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Public Defense Services Commission

Marion County Service Delivery Review Final Report June 2015

I. INTRODUCTION

Background. In 2004, the Public Defense Services Commission (PDSC) began meeting in public session in various regions of the state as part of its commitment to evaluating the effectiveness and efficiency of public defense services in all counties of the state. Since that time, the Commission has met in every region of the state. Reports from these evaluations, based upon dozens of interviews and public testimony from local justice system stakeholders, have focused on the structure of public defense services. Some counties rely upon one consortium for all its representation needs, while others might also include a non-profit public defender office, a private law firm, or hourly attorneys, in order to provide sufficient services for the county. The goal of these “service delivery reviews” has been to ensure that the best type and number of public defense organizations are serving each county.

Parallel with the Commission’s service delivery review process, the Office of Public Defense Services (OPDS) has facilitated nearly 50 peer reviews of individual public defense providers since 2004. For each review, teams of public defense leaders from around the state spend several days in a county conducting interviews with justice system stakeholders in the course of examining the quality of representation provided by the entity under review. Among the primary aims of these reviews are identifying successful local policies and procedures that might be recommended to other public defense providers, and making recommendations for improvement where needed. The overarching purpose of these reviews is to assist each public defense provider in pursuing excellence. Until recently, peer review teams produced confidential reports provided only to contract administrators and managers at OPDS.

In 2013, OPDS merged the two review processes while preserving the core purposes of each review. Under the current practice, a peer review team will examine some or all providers in a county, much as it would in the past. As a part of the peer review, providers and other system stakeholders are informed that the Commission will visit the county under review to follow-up on the findings and recommendations of the peer review report. Prior to the Commission’s public meeting in the county under review,

OPDS staff update the peer review report based on follow-up interviews with public defense providers and county officials. After the Commission's hearing, at which it receives testimony from stakeholders, a draft final report is prepared for Commission deliberation and approval.

Marion County Peer Review. The Marion County peer review team looked at the two public defense contractors providing representation in criminal cases. The Marion County Association of Defenders, Ltd. (MCAD) is a consortium of approximately 40 attorneys that contracts to provide representation in all criminal case types. The Public Defender of Marion County (PDMC) also contracts for these case types. The peer review team did not examine the work of the sole juvenile court contractor, the Juvenile Advocacy Consortium in Marion County.

The OPDS executive director asked David Audet to chair the peer review team, and asked attorneys Rosalind Lee, Alex Bassos, Morgen Daniels, and Tony Bornstein to serve as team members. Paul Levy, OPDS General Counsel, served as staff for the team.¹ The team's site visit was conducted in May, 2013, with a final report submitted in September 2013.

Prior to the review team's site visit, OPDS solicited information about each contract group. MCAD members and PDMC employees received an online survey about entity operations and the effectiveness of contract administration. The administrators of MCAD and PDMC also answered detailed questionnaires about their organization's operations. Both administrators cooperated fully with the evaluation, providing invaluable assistance in preparing for the evaluation and scheduling interviews for the site visit. Typically, peer reviews also employ an online survey of justice system stakeholders who are familiar with the work of a contractor. However, OPDS had asked all Marion County judges and the District Attorney for comments about MCAD and PDMC as part of its annual statewide performance review of all public defense conducted earlier in 2013. The peer review team reviewed results from the statewide surveys from 2010 to 2013.

A three-day site visit to Marion County was completed on May 3, 2013. During the site visit, team members met with judges, court staff, prosecutors, Sheriff's staff, MCAD and PDMC board members, attorneys and staff of each organization, and others, interviewing more than 35 people. At the conclusion of interviews, the team met separately with each administrator to discuss preliminary findings and conclusions. A draft report was then provided to each administrator for comments and corrections, after which the team approved a final report.

¹ David Audet, who has served on a previous peer review team, is in private practice in Hillsboro, where he is a member of the Oregon Defense Attorney Consortium. Previously, he was an attorney with the Metropolitan Public Defender. He is a past-President of the Oregon Criminal Defense Lawyers Association (OCDLA). Morgen Daniels is an attorney in the Appellate Division of the Office of Public Defense Services. Previously, she was with the Intermountain Public Defender in Pendleton. Alex Bassos is Director of Training at the Metropolitan Public Defender. Rosalind Lee is in private practice in Eugene, where she is a member of the Lane County Defense Consortium. Tony Bornstein is an attorney with the Federal Public Defender in Portland. He is also an alumne of the Metropolitan Public Defender.

Service Delivery Review Procedure. On October 29th and 30th, 2014, OPDS Executive Director Nancy Cozine, PDSC member John Potter, and OPDS Analyst Shelley Winn, conducted interviews with key Marion County justice system officials and contractors to determine what developments had occurred in the county in response to the peer review reports.

The key findings and recommendations of the peer review reports, and the information gained from the follow-up interviews and meetings, are related in the balance of this report. This report will be amended further in response to information gained during the PDSC meeting in Marion County on January 22, 2015. The report will be finalized following a subsequent PDSC meeting after deliberations on any specific findings and recommendations arising from the January meeting.

II. MARION COUNTY

Demographics. Marion County has a population of about 319,985, making it the fourth most populous Oregon county after Multnomah (759,256), Washington (547,672) and Lane (354,542). The total estimated population for Oregon in 2012 was 3,899,353². The county includes 20 incorporated cities, of which the largest are Salem and Woodburn.³

According to U.S. Census data, the county is significantly more diverse than the statewide population, with 68.2% identifying as white persons not of Hispanic or Latino origin (78.1% statewide); 1.4% identifying as black persons (2.0% statewide); 2.5% identifying as American Indian or Alaska Native (1.8% statewide); 2.1% identifying as Asian persons (3.9% statewide); and 24.8% identifying as persons of Hispanic or Latino origin (12.0% statewide). Census data also show the county has a slightly lower than statewide percent per capita of high school graduates (82.5%; 88.9% statewide), and a lower percent of college graduates (20.7%; 28.6% statewide). Nearly a quarter of persons over the age of five in the county speak a language other than English at home (14.6% statewide).⁴

Geographically, Marion County extends east from the Willamette River to the Cascade Mountains, covering the “promised land” that was the destination for Oregon Trail pioneers. The county is the largest producer of agricultural income among Oregon’s counties. The State of Oregon is the largest single employer in the county, with 38 state agencies based in and around Salem. Other major employers include food processors, manufacturers, schools and colleges, and tourism.⁵

² U.S. Census Bureau, State & County QuickFacts, 2012 Estimates.
<http://quickfacts.census.gov/qfd/states/41/41047.html>

³ The Salem Metropolitan Statistical Area (MSA), which consists of Marion and Polk counties, is the second largest in the state after the Portland-Vancouver-Hillsboro MSA, which consists of seven counties adjacent to or near Portland, and ahead of the Eugene-Springfield MSA, which consists of Lane County.
<http://www.pdx.edu/prc/2010-census-profiles-oregon-cities-alphabetically>.

⁴ <http://quickfacts.census.gov/qfd/states/41/41007.html>

⁵ <http://bluebook.state.or.us/local/counties/counties24.htm>.

Oregon State Police profiles of index crimes for Marion County show a steady decline over the five year period ending in 2010, with the numbers dropping from 15,389 in 2006 to 10,868 in 2010. Total reported crime for the county also declined each year over the same period.⁶

Justice System. Several features define the Marion County criminal justice system. First, its operations take place at two courthouses. While other large counties, such as Multnomah and Washington, also divide criminal court operations between two locations, in those places the facilities are separated by a short walk. In Marion County, the main Courthouse in downtown Salem is about five miles away from the Court Annex, where first appearances occur in all cases and where numerous other hearings can occur in many cases. The county jail is located adjacent to the Annex.

Another defining feature of the Marion County court system is the absence of central docketing. As discussed further below, if cases are not resolved at the Annex, they are assigned to one of the ten or so available judges at the Courthouse, each of whom manages his or her own docket. While this presents some logistical challenges for busy public defense attorneys, most lawyers report that they like the system because they know what to expect from a judge as a case proceeds toward resolution and because trials are rarely rescheduled due to other trials competing for the same time slot.

Twelve judges have offices in the Marion County Courthouse, including Presiding Judge James Rhoades. The building underwent extensive renovation after a 2005 arson fire and is now a comfortable, modern building with impressive accommodations for the court and public. The District Attorney's offices are located in a building across the street from the Courthouse.

Case processing. All criminal cases originate at the Annex, which is a court facility located near the Marion County Jail at 4000 Aumsville Hwy SE, Salem, about five miles from the downtown Courthouse. The Annex is served by two judicial officers: a referee, and a Circuit Court judge.

First appearances in criminal cases at the Annex are at 8:30 am for out-of-custody defendants; in-custody defendants appear at 3:00 pm. Jail staff provide in-custody defendants with a sheet of paper listing all MCAD and PDMC attorneys, with the name of the lawyer appointed to a particular defendant highlighted.

Discovery and plea offers are given to defense counsel at the first appearance in nearly all misdemeanor cases. In many felony cases, police reports and plea offers are available at first appearance if the defendant waives a "preliminary hearing." If it later appears that the case will proceed to trial, a defendant may request a preliminary hearing (which, as in most counties, simply means the deputy district attorney will take

⁶ Oregon State Police, 2010 Annual Uniform Crime Report, http://www.oregon.gov/osp/CJIS/Pages/annual_reports.aspx. The "Crime Index" was developed to measure crime on a national scale by choosing eight offenses that are generally defined the same by each state, which are: Willful Murder, Forcible Rape, Robbery, Aggravated Assault, Burglary, Larceny (Theft), Motor Vehicle Theft and Arson. Total reported crime was 40,942 in 2006 and 33,270 in 2010, the last year for which data are available and a low for the five-year period.

the case to grand jury), although many cases proceed to trial on an information of the district attorney.

