. Former associates of the firm have been able to go out on their own and do public defense cases. The pay for public defense work is so low that one benefit of opening a public defender office might be that it could at least provide better benefits. Chair Ellis said that other benefits would be institutionalized recruitment, training, supervision, mentoring and participation in the criminal justice system. Jeff Hollen said that those things had been provided to associates in his firm. He said that there are more and more expectations of public defense lawyers without any increase in pay. People are not moving in and setting up new offices.

Commissioner Ozanne said that PDSC expends \$1.1 million on public defense in the county with 20% of it going to the Ouderkirk and Hollen firm, but, because it is a firm, PDSC cannot see what the associates are being paid, what the overhead is and where the funds are going. Commissioner Welch asked what the consortium could do to increase the number of experienced lawyers handling Measure 11 cases. Guy Greco said that actually there are eight lawyers handling these cases in the county. Jeff Hollen said he hadn't handled one for some time but could if needed. He didn't see Measure 11 cases as a problem. Commissioner Ozanne noted that the lower than average felony trial rate suggests that there may be a problem. Jeff Hollen said that when the district attorney's office declined to negotiate on these cases he advised his lawyers to simply set them all for trial. Many of those ended up getting dismissed. The district attorney's office is different now and you can negotiate with them.

Alan Reynoldson said that he is one of the five solo practitioners and has been practicing in the county since 1992 when he started with the Pridgeon firm. He remained there five years and then went out on his own. Currently about 80% of his work is public defense. There isn't a lot of money in the county to support other types of law practice. If a public defender office were opened it would squeeze out some of the current practitioners. Criminal practice is very demanding. You can't dabble in it. Lawyers who handle public defenses cases have an incentive to do them well if they want private clients to hire them. If a public defender office were created it would take the less demanding cases, leaving the sole practitioners with more of the trial cases. Chair Ellis said that had not been his experience. PD offices tend to take the heavier cases. Mr. Reynoldson said that there are benefits from the public defense contract work but if the income were reduced very much, private work would become more attractive. With respect to monitoring quality, all the lawyers are friends and can talk to each other. Guy Greco said that in order to monitor there has to be communication. He has to know there is an issue. In the last two years the judges have become more willing to let him know about problems. When problems have been identified he has acted to address them. Chair Ellis said that Guy Greco had no authority from the consortium to take actions against attorneys. He asked whether consideration was being given to adding outside members to the board. Mr. Greco said he had gotten some new ideas from the Lane County testimony.

Judge Sheryl Bachart said that the initial report appeared to be thorough and reflected her own concerns about the weaknesses of the system. She said she took the bench in 2008 after practicing in the district attorney's office since 1997. She handles many case types but not all of them. Chair Ellis asked her to comment on the use of law firm associates to handle public defense cases. She said she sees the associates daily but has no contact with the partners. There is a learning curve for new attorneys. Mentoring would help these lawyers. She has not seen a senior partner or other mentor actually observe the new lawyers in trial. Commissioner Ozanne asked her how she as a judge felt about the lack of a centralized court docket. She said that she likes knowing her cases and their history and having control over the trial status. She tries to be sensitive to the needs of the attorneys who might have multiple trials set for the same week in different courtrooms. Guy Greco said a centralized docket would make life easier for the lawyers. Commissioner Welch asked whether she was concerned about the availability of qualified lawyers to handle Measure 11 cases. She said that the lawyers who are handling them appear to be qualified. But she does see inexperienced lawyers who don't appear to be using all the tools available to them in negotiating with the state and at sentencing. Newer lawyers need to have somewhere to go with their questions. Commissioner Welch said that she sees it as part of a judge's job to raise concerns about the qualification and training of the lawyers who appear in court and asked whether there had been a culture of silence in Lincoln County in the past. Judge Bachart responded that she would feel comfortable letting Guy Greco know if she had concerns. She

