

Members

Barnes H. Ellis, Chair
Shaun S. McCrea, Vice-Chair
Henry H. Lazenby, Jr.
Peter A. Ozanne
John R. Potter
Janet C. Stevens
Honorable Elizabeth Welch



Ex-Officio Member

Chief Justice Paul J. De Muniz

Executive Director

Ingrid Swenson

PUBLIC DEFENSE SERVICES COMMISSION

PUBLIC DEFENSE SERVICES COMMISSION MEETING

Thursday, April 16, 2009
9:00 a.m. - 1:00 p.m.
Aldrich Kilbride & Tatone LLC
680 Hawthorne Ave., SE, Suite #140
Salem, Oregon 97301

AGENDA

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| 1. Action Item: Approval of the Minutes of PDSC's March 12, 2009 Meeting
<i>(Attachment 1)</i> | Barnes Ellis |
| 2. Commission Discussion of Service Delivery Plan for Clackamas County
<i>(Attachment 2)</i> | Barnes Ellis
Commissioners |
| 3. Review of Proposed Amendments to Qualification Standards
<i>(Attachment 3)</i> | Paul Levy |
| 4. Defense Representation in Drug Courts
<i>(Attachment 4)</i> | Barnes Ellis
Ingrid Swenson |
| 5. Commission Discussion of Service Delivery Plan for Post Conviction Relief Cases
<i>(Attachment 5)</i> | Barnes Ellis
OPDS Staff |
| 6. OPDS Monthly Report | OPDS Management Team |

Please note: Box lunches will be provided for Commission members at 12:00 p.m.

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours before the meeting, to Laura Weeks at (503) 378-3349.

Next meeting: The next meeting of the commission is scheduled for May 14, 2009 from 9am to 1pm at a location to be announced in Salem, Oregon.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

MEETING MINUTES

Thursday, March 12, 2009
9:00 a.m. - 1:00 p.m.
Clackamas County Circuit Court
Holman Building
821 Main St.
Oregon City, Oregon 97045

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
John Potter
Chip Lazenby
Hon. Elizabeth Welch

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Paul Levy
Billy Strehlow
Amy Jackson

(Meeting was called to order at 9:04 a.m.)

Chair Barnes Ellis called the meeting to order at 9:04 a.m.

Agenda Item No. 1 Approval of the Minutes of PDSC's January 22, 2009 Meeting

MOTION: Shaun McCrea moved to approve the minutes; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Agenda Item No. 2 Presentations on Public Defense Delivery in Clackamas County

Mari Miller, the Trial Court Administrator for the Clackamas County Circuit Court welcomed Commissioners and guests to the court. She noted that her staff is occupied with planning for Friday court closures. She said that the court has worked effectively with public defense providers to resolve issues before they occur. She noted that her court has the highest number of cases per judge in the state.

Chair Ellis said that the Commission is engaged in a process of reviewing the delivery of services throughout the state and has taken the approach that each community is different and its public defense needs may be different too. The Commission's two goals for public defense are quality and economy. He noted that Clackamas County is the only remaining metropolitan county that has a single provider system and the Commission would like to make sure that the single consortium model is the appropriate one.

Barbara Johnson testified that she is the Executive Director of the CASA program in Clackamas County. She said that she has met with the juvenile consortium administrator in

the past to discuss issues that arise between CASA volunteers and attorneys for parents and children. She spoke to a number of experienced CASA volunteers to obtain their comments for the Commission. CASA volunteers commented that attorney caseloads are high and that, although attorneys can make a real difference, they sometimes lack passion, don't return calls, are less zealous when they represent children than when they represent parents, often meet their clients just before court and fail to bring any original information to the court. Attorneys don't regularly attend child safety meetings but do attend CRB reviews. Ms. Johnson suggested that a CASA be appointed in every case and that counsel be appointed only upon request of the CASA or other party. Ms. Johnson said that the decline in the dependency caseload in Clackamas County coincides with the implementation of the Oregon Safety Model and that the decline may be the result of the way the model has been implemented in the county.

Commissioner Welch noted that Oregon has a significantly higher rate removal for children from their homes than most states.

Mike Clancy and Gay Canaday testified that they were part of an original group of four lawyers that founded the Independent Defenders, Inc. (IDI), a consortium that is the sole contractor in the county for juvenile public defense cases and civil commitment cases. IDI has a rotating system for case assignments. Most attorneys handle both dependency cases (parents and children) and delinquency cases. Most civil commitment cases are assigned to Ms. Canaday. Consortium attorneys also cover the juvenile drug court. Most members of the group have been practicing for twenty years or more. Consortium members have brought in some younger attorneys recently, however. Mr. Clancy has mentored one of the newer members. He said consortium needs to do a better job of bringing people in.