The second appearance in criminal cases, called a “Rule 7” hearing, after Uniform Trial Court Rule 7.010, is also at the Annex. This proceeding is the occasion for defendants to enter a plea of guilty, or to enter a plea of not guilty and request a court date at the downtown courthouse. Those who plead guilty at the Annex can elect to be sentenced immediately or at a later date, and Rule 7 hearings may be continued to allow the parties to continue negotiations. In-custody cases must go downtown if a settlement is not reached within 30 days of arrest, unless there is a waiver of the defendant’s 60-day speedy trial right.

Typically, the first Rule 7 date is set within one or two weeks of the first appearance for in-custody defendants. For them, the appearance is at 8:30 am. For out-of-custody defendants, Rule 7 hearings are at 1:30 pm, about 30 days after the first appearance. The court limits the number of cases on any given day, and attorneys have some control over when the Rule 7 hearing will be held, so there is some variance on when these are scheduled.

When cases are transferred to the downtown courthouse after a Rule 7 hearing, the defense attorney asks Annex court staff at the service counter to assign a judge to the case. Any intention to file a motion for change of judge (“an affidavit”) must be announced at the counter, with motions filed by 5 pm the following day. This allows little or no time for client consultation, especially for those who are in custody. Court staff also provides defense counsel with a case status date with the assigned downtown judge. Each judge conducts case status hearings at regular times during the week, although the time and day is different for each judge.⁷

Once a case goes downtown, it is managed by the assigned judge. In Marion County, pretrial motions are, in fact, scheduled and heard on a date prior to the scheduled trial, unlike some other counties where motions are heard on the day of trial.

Before a case resolves at the Annex or goes downtown, there may be other pretrial matters heard at the Annex, such as release hearings, and some trial-related motions, such as motions to suppress or motions in limine. (A short release pitch is typically made at first appearance, but more informed release hearings are heard separately.) Pretrial hearings at the Annex are heard at 10:30 am for in-custody defendants; 2:30 pm for out-of-custody.

Probation violation hearings are also held at the Annex unless a judge has made clear that he or she wants to preside over a particular defendant’s probation violations, which happens relatively rarely. After the first appearance on most PVs, there is an “Admit/Deny” date about 12 days after arrest. Contested hearings are set at the Annex

⁷ The trial judges each have slightly different practices once the case gets on their docket; most of the judges require one or more “status conferences” and a pretrial hearing. Some require only a pretrial. Most judges, but not all, have a standard Pretrial Order setting out their specific requirements and deadlines for such things as exchange of exhibits, etc. The content of the orders varies from judge to judge. Most of these matters are explained in a “Judicial Preferences” Manual maintained by the Court.

a couple days after the Admit/Deny date, in order to meet the statutory requirement to have a hearing within 14 days of arrest.

Marion County also operates a Drug Court, a Mental Health Court, and a Veterans Court. MCAD attorney Phil Swogger staffs the Drug and Mental Health Courts. Some cases are referred directly to these courts at the time of arraignment. If a case that begins on the regular case track is negotiated into one of these courts, Mr. Swogger is typically substituted as counsel when the client enters the specialty court. Judge Dennis Graves presides over the Drug Court, and Judge Mary James presides over the Mental Health Court.

Daniel Wren, an MCAD attorney and board member, staffs the Veterans Court, along with a PDMC attorney, a deputy DA, and representatives from the Veterans Administration, probation and parole, and treatment providers. Judge Vance Day presides over the Veterans Court.

Oregon Judicial Department (OJD) data shows that the Marion County felony trial rate is slightly higher than the statewide average, and the misdemeanor trial rate is slightly below the statewide average.⁸ The average age of criminal cases when closed is older than OJD targets but consistent the statewide average.⁹ The total number of criminal cases filed has declined slowly but steadily over the past five years.¹⁰

System Issues. Overall, defenders, prosecutors, the court, and other criminal justice system stakeholders in Marion County enjoy cordial and collegial working relationships. While the normal friction of adversaries is clearly present, the various parties express

⁸ Cases Tried data from the Oregon Judicial Department, at <http://courts.oregon.gov/OJD/OSCA/pages/statistics.aspx>.

	<u>Felony</u>	<u>Misdemeanor</u>
2011	5.2% (4.4% statewide)	2.3% (3.8%)
2010	4.9% (4.2%)	2.5% (3.7%)
2009	6.1% (5.7%)	2.6% (4.4%)

⁹ Age of Terminated Cases data from the Oregon Judicial Department, at <http://courts.oregon.gov/OJD/OSCA/pages/statistics.aspx>

	<u>Felonies Closed Within 120 Days (Goal is 90%)</u>
2011	71.7% (71.7% statewide; 70.5 Multnomah, 88.0 Lane, 88.1 Coos)
2010	72.6% (70.6% statewide; 67.1 Multnomah, 88.7 Lane, 88.9 Coos)
2009	71.3% (69.7% statewide; 61.9 Multnomah, 85.9 Lane, 89.3 Coos)
	<u>Misdemeanors Closed Within 90 Days (Goal is 90%)</u>
2011	79.1% (80.0% statewide; 86.6 Multnomah, 86.3 Lane, 87.4 Coos)
2010	76.1% (78.2% statewide; 82.8 Multnomah, 88.7 Lane, 86.3 Coos)
2009	77.7% (78.5% statewide; 79.5 Multnomah, 87.1 Lane, 88.8 Coos)

¹⁰ Cases Filed data from the Oregon Judicial Department, at <http://courts.oregon.gov/OJD/OSCA/pages/statistics.aspx>

	<u>Felonies</u>	<u>Misdemeanors</u>
2011	2,543	3,979
2010	2,705	4,044
2009	2,750	4,409
2008	2,791	4,364
2007	3,246	4,495

general satisfaction with the structure of the county's criminal justice system and work collaboratively on some policy and procedural matters. As noted above, difficulty with access to confidential meeting space for in-custody clients is a barrier to necessary communication between attorneys and clients. And the physical distance between the Annex and the downtown courthouse creates a strain on defenders who regularly find themselves needed in several places at or near the same time.

The peer review team explored in several interviews the findings of a 2011 Criminal Justice Commission report¹¹ on Measure 11 showing that 63 percent of Measure 11 defendants in Marion County are convicted of some Measure 11 charges. This is a higher percent than in other rural counties, which on average convict at a lower rate than larger populous counties. By way of comparison, though, the Measure 11 conviction rate in Multnomah County is 36 percent. The study also showed that while blacks who are indicted for Measure 11 offenses are about 15 percent less likely to be sentenced to prison than whites, Hispanics are about 40 percent more likely to be sentenced to prison than whites in Marion County. When the peer review team asked deputy DAs about the report, they were unaware of it but suggested the data simply reflects better case assessment and charging decisions by the Marion County DA's office than in those counties that convict in a smaller percentage of cases.

Statewide Survey Results for Marion County. As noted above, unlike most other peer reviews, OPDS did not send Marion County justice system stakeholders a survey specific to MCAD and PDMC because the annual statewide public defense performance survey had been sent to some of these officials just a couple months prior to the site visit. The peer review team did review the Marion County results for the statewide surveys for 2010 through 2013.

The statewide survey asks generally about public defense representation in Marion County. Some survey responses had suggestions aimed at both entities, but other comments did not identify whether it was true of one or both providers. Particular areas of concern for both entities included better management of lawyers, though the particular challenge areas for each group appear to be quite different. Some MCAD lawyers are criticized for not visiting clients frequently enough, or arriving to court unprepared. One respondent indicated that the "Public Defender in Marion County does a better job litigating pre-trial issues than the MCAD members," but that "MCAD membership (overall) does a much better job managing clients and getting clients to acknowledge the reality of their situation." Overall, most respondents to the statewide surveys reviewed by the peer review team rated public defense representation in Marion County as "good," with a few respondents over the years saying it was "excellent," some saying "fair," and none saying "poor."

III. OVERVIEW OF MARION COUNTY ASSOCIATION OF DEFENDERS (MCAD)

Background. The Marion County Association of Defenders, Ltd. is a consortium of attorneys formed in 1993 as a Section 501(c)(3) nonprofit corporation. Steve Gorham served as MCAD's first Executive Director until 2008, when Paul Lipscomb became the

¹¹The study attributed most of the disparity in application of Measure 11 to DA practices. The study is available at http://www.oregon.gov/CJC/docs/measure_11_analysis_final.pdf.

Executive Director after retiring as Presiding Judge in Marion County. Shortly after the finalization of the peer review report, Jon Weiner, a Salem attorney, became Interim Director of MCAD. He continues in that position as of the writing of this report.

In 2005, when MCAD was still the sole public defense provider in criminal cases in Marion County, the PDSC conducted a service delivery review of public defense in Marion County. Its 236-page report recognized that there were some very good attorneys on MCAD's active roster of between 50 and 55 attorneys, but found that the organization lacked structure and, in particular, did not have effective quality assurance and management mechanisms.¹² The report concluded that MCAD should undertake significant reforms if it wished to continue to contract with PDSC and that a new public defender office should be established with quality assurance and management structures that would "serve as models for other public defense providers across the state."¹³

In September 2006, MCAD reported to the Commission on progress toward reforms. Their 46-page report described a restructured board of directors that would include non-MCAD members appointed by outside entities; creation of a "communications plan" that required members, among other things, to check their voicemail; an "education plan" requiring mandatory membership in OCDLA and attendance at CLE programs; and the creation of a "work group" structure, which would be the core of MCAD's quality assurance program.¹⁴ As described in more detail later in this report, these structures remained in place at the time of the peer review.