said that as a district attorney she sought out the judges' comments and that judges would not have been reluctant to contact her boss if there were a problem. She said that Guy Greco had given the judges questionnaires to complete and that she completed hers. She said that after jury trials she often debriefs the jury and is willing to share that information with counsel as well. Richard Scholl asked whether a juror had ever told her that a lawyer had done a terrible job. She said she had received such a comment and had passed it on to Guy Greco. She said that as a judge she tends to be more critical of deputy district attorneys than of defense lawyers since that is her background. She is sensitive, however, to the needs of the defendant. If defense lawyers don't know the sentencing guidelines they cannot give proper advice so it means a lot and she holds defense lawyers to a higher standard as far as their ability to handle complex cases is concerned. Commissioner Potter asked about the quality of representation in civil commitment cases. She said that there are not a lot of them in the county and it is an area of concern for both the lawyers and the court.

Ingrid Swenson reported that District Attorney Rob Bovett had had to leave and would not be available to testify later in the day but that his comments had been included in the initial report.

Dan Taylor said that he is one of the sole practitioners who handles public defense cases. His largest concern is the issue of compensation. It is hard to attract and retain quality people when the compensation is so low. He explained his personal financial situation and said that out of contract funds he has to pay all his own costs and can only afford part-time staff. His own salary is less than \$45 per hour and he has no retirement plan. If the Commission wants to recruit people to come to Lincoln county and stay it will have to offer something more than is being paid right now. Attorneys in public defense offices that he worked in in Coos and Washington County seemed to stay a couple of years and then leave. He suggested that the Commission advocate for more money in the legislature since public defense is an important part of the public safety system. Commissioner Ozanne said that lawyers who do the work have not communicated with their own legislators.

Guy Greco said that he participated in an OPDS site visit to the Clackamas Defense Consortium, which he was told was doing really great work. He visited with four or five sole practitioners. They worked in slums on bare bones budgets. In contrast, he is able to make a good living in Lincoln County because he is not tied exclusively to public defense cases. If you join local groups and get your name out there in three or four years you can get a practice going and make a decent wage. The question for PDSC is whether it can afford to have full time lawyers in a public defender office. If so, maybe lawyers like Dan Taylor could work there and get some benefits and a better wage. Commissioner Ozanne said that most of PDSC's providers take primarily public defense cases. Guy Greco's practice is unusual.

Judge Thomas O. Branford said that he had a long civil trial underway in his courtroom and had not had a chance to review the initial report but that he had spoken to Judge Bachart about the information she provided and said that he agreed with her. He said he would prefer not having a public defender office. He would not want to see current providers cut out since they have been doing good work for a long time. Chair Ellis raised the issue of having firms that commit only associates, not their partners, to the public defense work and asked whether a public defender couldn't replace the firms. Judge Branford said there had been a lot of turnover in the Pridgeon firm. People gain talent and then leave the area. He would like to see attorneys who have chosen to live and work in the county and who are doing good work stay and not be financially undercut. Commissioner Ozanne said the difficulty with the firms is that PDSC cannot look inside them. Judge Branford said he too struggles with the lack of oversight. New people are really put out to sea. It is not fair to defendants. Chair Ellis said the Commission had confronted a similar consortium model in Marion County. It developed a defender office and the combination is now working well. Both organizations are now better and stronger. Even if it wanted to the Commission couldn't substitute a public defender for the consortium in Lincoln County because of the conflict rule. Commissioner Potter said that Lincoln County has a model but there is no structure underlying the model. There is nothing that governs recruitment, training, administration. If a public defender were introduced and had no structure it would fail. Any model can fail. It works depending on the structure. Commissioner Ozanne inquired about the county's trial rates and whether lawyers were assessing cases well. Judge Branford said that it is a problem on both sides.