Ms. Canaday said that consortium's eleven members bring with them different kinds of expertise. Some members have expertise in criminal cases or in domestic relations cases; one member has expertise in social security benefits and Ms. Canaday has expertise handling mental health cases. The benefit of having this expertise available probably outweighs the scheduling challenges that arise with attorneys who have other kinds of practices. She said that IDI attorneys love their juvenile work and that that is a key to good representation. She said that IDI has a board of four members including three senior IDI attorneys and one CASA. The board meets quarterly and IDI members meet at least quarterly as well. She believes IDI attorneys get along well with CASA volunteers, who have a different perspective than the attorneys.

Mr. Clancy said that IDI had met with the CASAs to discuss their relationship and other issues. He said that attorneys sometimes have difficulty reaching their clients before hearings, despite efforts to do so. Timeframes for hearings are short and don't always allow the attorney time to meet with the client. Some appointments occur just prior to hearing dates. Most attorneys send letters to clients immediately after receiving notice of appointment by fax.

Chair Ellis inquired how the consortium deals with members who have performance issues.

Mr. Clancy said that they use progressive sanctions. The organization lacks a full-time administrator and probably needs to have better procedures in place. Over the years there has not been a need for progressive sanctions because of the experience level of the attorneys. If there are problems, board members talk to the attorney about them.

Ruth Boen, who serves as administrative staff to IDI said that the consortium is responsive to complaints. After discussing calendar management problems with one attorney and providing him specific guidelines the board sent him a letter setting forth its expectations. She also noted that in addition to the new attorney who was mentored and trained by Mr. Clancy, another young attorney received the same kind of training in another member's office.

In delinquency cases, Mr. Clancy said that there was a period of time when the district attorney's office was objecting to formal accountability agreements (FAA) even in cases in which DA approval was not needed. After a discussion with the juvenile department, circumstances have improved and juvenile court counselors will sometimes agree to FAAs without the district attorney's agreement. Another approach that attorneys for youth have taken is to ask that a case be set out for trial for a long enough period to complete needed services.

Mr. Clancy said that the perception some people reported about attorneys not having contact with delinquency clients was a misconception. Detained youth are held in Multnomah County which does make it more difficult for attorneys to see clients in person. In dependency cases, IDI has hired a retired DHS worker as an investigator who sees children in foster care and prepares a written report that is provided to the court and DHS. DHS workers are not always seeing children as often as they are supposed to or seeing them outside the foster home.

Both Ms. Canaday and Mr. Clancy said that contact with OPDS has been satisfactory. Ms. Canaday expressed a desire to have access to a list of expert witnesses in termination of parental rights cases to supplement the short list that they are currently working from.

Judge Deanne Darling is the principal juvenile court judge in Clackamas County. She outlined the schedule for juvenile court hearings and noted that attorney availability is a major issue for her in trying to schedule juvenile court matters in a timely way.

She said that the IDI attorneys are very experienced, very efficient and very cohesive in terms of being willing to cover for each other. When lawyers cover for each other, however, they may not know the case. She said that it would help if lawyers in the juvenile consortium were not also taking cases from the criminal consortium because of schedule conflicts. She also suggested that consideration be given to creating a regional contract office that specialized in termination of parental rights. With respect to a public defender office handling part of the juvenile caseload, she said that the consortium has benefits with respect to the management of conflicts.

Judge Darling said that all but possibly one of the consortium attorneys is capable and well informed and that they do a good job of understanding the difference in their role when representing young children and representing older children. She believes they may need to do better outreach in order to have earlier contact with their clients and noted that it is rare that attorneys provide any first hand information or reports to the court regarding any of their clients.

Ron Gray, the administrator of the Clackamas Indigent Defense Consortium (CIDC), said that the consortium was started in 1983 and grew over time. The consortium now has 27 members who are on rotating lists for case assignments. There are separate lists for probation violations, misdemeanors, Ballot Measure 11 cases and homicides. Cases are assigned on a rotating basis, except that if an attorney with special qualifications is available a case may be directed to that attorney outside the rotation. Substitutions do not cost the state any additional funds in Clackamas County since only the second attorney is paid. There is a provision in the CIDC contract that permits attorneys to share the payment but it is rarely used, most attorneys believing it evens out over time. With respect to substitutions due to attorney/client incompatibility, the court usually lets a defendant know when the state will provide one more attorney but only one. Within the consortium there are three members who volunteer to accept appointments for these clients.

Mr. Gray noted that five of the current Circuit Court Judges are alumni of CIDC. He said that currently the District Attorney's office perceives the defense as an enemy. CIDC was able to work more effectively with previous district attorneys.