In early 2009, Ingrid Swenson, then-executive director of OPDS, provided the Commission with a 12-page report summarizing the 2005 review and subsequent improvements at MCAD.¹⁵ By this time, Judge Lipscomb had become executive director of MCAD and the new public defender office was also in operation.

In 2010, the Commission again heard from MCAD and PDMC.¹⁶ The MCAD report described plans to become a "model of excellence" in public defense. The PDMC report described its basic office operations.

Operations. As noted above, MCAD is governed by a board of directors. There are nine board members, three of whom are non-MCAD members. The Marion County Circuit Court Presiding Judge, the local bar association and the dean of the Willamette Law School each select one of the non-MCAD board members. MCAD attorneys on the board have staggered three year terms. The non-MCAD members do not have limits to their length of service. The board meets monthly and considers major policy, personnel, and financial matters.

¹² *OPDS's Report to the Public Defense Services Commission on Service Delivery in Marion County* (February 2006),

<http://www.oregon.gov/OPDS/docs/Reports/MarionCountyReportwithappendices022106.pdf>.

¹³ *Id.*, at 34.

¹⁴ PDSC Agenda, September 14, 2006. <http://www.oregon.gov/OPDS/docs/Agendas/09-14-06.pdf>.

¹⁵ PDSC Agenda, January 22, 2009. <http://www.oregon.gov/OPDS/docs/Agendas/01-22-09.pdf>.

¹⁶ PDSC Agenda, June 17, 2010. <http://www.oregon.gov/OPDS/docs/Agendas/06-17-10.pdf>.

The MCAD Executive Director is selected by and serves at the pleasure of the board. When Paul Lipscomb began his service as Executive Director, he devoted a significant amount of time to MCAD business. He later moved from Salem to Sisters, Oregon. Although he always attended board meetings and remained available by phone and email to address MCAD matters as needed, the distance limited his day-to-day contacts in Marion County. As noted earlier, Jon Weiner became the Interim Executive Director in January 2014 and he continues to serve in this capacity.

The daily operations of MCAD are managed by the Office Manager, Lisa Richardson, who works full time, and Leslie Cross, who works on an intermittent part-time basis. They work with MCAD members and the court to track case assignments and manage payments to members. They also maintain a database, which members can access and update, to track attorney caseload and case-specific data, such as disposition by counts. A fine is imposed on members who are late in entering closing data about their cases.

Members of MCAD must apply for membership every two years, coinciding with the two-year period for MCAD's contract with PDSC. Each member signs an "MCAD Independent Contractor Attorney Agreement," which details the conditions of membership, including provisions regarding imposition of corrective actions and termination for unsatisfactory performance. Corrective measures and termination may be taken by the MCAD board of directors "or its designee."

Although the active roster of MCAD attorneys lists 41 members, that number includes some who accept very few or no appointments through the group, either because they have their own contracts with PDSC to provide representation in capital or PCR cases or because they have a busy practice of retained cases.

MCAD's written protocols include three main components to the group's quality assurance mechanisms. First, an education plan requires, among other things, membership in OCDLA and attendance at CLEs, including two MCAD-sponsored CLEs per year. Second, assigned mentors provide guidance to new MCAD lawyers regarding Marion County criminal procedure, as well as knowledge and skills for effective criminal defense. Third, a mandatory work group structure provides that each member will participate in a work group, headed by a group leader, which meets regularly to discuss legal and procedural developments affecting criminal defense in the county. In addition, according to the plan adopted by MCAD, the work groups "include oversight of attorney performance, routine performance reviews, and appropriate response to complaints."

According to the work-group plan description, complaints are handled within a three-level structure. At the first level, the work group will investigate complaints and develop an "action plan" to address specific concerns about a member's performance. Matters that cannot be resolved at the first level are referred to a "Committee of Working Group Leaders," which may place a member on probation for no longer than three months. At the end of that period, a "probation monitor" will report on the matter, recommending an end to probation if the report is good or referral to the next level. At the third level, the MCAD Executive Director receives reports about the matter and "will impose whatever resolution s/he deems appropriate," subject to a member's right to seek review by the MCAD board of directors.

MCAD members are appointed to cases through an “attorney of the day” structure that has been in place since well before the 2005 PDSC review of public defense in Marion County. At a monthly MCAD membership meeting, attorneys sign up for a rotation on a court calendar for misdemeanor and felony case assignments. On his or her designated day, the attorney is present in court for arraignments and personally meets new clients there and can make arrangements then for further meetings with the client. PDMC receives cases on the first work day of the week, and MCAD is present the other days of the week to receive case appointments. According to MCAD, its attorneys meet with all clients within the time periods required by its contract with PDSC. At the time of the peer review, lawyers were able to switch days and trade cases in ways that increased some attorney caseloads to unacceptably high levels. Since the peer review, MCAD reports that it has implemented case distribution oversight to even-out caseloads and prevent attorneys from carrying too many cases.

IV. SUMMARIZED FINDINGS OF THE PEER REVIEW & SYSTEM DELIVERY REVIEW UPDATES

Responses to Questionnaires Circulated in 2013. MCAD members were asked to complete an online survey about the operations of the consortium. Thirty-two members responded to that survey. In response to the member survey circulated at the time of the peer review, most MCAD attorneys expressed general satisfaction with how the consortium operated. However, in response to a question about how well MCAD addresses concerns about underperformance by lawyers, while most (16) said it was “good,” and five said “excellent,” five also described it as only “fair,” and five said “poor,” and comments suggested that MCAD needed to address the consistent under-performance of certain attorneys.

Information Obtained During Peer & Service Delivery Review Interviews. During the course of its three day site visit, the peer review team interviewed about 35 individuals involved with the Marion County criminal justice system, in addition to meeting twice with Paul Lipscomb. The Service Delivery Review team, which included OPDS Executive Director, Nancy Cozine, PDSC member, John Potter, and OPDS Analyst, Shelley Winn, interviewed stakeholders, as well as MCAD and PDMC lawyers and leaders, during October 29-30, 2014.

Most interviewees described overall satisfaction with MCAD attorneys and, more generally, with the functioning of the criminal justice system in Marion County. Attorneys from MCAD are seen as good partners in a number of collaborative efforts, such as standing committees on court operations and security, special projects such as an effort to streamline jury duty procedures, and in connection with a number of special courts, such as a new veteran’s court that requires good working relationships among prosecutors, defenders, the court, community corrections, and treatment providers. Marion County is also enthusiastically embracing evidence-based practices in its parole and probation operations, which are managed by the Sheriff’s Department. Likewise, the county has been active in grant-funded prison reentry programs.

Many interviewees did express some concern regarding the county’s Courthouse Annex and jail operations. The options for meaningful, confidential attorney visits with clients at

the jail are very limited. On the other hand, Annex personnel complain about attorneys showing up late and unprepared for proceedings. Moreover, the jail is at capacity, requiring routine releases for purposes of population control.¹⁷

Interviewees generally described the work of MCAD attorneys as very good, and many said that the quality of the group overall improved significantly when Paul Lipscomb became executive director. Stakeholders noted additional improvements when Jon Weiner became the Executive Director in January 2014. However, reports continued to suggest that a small number of low performers remain in the group. The concerns with these attorneys generally involved lack of adequate case preparation and poor client contact.

According to interviews, MCAD attorneys like being a part of the consortium and especially appreciate the support they receive from the MCAD office staff. Several attorneys described a high degree of satisfaction with the group's mentor program for lawyers new to MCAD. It appears that MCAD did some work to improve its training and mentoring program between the time of the peer review and the service delivery review visits.

V. RECOMMENDATIONS OF THE PEER REVIEW TEAM FOR MCAD & MCAD RESPONSE

Consortium Structure and Administration

The peer review team found that the consortium model generally, and MCAD's structure in particular, allows public defense clients to benefit from the knowledge and skill of experienced criminal defense attorneys who wish to engage in the private practice of law but are willing to accept public defense cases, and that the MCAD consortium includes some excellent attorneys. These attorneys, who generally maintain a substantial caseload of privately retained clients, enjoy the collegiality of the MCAD group and appreciate the efficiency of MCAD staff in handling the business end of public defense work.

The peer review team also found that MCAD has structures designed to assure quality representation. Its education plan is a model that can be recommended to other consortia, including MCAD's commitment to conduct its own CLE programs. The mentorship program is appreciated by members new to the group. The group's email listserv is an important and effective means of collaboration among members. And the work group structure is a good model for consortium lawyers to keep abreast of legal and procedural developments and to address particular issues and challenges that group attorneys may be facing. MCAD also has an excellent database that is capable of capturing and measuring important information about caseloads, case outcome, and attorney performance. MCAD's addition of caseload oversight and management is a very positive improvement.

¹⁷ Members of the peer review team observed an in-custody arraignment of a person charged with theft in the third degree, who was ordered held in custody. Asked about this afterward, the team was told the person would undoubtedly soon be released due to overcrowding.

Quality of Representation

MCAD took steps to improve overall representation and to address concerns regarding particular lawyers following the peer review report. Still, effective quality assurance remains a challenge for MCAD. Interviews indicate that there are a few lawyers in the group who continue to appear for court without being well prepared, effective advocates for their clients.