Chair Ellis said he would like to get some initial reactions from commissioners on Lincoln County. John Potter said that it was important to talk about a public defender office but that more important than the model is the structure. There are a variety of successful models around the state. The same model doesn't work everywhere. There are examples of good providers with each model but the structure and how it is put together is more important than the model itself. The Lincoln County system has no structure. There are no bylaws, no vision for the future, no training or mentoring, nothing other than receiving and distributing the funds and reporting on case numbers to OPDS. It is a hollow shell. He mentioned to Guy Greco that he would like to see him come back and fill in the blanks. In Lane County the system he recommended to the Commission didn't work because it didn't have a good structure and a really good manager. The system in place there now is the same model that hasn't worked here. But it is working in Lane County with someone who is turning out to be a good manager. If PDSC were really clear about the structure it wants to see in Lincoln County, the providers might be able to make it happen. The Commission has been here before, however, and has talked to people and really nothing has changed.

Commissioner Ozanne agreed with the structure/model distinction.  
Commissioner Welch said she agreed with the comments too but believes

people should be told what is wrong with their system and asked whether Commissioners agreed on what is wrong. Commissioner Ozanne said they had been told what was wrong. Chair Ellis said OPDS is contracting with an amorphous group without bylaws and in which there is no one to do the fundamental things PDSC requires such as recruitment, training, supervision, mentoring and discipline. There is not only no structure but no model. There are no bad actors. This is just how they have always done things. There is a big vacuum to fill. The climate is right for a public defender with the right director. The judges might be willing to support it if it didn't displace the individual practitioners. Commissioner Ozanne said that the community seemed more open to change than when he came to Lincoln County as the OPDS director. Ingrid Swenson said that the five independent lawyers are all reported to be doing good work without any organization. They need a sufficient caseload to sustain them. A public defender office, to be functional would need to take a large part of the caseload. It might be more difficult to start a public defender office in Lincoln County where the bench is less dissatisfied with the current system than it was in Marion County. It would be difficult to create a public defender office without local support. Commissioner Ozanne noted the involvement of the chief justice in creating the office in Marion County. Ingrid Swenson said some of the judges had suggested contracting directly with the lawyers who do the work or with a consortium, like that in Lane County, that is comprised of individual attorneys all of whom do public defense cases. Chair Ellis said he thought a public defender office could work in Lincoln County. Commissioner Ozanne said the office could start as a very small office and expand as needed to replace attorneys who might be retiring. Commissioner Ozanne suggested that a topic for a future PDSC retreat could be whether the site visit process and the structural reviews conducted by the commission would be combined.

Chair Ellis said that the next step for the Commission would be to discuss what they had heard at future meetings and that it would take several months before a final report was issued.

Comments provided after the March 10, 2011 PDSC Meeting:

On April 12, 2011 Guy Greco informed OPDS that the consortium was in the process of finalizing new bylaws and attorney agreements and was creating a nonprofit corporation. A new board of directors would be formed that would meet the PDSC requirements for contracts beginning in January of 2012. The new body would be creating a complaint policy and possibly a conflict of interest policy for board members. It would be creating a form for attorneys to complete after all trials so that the group could objectively measure whether members were getting effective results in bench and jury trials. OPDS's Best Practices were being used as a model. Mr. Greco also reported that that the consortium's new attorney agreement includes mandatory minimum CLE requirements and provides that any member with less than five years experience will be required to

complete a trial skills course. There are five Measure 11 lawyers who appear to be doing good work and three who were identified as having issues that need to be addressed. The consortium has a new evaluation process that will allow its board of directors to prohibit a lawyer from handling Measure 11 cases if they are no longer qualified to do so. The Board will also ensure that there are an adequate number of Measure 11 qualified lawyers available.

Judge Littlehales provided the following comment on April 21, 2011: "I am very pleased at the direction indigent defense is moving under the direction of Guy Greco. Setting up the nonprofit corporation with guidelines, case caps per attorney and requirements for CLE and training updates is a good way to go. .... Over the more than forty years I have been doing this, the courtroom has always been a training ground for new attorneys. However, over the past several years it seems more so and this is true of both defense attorneys and DA's. I believe with [Guy] Greco's work with three individual attorneys and with the overall group and new rules on training and competency, we will have a truly functional public defender system."