Contrary to a statement in the draft report, Mr. Gray said that CIDC has brought in some new and younger lawyers. The consortium has an apprentice program for new attorneys. New attorneys have to find a mentor lawyer within CIDC to serve as a resource. Only some of the apprentice attorneys are given a position with CIDC.

Five or six of the 27 members handle just criminal cases. Other members have mixed practices and some serve as prosecutors and judges in municipal courts. For most CIDC lawyers 50% or more of their practice is in CIDC cases. This means that most members have a variety of skills that may be needed in particular cases. It also gives members a balanced view of the larger system and makes them more effective in settling cases.

Chair Ellis recalled that several years ago the United States Department of Justice explored the antitrust implications of CIDC being the exclusive contractor for public defense services in criminal cases in Clackamas County. The issue was not pursued by the Department of Justice but Mr. Ellis inquired whether having a single provider was the best model.

Mr. Gray said that the question for the commission should be whether that model provides quality representation. He said a good consortium needs an aggressive manager who is willing to confront attorneys who are not performing satisfactorily. The operation should also be economical for the state and if the state only has to send one check per month to the consortium, it is efficient for the state. Micromanagement by the state is not necessary. If the system isn't broken you shouldn't try to fix it. A public defender office was attempted in Clackamas County in the early 1980s. Consortia have lawyers with broader experience than public defenders and some public defenders have an adversarial relation with district attorneys.

Mr. Gray said that the consortium does not currently have a succession plan for his position, should he decide to retire. To be effective the administrator needs to be willing to be unpopular and he is not sure where his successor will come from but there are a couple of members of the group who might be good candidates.

The CIDC board of directors has five permanent and four rotating members. There was one outside board member but he retired recently and has been replaced by a CIDC member.

CIDC is working on a questionnaire for randomly polling clients about the performance of CIDC attorneys.

When a complaint is received about a CIDC lawyer, Mr. Gray usually consults immediately with the attorney. If the problem is not resolved Mr. Gray can take the matter to the board and the board decides whether or not the attorney can remain a part of CIDC. In two cases, the members resigned before the matter could be taken to the board.

Mr. Gray said that he and his staff have a good working relationship with OPDS staff.

Mr. Ellis expressed appreciation to Mr. Gray for his contributions to the public defense system as a whole.

Judge Maurer, the presiding judge of the Clackamas County Circuit Court, said that he and his colleagues have a high level of satisfaction with the operation of CIDC, especially their screening system for applicants, their level of competence and their commitment. Judges who are former CIDC members continue to have an investment in seeing that high quality public defense services are provided.

The court has been very comfortable with Mr. Gray's ability to address concerns and the mentoring that is provided by senior CIDC members. There have only been a handful of new members added because of the limited size of the group. The process for training new members is not too dissimilar from public defender office models although the public defender offices can provide a greater level of in house training and mentoring. There will be a need to bring in more new lawyers as the older ones retire and at some point to bring in a new administrator. A more specific and comprehensive recruitment process will need to be implemented to replace retiring members. A public defender office has some advantages in terms of the incentives it can offer to a new attorney but the consortium model offers some incentives too, such as the benefit of having a portion of a new attorney's practice guaranteed, to cover office overhead.

On the whole, this county has preferred a single provider approach. The bench in Clackamas County has been had very involved in public defense and has been able to work collegially with this group.

Agenda Item No. 3

Post-conviction relief – Performance Standards, Task Force Recommendations, Training

Paul Levy introduced Dennis Balske who served as the chair of the task force that was created by the Oregon State Bar to prepare written performance standards for attorneys in post conviction relief cases.

Dennis Balske thanked Mr. Levy for the work he had done on the project and said that the standards that the group identified are comprehensive and should serve as a road map for lawyers new to the field. They can also be shown to judges who may not understand the extent of the attorneys' obligations in these cases.

The group believed that to provide competent representation it is going to be necessary to create an office that specializes in PCR representation. Such a unit might also help to resolve the venue issue. Short of creating such a unit there may not be any good "stop gap" measures.

Chair Ellis noted some of the obstacles to improving representation in this area of practice and agreed that a specialized office, as proposed by the Commission in its current and previous budget requests, would be the best option.

Kathryn Aylward was asked whether a contract office could provide the necessary services. She said that that effort had been made but that individual contract attorneys have not been willing to create such an office.

Mr. Balske said the PDSC would not be able to attract the best quality lawyers to this work because the level of compensation provided is not sufficient.

Commissioner Potter inquired whether an attorney taking a high volume of those cases wouldn't be able to put more effort into meritorious cases and, by averaging those cases with the non-meritorious cases, on average receive a reasonable rate of compensation.

Mr. Balske said that a lawyer can't determine whether a case is meritorious without putting in a significant amount of time and \$2500 per case is not nearly sufficient to do that.