Peer Review Recommendations & MCAD Response

1. **Quality Assurance.** The peer review team recommended that MCAD review its procedures for ensuring quality representation by all of its members, and that the board review the OPDS *Best Practices for Oregon Public Defense Providers*¹⁸ and determine how best to implement procedures for training attorneys, monitoring and evaluating attorney performance and, where necessary, remedying performance deficiencies. The peer review team further encouraged MCAD to explore the prevalence of resolving cases at the Annex without pretrial litigation, including whether the practice is confined to particular attorneys, and determine whether each attorney is fulfilling the obligation to advocate for a client's cause with zeal, skill and loyalty. MCAD has clearly taken steps to address concerns regarding the quality of services provided, but has not yet found a way to address all concerns.
2. **Enhanced Database Capability.** The peer review team found that MCAD is well served by a strong office staff and a sophisticated database that enables the group to easily account for the work it performs, make required reports to and receive payment from OPDS, and distribute payment to its members. The peer review team recommended that the database be used to track additional information such as open public defense cases for each member, and case closing information such as the resolution by alleged counts and the manner in which the case was resolved. Again, MCAD has been responsive to the peer review team recommendations and has begun tracking attorney caseloads and other information.
3. **System Issues.** With the physical distance between the Annex and downtown courthouse, the peer review team found that public defense lawyers could spend much of each day literally running and driving around, with little time for client contact, case preparation, or litigation. The peer review team recommended that MCAD leaders explore the desirability of changing the current scheduling practice and work with PDMC and the court if a different approach appears to be preferable. This appears to be an area where MCAD could continue to focus.
4. **Measure 11 advocacy.** The peer review team recommended that MCAD review the findings of the 2011 Criminal Justice Commission report on

¹⁸ Available on the OPDS website at <http://www.oregon.gov/OPDS/CBS/pages/bestpractices.aspx>.

Measure 11, and determine if a different approach to these cases, either on a case-by-case basis or as a systemic challenge, is warranted by the data that show disproportionate conviction rates in Marion County for persons charged with Measure 11 offenses. This appears to be another area where MCAD could continue to implement improvements by ensuring that qualified lawyers are readily available for more serious case types.

VI. OVERVIEW OF PUBLIC DEFENDER OF MARION COUNTY (PDMC)

Background. As noted above, the October 21, 2005, Service Delivery Plan adopted by the Commission for Marion County called for the creation of a new public defender office with quality assurance and management structures that would “serve as models for other public defense providers across the state.”¹⁹ Thereafter, a steering committee that included members of the local community worked with OPDS to plan for the new office and recruit a board of directors, which held its first meeting in September 2006. The board met regularly to establish the new office and recruit an executive director. Tom Sermak, who had been a senior attorney with the Public Defender Services of Lane County, was selected as the Executive Director. He began working with the Board on April 2, 2007, to locate office space and furnishings and recruit an initial staff for the office, which opened in July 2007.

In Ingrid Swenson’s 2009 report to the Commission on Marion County, she described the efforts made to establish the PDMC. She reported that in 2008, the first full year of PDMC operations, the office received 1,877 appointments (MCAD received 6,319 appointments). She also wrote that “[w]hile the substantive legal work of the office is said to be good, there have been on-going issues related to the deployment of the office’s attorneys, timely appearances at court hearings, office management, and adequate training of new attorneys.”²⁰ Later, in an update before the PDSC in 2010, it appeared that many of the concerns identified earlier had been resolved. The office had expanded to eight lawyers, two investigators, a legal assistant and three other fulltime support staff, and was handling approximately 25% of the adult criminal caseload in the county.²¹

Operations. PDMC is a nonprofit corporation governed by a seven-member board of directors that meets monthly. One board member each is appointed by the Chief Justice of the Oregon Supreme Court, the President of the Oregon Bar Association, and the Chair of the Marion County Board of Commissioners. The board selects the remaining members. Among its duties, the Board approves an annual audit and report from the Executive Director, approves revisions to an employee manual, and conducts an annual review of the Executive Director. According to the employee manual, the board may also receive employee grievances, a process that had been followed in at least one instance at the time of the peer review.

¹⁹ OPDS’s *Report to the Public Defense Services Commission on Service Delivery in Marion County* (February 2006), at 34.

<http://www.oregon.gov/OPDS/docs/Reports/MarionCountyReportwithappendices022106.pdf>.

²⁰ PDSC Agenda, January 22, 2009. <http://www.oregon.gov/OPDS/docs/Agendas/01-22-09.pdf>.

²¹ PDSC Agenda, June 17, 2010. <http://www.oregon.gov/OPDS/docs/Agendas/06-17-10.pdf>.

At the time of the peer review, PDMC had budgeted for eight attorney positions in addition to the Executive Director, who handles his own caseload. Their work was supported by two investigators, two legal assistants, and several other support staff. As discussed more fully below, the Executive Director articulated a strong desire to add several new attorney positions, another investigator and another support person to the office staffing.

The PDMC negotiated for an increase in its 2014 contract in order to add attorneys and staff, and while the number of lawyers had increased to 10 by the time of the service delivery review, PDMC had not yet implemented any form of mid-level management as was recommended by the peer review team. Additionally, only one attorney who was employed at the time of the peer review remained by the time of the service delivery review. Seven of the lawyers interviewed at the time of the Service Delivery Review were relatively new to the office.

PDMC is the primary public defense contractor for new case appointments on the first workday of every week. An attorney from PDMC, usually the Executive Director, is present at criminal arraignments, at which time new clients and the court are given the name of the PDMC lawyer who will handle the matter. Lawyers are assigned on the basis of their qualifications to handle particular case types, with an effort to maintain balanced workloads. PDMC reviews the docket prior to arraignment to screen for obvious conflicts of interest. After arraignment, when discovery is received, the assigned attorney determines whether any conflicts of interest are present pursuant to a written conflict checking procedure.

Although a senior PDMC attorney holds the position of “assistant to the executive director,” Mr. Sermak has primary responsibility for supervising and training all staff attorneys. Training consists largely of an orientation to the office and the Marion County court system, the assignment of a mentor, and some case review during the early stages of employment. Thereafter, PDMC relies upon the resources of the Oregon Criminal Defense Lawyers Association (OCDLA) for most of its training and continuing legal education needs. The physical configuration of the PDMC office promotes frequent informal consultations among the firm’s attorneys, who also meet as a group once a week to discuss their cases and system issues. At the time of the peer review, and again during the service delivery review, Mr. Sermak was described as being spread too thin to offer sufficient supervision to newer lawyers in the office. Nonetheless, lawyers report that they enjoy their work, appreciate the excellent support staff, and feel supported in the office.

As part of its case closing protocol, PDMC seeks to provide each client with a survey asking about satisfaction with the firm’s services. Responses, which are rare, are reviewed by the case attorney and, in the event of critical responses, by the Executive Director. The responses are maintained in the client’s file. There is no tabulation of responses or other data maintained concerning the responses outside of the client’s file.

According to the Executive Director, “[a]ll staff is to be evaluated annually.” However, responses on the survey of all PDMC staff, discussed further below, indicate that regular performance reviews may not be occurring. Annual performance appraisals

were still not happening at the time of the service delivery review visit, but there had also been a significant turnover in lawyer staff.

PDMC is an active participant in justice system policy discussions. All PDMC attorneys are members of the Marion County Bar Association. The Executive Director is a member of the Local Public Safety Coordinating Council. He also meets regularly with the presiding judge to discuss issues concerning his office. He also represents the office at monthly meetings with judges, court staff, jail administration, community corrections and others regarding operations at the Courthouse Annex. All stakeholders described Mr. Sermak as an excellent resource who has fostered positive working relationships with all Marion County stakeholders.

VII. SUMMARIZED FINDINGS OF THE PEER REVIEW & SYSTEM DELIVERY REVIEW UPDATES

Responses to Questionnaires Circulated in 2013. In response to the survey of PDMC employees in 2013, there was strong endorsement for the clarity of the PDMC mission to provide high quality legal services²² and that PDMC is accomplishing its mission. Nearly all respondents to the survey said they were proud to work at PDMC, and that they were supported in their work by the office. Most respondents disagreed with the statement that “my compensation is about equivalent to others who do the same kind of work,” and, for reasons discussed further below, similarly disagreed with the statement “people stay in the same job assignment too long.”

Responses were somewhat mixed regarding PDMC supervisory functions, which was reflected as well in staff interviews conducted by the peer review team. While nearly all respondents strongly agreed that “my supervisor treats me with respect,” there was some disagreement that management priorities are consistent with the PDMC mission and that management decisions take into account the needs of PDMC staff. There was also somewhat weak support for the statement that the “current organizational structure is appropriate for PDMC’s mission and philosophy,” and mixed responses to whether supervision is helpful in accomplishing daily tasks. Nearly half of the respondents also disagreed with the statement that “I receive regular formal performance reviews by my supervisor.”

Information obtained during interviews. During the course of its three day site visit, the peer review team interviewed about 35 persons involved with the Marion County criminal justice system, in addition to meeting twice with Tom Sermak. As noted earlier, the Service Delivery Review team, which included OPDS Executive Director, Nancy Cozine, PDSC member, John Potter, and OPDS Analyst, Shelley Winn, interviewed stakeholders, as well as MCAD and PDMC lawyers and leaders, from October 29-30, 2015.

²² The firm’s mission statement reads: “The overall mission of the Public Defender of Marion County is to provide high quality, cost effective criminal defense to persons who qualify for our services while maintaining the confidence of the clients that they are receiving zealous and proficient legal representation.”
http://www.pdmarion.org/Public_Defender_of_Marion_County/PDMC_Home.html.

Most interviewees described overall satisfaction with both PDMC attorneys and, more generally, with the functioning of the criminal justice system in Marion County. Like MCAD, attorneys from PDMC are seen as good partners in a number of collaborative efforts, such as standing committees on court operations and security, special projects such as an effort to streamline jury duty procedures, and in connection with a number of special courts, such as the veteran's court that requires good working relationships among prosecutors, defenders, the court, community corrections and treatment providers.