#### Testimony and Discussion at May 5, 2011 PDSC meeting

Ingrid Swenson noted some corrections to the Lincoln County report provided to Commissioners for the May 5, 2011 meeting.

Guy Greco reported that he had completed the attorney performance review that had been undertaken before the Commission's March 2011 meeting in Lincoln County. He said that he had met with all of the judges and discussed the information that they had provided and identified three attorneys in the consortium about whom concerns had been expressed. He had observed a significant change in the judges' willingness to bring performance issues to his attention. Judges were now informing him about attorney performance in individual trials. He said that the attorney who appears at arraignment will not necessarily be the attorney to whom the case is assigned. Cases will now be assigned based on the qualifications of the particular attorney. There are two or three attorneys who should not be handling Measure 11 cases. Even without these attorneys, however, there is a sufficient number of qualified lawyers to handle the Measure 11 caseload. He said that in response to PDSC's next request for proposals the current group of providers would organize as a non-profit corporation that would have written agreements with each lawyer who would be accepting cases under the contract and that it would not be contracting with the firms. The corporation would be governed by a board with two outside directors appointed by the Lincoln County Bar Association. The board would have the authority to terminate its agreement with any attorney, even if the attorney were an associate in a law firm. The Administrator would be able to monitor the caseload of each participating attorney. The agreement would not prohibit a law firm associate who handled public defense cases from leaving the law firm. The consortium administrator would oversee training, supervision,

mentoring and monitoring of the attorneys, including those employed by law firms. Although he could not control the amount of compensation paid to an associate he could control the number and type of public defense cases assigned to that attorney.

Chair Ellis said he was looking for a way to work with the local legal community. There needs to be a structure. There is a problem in a consortium that includes law firm members when the firm partners do not participate in the work. From the testimony provided in March, it did not appear that either the consortium or its members were providing training, mentoring or quality review. He said that it appeared that there was now an effort to address these needs. He said that one possible model for Lincoln County would include both a consortium and a public defender office. He asked whether there had been any discussion of a public defender office. Guy Greco responded that monthly lunch meetings had been instituted and will be mandatory in the future. None of the attorneys with whom he spoke expressed an interest in being part of a public defender office because they all preferred to be able to accept private cases. If PDSC wanted to create a public defender office it would have to recruit lawyers from outside the area. Chair Ellis asked how Mr. Greco recommended the commission proceed. Mr. Greco said that the Commission could refuse to fund the associates. He said "Salem" used to determine who received cases. That has changed and PDSC now wants the provider to be doing this. He said that the consortium would make the changes that PDSC required it to make. Compliance might demand a lot of the administrator's time. He said that if PDSC didn't want the firms to participate in the consortium it could prohibit them from doing so. Commissioner Potter asked whether the board of the non-profit would hire and fire the administrator. Guy Greco said that that is what is provided in the bylaws. The non-profit will be incorporated by the time it responds to the RFP. There are some tax issues that need to be resolved relating to whether the administrator is an employee and whether the group's retained earnings are taxable income. Ingrid Swenson asked if it wouldn't address the Commission's concerns if the consortium were to contract directly with individual attorneys rather than with law firms, so that even though associates in law firms might be handling public defense cases, it would be the consortium, rather than the firm, that selected attorney members, assigned cases and oversaw the quality of representation. Chair Ellis asked whether the consortium's contract would be with the individual attorneys rather than with the law firm. Mr. Greco said that was correct and the consortium board would have to approve the addition of any new lawyers. Chair Ellis said that the formation of a public defender office would not be an easy thing to do. It took a lot of effort in Marion County and the Chief Justice had been instrumental in recruiting the initial board of directors there. He said the Commission was not anxious to rush down that track but PDSC could go that direction in the future if needed. Guy Greco said that a public defender model could work in the future but that current providers value their freedom to engage in private practice. He said there would be changes in the operation of the consortium because there would be an administrator overseeing their work.