Most interviewees recognized PDMC as an important player in the Marion County's criminal justice system. A number of people noted the difficulties that PDMC had when it began operating in a fairly closed and insular legal community. In this connection, one person described Salem as a "big farm town." Several judges acknowledged that Mr. Sermak had a "steep learning curve" when PDMC began operations and that there were a number of problems at first. Those issues have been largely resolved, although the fairly regular turnover at PDMC means a regular influx of attorneys new to the system who face challenges of mastering difficult work in a complex setting. Generally, though, judges and other court staff consider Mr. Sermak to be a very good manager. He is said to "check in" regularly about attorney performance, responds to specific performance concerns, and participates constructively in system policy discussions. One person said he does a "fantastic job" as a system partner.

Overall, PDMC attorneys are seen as zealous advocates for their clients. Some interviewees expressed concern that some attorneys were zealous to a degree that it was a disadvantage to the clients. Others noted appreciation for PDMC motion and trial practice. At the time of the service delivery review, PDMC lawyers were described as having consistently good client contact and arriving well-prepared for court hearings.

Several interviewees mentioned the turnover at PDMC, which means that judges, DAs and others regularly encounter inexperienced attorneys who are dependent upon training and supervision from Mr. Sermak. As mentioned earlier, there are concerns that Mr. Sermak spends too much of his time in court and on casework to devote sufficient time to supervision.

Interviews with PDMC attorneys and support staff reflect a group that is strongly committed to zealous client advocacy but frustrated with the barriers to effective advocacy. The relatively low compensation for attorneys is seen as the primary reason for high turnover at the office. At the time of the site visit, two senior attorneys had just resigned and another one, who said he loved his job there but needed to find better paying work, resigned shortly after the visit. As noted earlier, by the time of the service delivery review, only one attorney who was present during the peer review remained on staff. The peer review team heard complaints regarding leadership, but those concerns were not articulated during the service delivery review. A major friction point for many was office technology, which is based on Apple products. While Mr. Sermak has not made any immediate changes to the office system, he is exploring other options.

Peer Review Recommendations & PDMC Response

- 1. Quality of Representation.** The peer review team commended PDMC for having established itself in the Marion County criminal justice system as a strong and respected presence known for its zealous and effective advocacy on behalf of public defense clients. PDMC was also commended for having a strong and engaged board of directors that is clearly committed to responsible stewardship of PDMC and supportive of its role in the local legal community. Finally, PDMC, largely through its Executive Director, was noted as a valued partner in county criminal justice planning and responsive to concerns and needs of the court and other system stakeholders. Mr. Sermak is widely applauded for successfully establishing PDMC, and providing strong representation for public defense clients.
- 2. Office Management.** The peer review team found that PDMC's structure must evolve in order to sustain its good work, and recommended that it add several attorney and staff positions to allow establishment middle-level management. This recommendation was identified as necessary in order to relieve the Executive Director of sole responsibility for the training and supervision of PDMC attorneys, and promote closer and more meaningful supervisor involvement with attorney development. The team also recommended that Mr. Sermak and the PDMC board assess whether he can better meet the demands of successfully leading and inspiring the office employees. The team specifically recommended that PDMC provide more training for its attorneys, noting that the high turnover rate makes on-going training essential. It recommended that the Executive Director explore ways to offer a new lawyer trial skills curriculum and hour-long presentations at the PDMC office, on topics affecting criminal defense generally and in Marion County. Finally, the peer review team recommended that, to the extent that the firm is able to increase its salary scale, both the office and its clients will benefit significantly. PDMC has done a few trainings in the office, but nothing consistent, has not implemented any mid-level management structure despite addition of new lawyers at the start of 2014, and has not created a new lawyer trial skills curriculum.
- 3. System Issues.** With the physical distance between the Annex and downtown courthouse, the peer review team found that public defense lawyers could spend much of each day literally running and driving around, with little time for client contact, case preparation, or litigation. The peer review team recommended that PDMC leaders explore the desirability of changing the current scheduling practice and work with MCAD and the court if a different approach appears to be preferable. This appears to be an area where PDMC could continue to focus.
- 4. Measure 11 advocacy.** The peer review team recommended that PDMC review the findings of the 2011 Criminal Justice Commission report on Measure 11, and determine if a different approach to these cases, either on a case-by-case basis or as a systemic challenge, is warranted by the data that show disproportionate conviction rates in Marion County for persons charged with Measure 11 offenses. PDMC has, since the peer review, designated two experienced attorneys in the office who handle all of the Measure 11 cases.

VIII. Service Delivery Review – Recommended Areas of PDSC Inquiry

Both MCAD and PDMC serve as dependable public defense resources in Marion County. Both should be applauded for taking steps to act on recommendations made by the peer review team. At the same time, both have challenges that will require the continued efforts of leaders and lawyers in both organizations.

1. Quality Assurance.

The Commission will likely want to ask MCAD about its plans for addressing concerns regarding individual lawyers. While many MCAD lawyers are seen as having good client management skills, some are reported as failing to meet with clients in a regular and timely fashion, failing to adequately prepare for court, and settling cases without appropriate pretrial litigation. Addressing these matters should be considered a very high priority. The Commission may also wish to ask MCAD what it has done since the service delivery review interviews to be sure qualified lawyers are readily available for murder and other serious case types.

With regard to PDMC, the Commission might want to inquire about any additions to training available to new lawyers, and any efforts it is making to attract and retain lawyers.

2. Management.

MCAD was applauded for having a robust database capable of ascertaining not only caseload information, but also details regarding case outcomes. The Commission might want to inquire about any enhancements planned for its database.

The Commission will likely want to ask PDMC about any plans it has to implement a mid-level management structure, whether new attorneys are getting regular reviews, and what plans the office has for acquiring new case management systems.

3. Systems Issues.

As noted, both MCAD and PDMC are seen as dependable, valuable resources. The Commission might wish to ask both about their willingness to work together to address system issues, and about any efforts they have made to achieve more regular communication with each other and with other system stakeholders. Additionally, the Commission might want to ask whether there are system issues that could be addressed more effectively through a collaborative approach.

4. Structure.

Marion County's current public defense structure, with a consortium and a public defender office, was adopted in 2007. It has served the community well, and

seems to have improved the overall level of representation in the county. The Commission will likely want to know that both providers remain committed to the concept of excellence and that both have concrete plans to improve representation through regular training, enhanced monitoring of attorney performance, regular reviews, and immediate responses to concerns regarding representation.

IX. TESTIMONY AT JANUARY 22, 2015, PDSC MEETING

Chair Ellis began by thanking everyone in Marion County for the time and effort they dedicated to the review process. Nancy Cozine then provided a summary of the Service Delivery Review Report and recommended areas of Commission inquiry.

Chair Ellis asked Judge Prall whether there was any information the court would like the Commission to consider. Judge Prall said the court shared the concerns and accolades outlined in the report, and confirmed that the introduction of a public defender office heightened the responsibility and professionalism of defense delivery in Marion County. She noted that the court shares the long-standing concerns created by the distance between the annex and the courthouse, and problems with lawyers signing themselves up to be in two places within too short a timeframe and then being late to court. She said the eCourt implementation exacerbated the issue because some of the annex work had to be shifted back downtown, increasing the need for travel between the two locations. Chair Ellis noted the efficiency created in the public defender office by having only one lawyer responsible for taking cases each day, and asked whether a similar efficiency could be created within the MCAD group; Judge Prall thought that might reduce time conflicts.

Chair Ellis also asked questions about lawyer assignment within both entities. Judge Prall said her impression was that both providers were making an effort to assign cases based upon experience, but that efficiencies might be captured through increased specialization at MCAD.

Chair Ellis expressed his sense that the public defense providers in the county worked well together. Judge Prall agreed, saying that Marion County benefits from a very collegial Bar. Chair Ellis asked whether the court has good access to both Mr. Weiner and Mr. Sermak. Judge Prall responded in the affirmative, explaining that both were very available during eCourt implementation. She commended their ability to work collaboratively and follow through with communication to their groups. Commissioner Potter asked whether there was any regular policy meeting for the defense bar, the judges, and the prosecution. Judge Prall said that a local Criminal Justice Advisory Council is on the horizon, delayed slightly because of eCourt, but starting soon. She also mentioned the Annex group, which meets regularly to address operational issues. Chair Ellis asked whether non-English-speaking populations are being well-served. Judge Prall noted that it was very helpful to have several lawyers who speak Spanish,

that in other cases the attorneys are good at utilizing and accessing interpreters, and that she is satisfied that attorneys are communicating well with their clients.

Chair Ellis asked whether the Commission could do anything to improve the quality of counsel in Marion County. J. Prall commended the Commission's approach to the Service Delivery Review, and indicated that it was a helpful and important process. Chief Justice Balmer asked whether there are enough lawyers available to handle the serious felony cases. Judge Prall said both providers seem to be focused on training newer lawyers to be able to handle these cases, pairing a less experienced lawyer with a more experienced lawyer.

Chair Ellis thanked Judge Prall and invited District Attorney Beglau to share his thoughts. Mr. Beglau began by thanking the Commission for including his office in the review discussions, and emphasized the collegial nature of the practice in Marion County. He expressed strong support for having prosecutors and defense practitioners on equal footing, and appreciation for Tom Sermak's and Jon Weiner's level of involvement in policy discussions. Mr. Beglau indicated that both were present for important discussions, like new approaches in misdemeanor cases where defendants are unable to aid and assist, and diversion of prison-bound property offenders who are at a medium and high level risk rate, which is saving about 50 or 60 prison beds, and specialty courts. He acknowledged that it can be harder to get the message out to MCAD attorneys because it is a bigger, more diverse group. He also suggested that it would be helpful to have those in public defense management positions refrain from taking a caseload.

Chair Ellis asked whether the District Attorney's Office is experiencing the same level of turnover that we are told the public defender's office. Mr. Beglau said that it isn't as big a problem, but that the office is starting to lose people to jurisdictions with better salaries. Chair Ellis asked whether there is an experience disparity between lawyers in the DA's office and those in the PD and MCAD. Mr. Beglau said there is disparity, and went on to explain that as Oregon comes out of the recession, counties are starting to increase salaries. He indicated that the issue is being studied in Marion County. He again emphasized the importance of creating equal footing between the defense and prosecution. When asked about anything the Commission could do a better job of, Mr. Beglau suggested increased training and mentoring for defense lawyers, saying that the issues presented today are more complex than ever; he also suggested increased salaries. Commissioner Potter asked about the discovery process in Marion county. Mr. Beglau indicated that it was the subject of a recent discussion and would be examined as part of the county's effort to identify ways to be more effective at resolving cases quickly.

Chair Ellis asked about the composition of the lawyers in Mr. Beglau's office. Mr. Beglau indicated that there are thirty-three lawyers, in four sections: domestic violence, child abuse and adult sexual assault, career property and the drug team. He explained that on each team there is a manager and five or six lawyers. The remaining case types are divided up, mostly the misdemeanors, and the entry level lawyers get most of those cases. He indicated that with a

manager for each team, there is a lot of supervision and mentoring on the more serious cases. Mr. Beglau pointed out that it takes five years for a lawyer to know what they are doing in a child abuse case, and that he wouldn't want a brand new lawyer taking on a child abuse case or a Measure 11.

Chair Ellis thanked Mr. Beglau and invited Mr. Weiner and Mr. Sermak to present information. Mr. Weiner began by saying that he began as interim executive director in January of 2014 and that it became obvious very quickly that his mission was to understand and address concerns outlined in the peer review report. Chair Ellis asked Mr. Weiner whether he is handling a caseload. Mr. Weiner said he doesn't have daily assignments, but that he tries to co-counsel with newer lawyers in more serious cases, and that he also likes to work on murder and PCR cases.

Chair Ellis asked about the composition of the MCAD board. Mr. Weiner indicated that three of the nine are external members and that the monthly meetings are well attended. Cheryl Richardson, Chair of the MCAD board, indicated that they would soon be filling the executive director position and that Mr. Weiner would be a frontrunner given the work he has accomplished in the last year.

Chair Ellis asked about MCAD's methodology for assigning cases. Mr. Weiner explained that MCAD lawyers don't get to decide what types of cases they are qualified to handle on their own; it must be approved by MCAD. He indicated that he is working with the court to make sure that only the most qualified lawyers are taking murder and Measure 11 cases, and he is also looking at the possibility of having lawyers specialize in certain case types.

Chair Ellis asked Mr. Sermak about turnover at the PDMC. Mr. Sermak explained that the primary reason is financial, and he gave several examples of lawyers who simply could not continue to practice with the low salary. Commissioner Potter asked why lawyers from MCAD aren't applying at PDMC. Mr. Weiner speculated that it was because most of the MCAD lawyers have been their own boss for a long time, and changing now would be very difficult, and that many like the flexibility of doing a variety of case types. He estimated that out of the 38 MCAD lawyers, 20 to 25 are full-time criminal law practitioners, but the rest enjoy other private work. Vice-Chair McCrea noted that Mr. Weiner was now monitoring caseloads, and asked whether that working out alright. Mr. Weiner indicated that it was. Vice-Chair McCrea followed up by asking whether there were any lawyers who were not taking cases regularly enough to stay current on the law. Mr. Weiner indicated that one lawyer didn't take a particular case type, but that it was not a problem, and said that the group is really working on getting newer lawyers up to speed so that they can take felony cases.

Mr. Weiner and Mr. Sermak expressed appreciation for the work of the Commission and employees at the Office of Public Defense Services. Both said the system is working well at this point. Mr. Sermak pointed out that his firm is prepared to expand when necessary, and expressed support for the idea of staffing specialty courts out of the public defender office. Chair Ellis asked

whether conflicts are becoming a problem now that PDMC has been around for a longer period of time. Mr. Sermak said they are becoming more prevalent, but checking dockets in advance allows them to avoid having too many. Vice-Chair McCrea asked Mr. Sermak whether he is still carrying a caseload, and he indicated that he stopped taking new cases several months ago and finished his last case late last week. He indicated that this change has given him time to address county policy and structure issues in his office. Vice-Chair McCrea finished her questions by asking Mr. Sermak about the challenges of practicing in Marion County. Mr. Sermak said they will be working on discovery issues – that often video tapes or other evidence are not requested from the policy until the defense attorney requests them, and this slows down the whole process. Mr. Sermak also noted the challenges with Measure 11 cases, saying that in Marion County there is a policy against negotiating out of Measure 11. He indicated that as a result, 20% of the Measure 11 cases in Marion County went to trial in 2012. He compared this to other counties: 27% in Clackamas County (but only 86 cases were filed during the entire year); 7% in Multnomah County; 6% in Lane County; and 12% in Washington County. He said this is a major challenge.

Chair Ellis thanked Mr. Weiner and Mr. Sermak.

X. A Service Delivery Plan for Marion County

Commission members met and discussed the service delivery plan for Marion County on March 19, 2015. After reviewing the report, testimony, and taking final comments and information from providers, the Commission concluded that overall, things are going well in Marion County. The Commission suggested that OPDS analysts continue with the current distribution of cases in Marion County, but also work on a plan for shifting caseload in the future. The Chair suggested that OPDS should consider shifting specialty court responsibilities to the public defender office, and encouraged MCAD to continue working with its attorneys to assign cases to align with the strengths of its attorney members.

MARION COUNTY ASSOCIATION OF DEFENDERS

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October 30, 2014

Executive Director Nancy Cozine
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301

Re – May 2013 Peer Review – Responsive Actions

Dear Director Cozine,

The Office of Public Defense Services (OPDS) completed its most recent peer review of Marion County contractors in May 2013. That process generated several reports, one of which focused specifically on the Marion County Association of Defenders (MCAD). The MCAD peer review report raised several concerns. Although MCAD's process of addressing those concerns is ongoing, the responsive actions taken by MCAD thus far are outlined below.

Concerns Raised in Peer Review Report

Although the peer review report's thoughtful consideration of the Marion County service delivery system addressed many issues, the report's primary concerns as to MCAD can be fairly described as follows:

- Are MCAD attorneys “working their cases” less vigorously than they should be? There is apparently a perception by some that there exists a pattern of MCAD attorneys filing disproportionately few pre-trial motions, and resolving a disproportionately large number of cases at the Court Annex.
- “Quality assurance remains a challenge for MCAD.” Many stakeholders opine that “a number of low performers remain in the group.” MCAD does not effectively address underperformance by its members. The workgroup structure, while an effective means of improving attorney performance, is perhaps too cumbersome to be relied upon as the sole means of addressing attorney performance issues in a timely manner.

- MCAD “does not appear to embrace a strong client-centered practice.” Members may be “worried about underperformers not because of the consequences for clients but because ‘their bad behavior reflects on others and may have economic impact on others.’” There is no “equivalent concern for the welfare of MCAD clients.”
- The distant location of then-Executive Director Paul Lipscomb necessitated that “the MCAD board directly address the need for leadership transition.” Although centralization of certain quality assurance functions is likely a positive development, Judge Lipscomb’s distance from Marion County impairs the effective performance of these centralized functions.
- “It appears that MCAD is in need of again examining whether the organization and its clients could benefit from changes in procedures and personnel.”

Responsive Actions by MCAD

MCAD has taken action on several fronts in response to the concerns raised in the Peer Review Report. Some actions have been relatively simple, while others have entailed considerably more planning and effort. While MCAD’s efforts are (and must be) ongoing, a summary of the changes effectuated thus far in 2014 are set forth below.

Transition in Leadership

MCAD transitioned to a locally situated interim executive director in January, 2014. After receipt of the OPDS’ evaluation of MCAD’s response to the Peer Review Report, and consideration of other interested applicants, the MCAD Board will decide whether to retain or replace the current interim executive director.

Changes in Personnel

MCAD has historically been challenged by its seeming inability to make necessary changes in its membership, and its seeming reluctance to add or subtract member attorneys when necessary from a quality assurance perspective. In 2014, MCAD responded to that challenge by making both types of changes to its membership rolls. In particular, MCAD added five new misdemeanor attorneys to its ranks.

Training/Mentoring/Workgroups

MCAD’s workgroup structure was recognized in the peer review report as a distinct asset. The workgroups have been reshuffled and revitalized. Attendance at the monthly workgroup meetings has returned to its former levels. Each new attorney has been assigned a mentor and a workgroup. In addition, the executive director plans to meet with these new attorneys for lunch approximately once per month. Oregon Post-Conviction Consortium Administrator (and MCAD Board Member) Noel Grefenson has agreed to attend these lunch meetings in an effort to enhance the training of these new members. It is anticipated that the Board will approve partial or full scholarships for each of these new members to attend the National Criminal Defense College (NCDC) in Macon, Georgia for two weeks. It has been the policy of the Metropolitan Defenders

(Metro) to send its new attorneys to the NCDC, and it would appear to be appropriate for MCAD to do the same.