Chair Ellis said he was encouraged by what the consortium was doing and that it had made a good faith effort to respond to the Commission's concerns. Guy Greco said that in addition to the changes already described he was creating a trial form to gather information about the cases tried and those pled and the outcomes so that he would have information in addition to the impressions of the trial judges about the work of the lawyers.

Commissioner Potter said that he applauded the consortium for initiating changes and advised Mr. Greco of the June 16, 2011 RFP response date.

Commissioner Welch said that she was pleased with the changes that were being implemented.

### **A Service Delivery Plan for Lincoln County**

Although the Lincoln Defense Consortium has been operating for a significant period of time as little more than a pass through for state public defense funds, the changes undertaken since March 2011 indicate consortium members heard the Commission's concerns (regarding the contractor's lack of structure, its inability to control caseloads and the assignment of cases, its failure to provide training, mentoring, supervision and quality oversight), and have taken encouraging steps and committed to taking others to address identified deficiencies. Should the consortium structure itself into the proposed new entity and should that entity be the successful bidder for a PDSC contract beginning in January 2012, PDSC approves continuation of the current service delivery plan - a single consortium providing representation in Lincoln County for all public defense case types excluding post-conviction, habeas corpus, murder and aggravated murder. PDSC will review the Lincoln County service delivery plan and the administration of the contract in approximately May 2012.

## APPENDIX A

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

1. Not-for-profit public defender offices. Not-for-profit public defender offices operate in eleven counties of the state and provide approximately 35 percent of the state's public defense services. These offices share many of the attributes one normally thinks of as a government-run "public defender office," most notably, an employment relationship between the attorneys and the office.<sup>8</sup> Attorneys in the not-for-profit public defender offices are full-time specialists in public defense law, who are restricted to practicing in this specialty to the exclusion of any other type of law practice. Although these offices are not government agencies staffed by public employees, they are organized as non-profit corporations overseen by boards of directors with representatives of the community and managed by administrators who serve at the pleasure of their boards.

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

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

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<sup>8</sup> Spangenberg and Beeman, *supra* note 2, at 36.

Due to the frequency of cases in which public defender offices have conflicts of interest due primarily to cases involving multiple defendants or former clients, no county can operate with a public defender office alone.<sup>9</sup> As a result, PDSC expects public defender offices to share their management and law practice expertise and appropriate internal resources, like training and office management systems, with other contractors in their counties.

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

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

In addition to the access to experienced public defense lawyers they offer, consortia offer several administrative advantages to PDSC. If the consortium is reasonably well-organized and managed, PDSC has fewer contractors or attorneys to deal with and, therefore, OPDS can more efficiently administer the many tasks associated with negotiating and administering contracts. Furthermore, because a consortium is not considered a law firm for the purpose of determining conflicts of interest under the State Bar’s “firm unit” rule, conflict cases can be cost-efficiently distributed internally among consortium members by the consortium’s administrator. Otherwise, OPDS is required to conduct a search for individual attorneys to handle such cases and, frequently, to pay both the

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<sup>9</sup> Id.

original attorney with the conflict and the subsequent attorney for duplicative work on the same case. Finally, if a consortium has a board of directors, particularly with members who possess the same degree of independence and expertise as directors of not-for-profit public defenders, then PDSC can benefit from the same opportunities to communicate with local communities and gain access to additional management expertise.

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

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

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

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

Finally, due to the Oregon State Bar's "firm unit" rule, when one attorney in

a law firm has a conflict of interest, all of the attorneys in that firm have a conflict. Thus, unlike consortia, law firms offer no administrative efficiencies to OPDS in handling conflicts of interest.

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

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

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