Changes in Case Assignment Process

Since its inception, MCAD has assigned cases on somewhat of a rolling basis, irrespective of the caseloads of the attorneys who are signing up to take “attorney of the day” (AOD) assignments. Typically, members choose their assignments by picking “felony days” and “misdemeanor days” at the monthly MCAD meetings. However, it became a common practice over time for attorneys to trade assignments between themselves (e.g. – “I’ll take your felony day next Tuesday and you can take my misdemeanor day tomorrow”). Moreover, some attorneys have proven to be especially adept at picking up stray cases from colleagues, the court, and even the Public Defender’s Office. MCAD has taken steps to de-randomize this process and flatten-out the distribution curve as much as possible, in order to inhibit the ability of its member attorneys to garner huge caseloads. In certain cases, MCAD has worked with individual attorneys to limit their caseloads when it appeared necessary to do so.

MCAD attorneys now sign up for cases in inverse order of the number of cases they have. In other words, the attorney with the fewest cases signs up first, the attorney with the next fewest cases signs up next, and so on. Although the Interim Executive Director and several members did travel to Portland to learn about the case assignment procedure used by Metro, it was determined that implementation of such a system would require a systemic change in the way that the Marion County Circuit Court handles its criminal docket. With Marion County’s change to ecourt at the end of this year, it was not feasible to address this type of systemic change at this time.

MCAD also took steps to reel in the supply of available stray cases. The court and the Public Defenders Office now route all such cases to the MCAD office, which assigns those cases based largely upon caseload considerations.

Enhanced Availability of Attorney (and MCAD) Contact Information

The first step to embracing a client-centered approach was for MCAD to provide accessible contact information to our clients. MCAD’s website has been enhanced, such that contact information for each of its attorneys is provided therein. Moreover, MCAD’s contact information is now prominently displayed, with an offer to help anyone having questions or issues regarding an MCAD attorney.

MCAD has also arranged with Lieutenant Doug Cox to have fliers posted in each pod at the Marion County Jail. These fliers have contact information for the MCAD office and each MCAD attorney. Similar to the website, the fliers display an offer to help anyone having questions or issues regarding an MCAD attorney.

Enhancing MCAD’s Participation in the Criminal Defense World and the Community

In spite of its status as the largest consortium in Oregon, MCAD has largely been absent from the criminal defense community. In 2014, MCAD has attempted to change this by actively seeking to take a more active role in that community. MCAD participated actively in the Pay Parity Committee and Lobbyist Selection Committees, receiving the OCDLA President’s Award for its

efforts on the Pay Parity Committee. MCAD is also active on several local committees, including the Marion County Circuit Court court committee and the Oregon State Hospital – Marion County workgroup.

MCAD has also attempted to increase its utility to the local community, enhancing its website to provide particularly useful forms and pleadings to other practitioners and the general public. MCAD has also added valuable information about important community resources – such as links to the following:

- Contact information for free clothing, food boxes, veterans' assistance, health and medical, and shelters.
- DOC Transitional Services Division – Department of Corrections Transitional Services Information and Contacts by county.
- Marion County Jail - Information regarding visiting hours, policies, and frequently asked questions.
- Marion County Jail Inmate Roster – Full Roster with booking photos.
- Victim Information and Notification Everyday (V.I.N.E.) - A searchable database to locate an inmate anywhere in Oregon.
- Oregon Courts Resources and Links – A guide to preparing yourself to navigate the court system, including court etiquette.
- Court Calendars

Expanded Utilization of Database

Taking heed of the Peer Review Report's recognition that the MCAD database could be more powerfully utilized, MCAD has expanded its use of the database in important ways. The database is now used to track members' caseloads. It has also been used to provide numerical data about trends among MCAD attorneys overall or even particular attorneys. This expanded use of the database has been instrumental in allowing MCAD to monitor attorney caseloads and make responsive adjustments accordingly.

Finally, the database is being expanded to allow for the tracking of two additional parameters – client meetings and pre-trial motions. Starting in November, attorneys will track all of their client contacts, and all motions filed, in new data fields being added to the database. These two metrics should provide valuable information regarding client-centered practices and how hard MCAD attorney are working their cases. Members have embraced these changes, and have suggested the addition of even more data fields to track valuable metrics.

Conclusion

The actions outlined above represent but a few initial steps in what must be a continual quest for improvement on the part of MCAD. As the largest consortium of public defense providers in

Oregon, MCAD is uniquely positioned to be a significant positive force in the public defense community. Metro, which occupies a similar position among public defenders' offices, has enthusiastically embraced its position as the flagship of the State's public defense fleet. Although in the beginning stages of fundamental change, MCAD is committed to moving toward an analogous position among private bar providers.

Sincerely,

Jon Weiner
MCAD Interim Executive Director



Executive Director
Thomas S. Sermak
Office Manager
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February 18, 2015

Ms. Nancy Cozine, Executive Director
Office of Public Defense Services
1175 Court St NE
Salem, Oregon 97301

Rè: Marion County Service Delivery Review

Dear Ms. Cozine:

Thank you for inviting me to appear before the Public Defense Services Commission when they addressed the forthcoming Service Delivery Review for Marion County. In your draft report you suggested the Commission might want to inquire into certain areas regarding PDMC's internal structure or it's role in the local criminal justice system.

While I found the inquiries made of me and the other Marion County folks invited to participate to be quite appropriate and enlightening, I did note that some of the areas you thought worthy of consideration were not addressed. Anticipating that you or the Commission might like to know how I would have responded had I been asked, I have prepared this letter.

The draft report suggested the Commission might inquire whether PDMC had created a mid-level management structure. PDMC had the semblance of such a structure but it was not formalized. Following the visit of your team to our office late last year we both formalized and expanded the structure. PDMC has nineteen employees. For some time all the office staff have been directly supervised and evaluated by our Office Manager, thus she has direct supervisory authority over three secretaries/legal assistants, a receptionist and an office clerk. The Office Manager is directly supervised and evaluated by the Executive Director. Ever since the Board adopted an Emergency Succession Plan, a senior lawyer has acted as "Assistant to the Director," which required her to be familiar with the duties of the ED and practiced at performing them when the ED is unavailable either due to vacation, illness, injury, etc. At my suggestion, my assistant also undertook a more direct role as office liaison to Willamette University Law School and the Extern program we participate in. We also had a deputy public defender who had volunteered to coordinate the law-clerk and CLS activities of the externs who worked with us. Your visit coincided with the conclusion of our office expansion to ten lawyers and increased support staff. Motivated by your visit and the increased need, we now have a formal management structure in which I, as ED, supervise the Office Manager, the Assistant to the Director, our three investigators, the Measure-11 lawyers, and share supervision of the Major Felony lawyers. The Assistant to the Director has primary responsibility to administer the Extern program and supervise the law clerks, she also supervises the misdemeanor/minor

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felony attorneys and divides supervision of the major felony qualified attorneys. She and I have in the past informally shared training responsibilities; her role in that process is now formalized. Admittedly the structure is rudimentary but we believe it will suit the needs of our nineteen employees. We also believe that by dividing the responsibility to regularly evaluate the employees it will alleviate another concern, which is the office's failure to comply with the schedule of annual formal evaluations. I have enclosed a flow chart showing the new management structure.

Our evaluation practice as set forth in the employee manual specifies that each new employee undergo an informal evaluation after three months of employment, a formal written evaluation at six months and a first annual review six months after that. The new hires are then evaluated annually thereafter. (While I have been lax about maintaining the evaluation schedule overall, new hires almost always receive their first three evaluations at or near the time they are scheduled.) We have now divided the duty of evaluating attorneys roughly in half. Additionally, our experience during our years of operation have led us to conclude that senior attorneys with more than three years in the office in most cases don't need to be evaluated annually, so we are changing our policy to require a formal evaluation every other year for attorneys with more than three years in the office. If in an individual case the need arises to do a formal evaluation more frequently we will assure that happens. In making this change we are mindful that the evaluation process is not a disciplinary tool nor is it a primary or even secondary training tool. PDMC policy and practice is to address disciplinary and training issues *as they arise* not wait till the annual evaluation occurs. The evaluation is to measure progress and set goals which, with the more senior attorneys can be adequately accomplished with biannual evaluations.

We are also in the process of formalizing our training program. A lawyer hired with no prior experience is taken out and introduced to the Annex experience usually on the first day; they are advised that within the next few days they will be expected to have chosen a "mentor" attorney, who will be the primary go-to person with questions. Each new hire is required to sit in on at least two client interviews, one of which must be in the jail. They must then conduct at least two interviews under supervision. They are expected to "shadow" an attorney for some portion of a day. They are expected to observe at least one of each kind of appearance or hearing before they take part in one. If they have not already done so they are sent to the new-lawyer CLE and to the next available OCDLA Trial Skills seminar. They are required to observe a trial, and co-counsel a trial before they have a trial on their own.

PDMC has a training manual, which I characterized in our meeting as having "fallen into disuse." While that may have been an apt characterization the manual was still circulating among new hires. However, it has always served as a secondary resource—secondary to the hands-on training described above. That said, the manual was out of date and not well-tailored to the practice of law in Marion County. The training manual is in the process of being updated and made more Marion County applicable with special sections describing the more common elements of local practice and with another section detailing how criminal law is practiced at PDMC—emphasizing office procedures and the specialized tools and support the office offers. Past experience indicates it will always be a secondary training tool, but it will provide a readily available and reliable source of

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information for those occasions when the inexperienced attorney cannot find a colleague to pose a question to.

Insofar as ongoing in-house training is concerned, I provided a partial list of trainings we have done here at PDMC; a more expanded list of the presentations we have done in the last fourteen months or so would include a CLE on Immigration Law set up by one of our staff lawyers. The presenter appeared interactively over the internet; she did trainings all over the country and her presentation to us was specifically tailored to Oregon and 9th Circuit law. We had a Forensic Psychologist come in for a lively session on the various types of forensic assessments, how they are conducted and the various instruments relied upon by the assessors; one of our members gave a formal CLE on the law as it pertains to firearms, concealed weapon permits, the "open carry" law, etc. We have had speakers present on the new ignition interlock devices, how they work, where they can be obtained, problems with them, etc. And we have had folks from local treatment agencies, jail mental health, the local 370 program and others come in on occasion to address topics of interest. We also make liberal and frequent use of OCDLA CLEs.

The draft report also mentioned what was characterized as frustration with our reliance on Apple products. I suspect the frustration was more directed at the database we are presently using rather than the machines we use to access it. In point of fact there *are* problems with our current database system principally surrounding how it integrates with our calendaring system. The database currently automatically enters on the assigned attorney's calendar all court appearances or events linked to a particular case and that calendar is available to all PDMC employees both in the office and remotely. But the ability to integrate or enter an attorney's personal appointments to that calendar is cumbersome and limited. The database is a custom product developed in conjunction with the Lane County PD office; maintenance has increasingly become an issue and development is slow. That said, and the calendaring issue aside, the system does pretty much what we need it to do. The New Dawn program would probably be better, certainly a bit more polished, and one would hope maintenance would be less of an issue, but it may not be cost-effective to switch databases. I won't know that until we can get some cost figures out of New Dawn. We will be attending a demonstration/ question-and-answer session on the New Dawn product at the end of this month and I hope to know more then.

The final topic the Commission was invited to inquire into was the rate of conviction for M-11s in Marion County versus the rest of the state. First, let me put the issue into historical perspective. The 2011 report that provided the troubling data was based entirely on cases filed in 2008. By the end of 2008 MCAD was about two years into its newly restructured form, and PDMC had been in existence for eighteen months. My office expanded considerably between 2008 and April 2013 when the site visit occurred. We had also just changed our own intra-office structure to designate two of our most senior and experienced attorneys to do the M-11 cases. I have since asked the Criminal Justice Commission, the source of the 2011 report, to update the data relied upon in that report and they have provided me with the most current data which, unfortunately, only goes up to 2012. Regrettably I cannot report a statistically demonstrable improvement in Marion County's M-11 statistics between 2008 and 2012. For example, in 2008 Multnomah County obtained convictions for M-11 offenses in 36% of those cases where M-11 was

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charged (21% highest M-11, 15% lesser M-11); in Marion County it was 63% (48% highest M-11, 15% lesser). In 2012 Multnomah County's numbers were 39% (28% highest, 11% lesser); Marion County's numbers were 64% (55% highest, 9% lesser)

The 2011 report notes, however, in discussing the disparity in prison sentences resulting from M-11 cases:

It appears that in Multnomah County prosecutors are more likely to indict an offender for a M11 crime, and then obtain a plea agreement to lesser offenses. The plea agreements still include a prison sentence in many of these cases. Prosecutors in Marion County are much more likely to convict for the indicted charge. If they are unable to obtain a conviction for the M11 offense indicted, then offenders are more likely to receive a probation sentence or have their case dismissed.

The report also noted that a M-11 case that goes to trial is 300% more likely to result in a M-11 conviction than if the case is negotiated. It is my perception, somewhat born out by statistics, that Marion County is less likely than most jurisdictions to negotiate out of M-11. Unfortunately the 2011 report does not break down trial statistics by county, but it does show that of the 2272 M-11 cases brought statewide in 2008 352, or 15% went to trial with 70% of those resulting in M-11 convictions. In 2012, statewide, 200 of 1665, or 12% of M-11 cases went to trial again with 70% resulting in M-11 convictions. I had CJC break down the resolution by trial statistics for 2012 by county. Marion County took 34 of 170 or 20% of its M-11 cases to trial with 74% of them resulting in M-11 convictions. By contrast Multnomah County took only 29 of 405 or 7% of its M-11 cases to trial, with 93% resulting in M-11 convictions. Lane County took 10 of 157 or 6% to trial with a 90% M-11 conviction rate. Washington County took 27 of 210 or 12% to trial with 70% resulting in M-11 convictions. And Clackamas County took 24 of 86 or 27% of M-11 cases to trial with 71% resulting in M-11 convictions.

I was recently advised by Walt Beglau that his office does not have a written policy for charging or negotiating M-11 cases but that they do not as a rule negotiate out of M-11. That was my experience when I was trying cases and it seems to be a policy that is only recently easing up. Our M-11 lawyers negotiate aggressively, and try a lot of M-11 cases. (When a client's option is "this measure eleven sentence for sure or a risk of that one," more of them opt for trial.) All the lawyers have reported to me that they are getting more non-M-11 offers and are taking fewer cases to trial. Unfortunately, statistical data is two years behind so my only data is anecdotal.

Another factor that should be addressed is variance, if any, between counties in the number of M-11 charges brought in a single case. It goes without saying that a client facing multiple M-11 sentences will plead to a lesser number of M-11 charges to cut his losses and it is also self-evident that a defendant taking a case to trial with multiple M-11 charges is more likely to end up in a M-11 conviction. I am told that data are available from CJC and I requested it but it was not provided.

Marion County brings a lot of M-11 charges. In 2012 they filed a M-11 case for every 1890 citizens; by contrast Multnomah County filed one for every 2368 citizens and Washington County filed one for every 2600 citizens. They also have a practice of not negotiating out of M-11; I believe that to be contrary to most jurisdictions where

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negotiating out of M-11 is a common way to avoid trial. (Marion County pays a price for that as well; the 2011 report noted that for the period 2004-2008 the per capita cost of prison for Marion County citizens was the highest in the state at \$118 per citizen per year.)

It is difficult for the defense bar to affect charging practices; we cannot turn down the faucet but we can block its flow, which is what we are doing by taking such a large percentage of cases to trial. If the current anecdotal evidence is born out by statistics as they become available we are effecting some change. I'm hoping when Marion County's Criminal Justice Advisory Council becomes operational, the increased dialogue will enable the defense bar to have a more direct impact on the way M-11 cases are prosecuted in Marion County and bring the statistics more in line with the rest of the state.

I hope this additional information is useful to you in preparing the Service Delivery Review for Marion County.

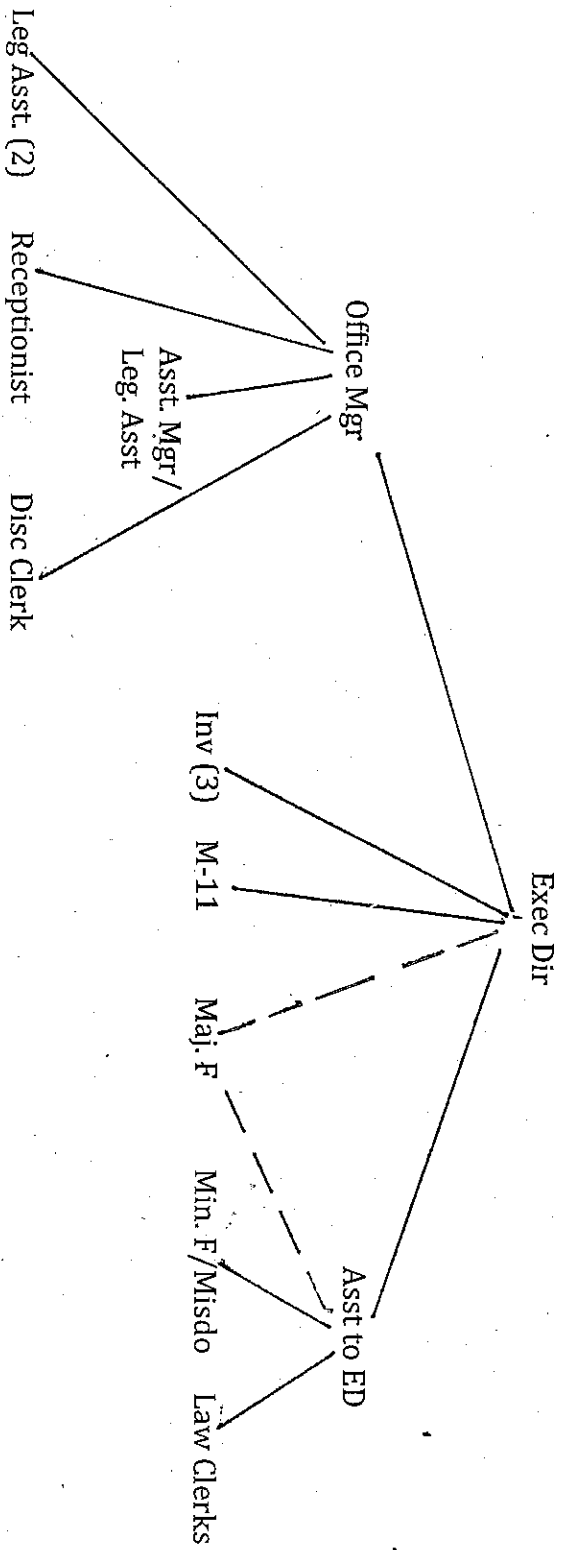
Sincerely,

A handwritten signature in cursive script, appearing to read "T. Sermak".

Thomas S. Sermak
Public Defender of Marion County, Inc.

PDMC Organizational Chart

Jan. 2015



The Exec Director supervises and does regular evaluations of the OM, AED, M-11 lawyers and Investigators; the ED and AED jointly supervise and evaluate the Major felony lawyers. AED in addition supervises and evaluates the Minor Felony/Misdemeanor lawyers and the law clerks. The AED also administers the Extern program with WULS. The AED remains able and available to perform all ED administrative functions in the AD's absence

In addition to having primary responsibility for all purchasing, case reporting, and budgetary matters, the Office Manager supervises and evaluates the receptionist, Asst. Office Manager, legal assistants and discovery clerk.