Agenda Item No. 4

Defense Representation in Drug Courts

This item was postponed until the April 2009 PDSC meeting

Agenda Item No. 5

OPDS Monthly Report

Ingrid Swenson and Kathryn Aylward reported on developments in the legislature regarding the agency's 07-9 budget and the -09-11 budget. Staff reported to the Legislative Fiscal Office that the 09-11 caseload projection was down and that the agency was projecting that it would need \$9.2 million less to meet caseload demands. Ms. Aylward said that current contracts might need to be adjusted downward to reflect the declining caseload. She noted that 1.55 FTE positions had been removed from the current budget.

Kathryn Aylward also reported that the Appellate Division had begun efilings and was making significant progress towards becoming a paperless office. She described the backup systems that are in place to prevent loss of or damage to records and the ability of attorneys to access files and documents from remote locations.

MOTION: Shaun McCrea moved to adjourn the meeting; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Meeting was adjourned at 1:11 p.m.

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, March 12, 2009
9:00 a.m. - 1:00 p.m.
Clackamas County Circuit Court
Holman Building
821 Main St.
Oregon City, Oregon 97045

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
John Potter
Chip Lazenby
Hon. Elizabeth Welch

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Paul Levy
Billy Strehlow
Amy Jackson

(Meeting was called to order at 9:04 a.m.)

1:30 Chair Ellis Good morning. I want to welcome all of you and we appreciate you welcoming us. We will call the meeting to order. This is the meeting of the Public Defense Services Commission. I want to say personally that I am very happy to be here because I am a Clackamas County resident. The bus service makes it very easy to get here from where I am. Mari, did you want to say a few words at the beginning?

Agenda Item No. 2 Presentations on Public Defense Delivery in Clackamas County

2:02 M. Miller Hi. I am Mari Miller and I am the trial court administrator here in Clackamas County. I just wanted to welcome you to our court. The Holman building that you are meeting in today, we talked the county into renovating for us. We moved into it two years ago this coming July. We are finding that this particular room is being used more and more for not just some of our hearings but for other kinds of outside meetings. I hope you can take some time to read about Justice Holman if you don't already know his life story and also come over to the courthouse and see Lady Justice. She is the original Lady that was on top of the 1884 courthouse. She was in storage for many years and was totally dismantled and disheveled. She was restored and in a museum. We partnered with the museum to gift it back to the courthouse and she is now on display in the main courthouse along with some history of the courthouse also. Besides that, I also wanted to tell you that, as you know, all of the state courts are going to be closing starting this Friday. A lot of us are very busy trying to figure out how that is going to work. We had to stop our night court. All of those cases are now on our regular docket along with trying to do our docketing for four days instead of five days. It is essentially doing six days because our night court made up essentially one day. We are going from six days to four

days. That is something that, as partners in the justice system, you need to understand as you are trying to do the kind of work you have to do. Every court is going to be struggling with how to make these adjustments. There is no end in sight because of the economy and what the state resources are going to be. I wanted to ask you to bear with us and not just Clackamas. I am sure you work with people in other courts as well. Finally, I think in your report you will hear about some of the things we do in Clackamas County relative to the defense bar and how we work with our indigent defense attorneys to try to solve issues prior to them actually occurring. I hope that if you have any questions about that during the meeting you will give us a call and we will come over. Or afterwards we will try to answer your questions. Other than that, just enjoy your time here. There are some very good restaurants across the street if you want to have lunch before you leave.

- 5:42 I. Swenson Mr. Chair, if members don't have questions, I have one about the volume of cases your judges handle. Yours is one of the highest in the state, I believe, in terms of the number of cases per judge.
- 5:59 M. Miller I don't have those numbers on the top of my head. We are not one of them, we are the highest and that is because we are one to two judges below what we are supposed to have. That is one of the reasons that we have night court. We have night court because we don't have enough courtrooms during the day and we don't have enough judges. We have pro tem judges that do our small claims, our FEDs, our traffic, as long as there is not some kind of a jury issue like a DUII or some other higher crime. As I mentioned earlier those are not on our day docket. The regular elected and appointed judges that we have, the actual circuit court judges, are now going to be handling all of those cases as well. If we had one or two additional judges, and we had courtrooms for those one or two additional judges, then we would be okay. You don't happen to know what our volume is for judges?
- 7:30 P. Holland I do know we have the highest number in the state.
- 7:43 M. Miller Before you go any further let me introduce you. Patty Holland. Patty Holland is the manager who supervises the docketing area of the criminal process, juries, indigent defense and assigning of attorneys. She is your main contact.
- 8:02 P. Holland I was just looking at the stats the other day. What I was very impressed with is that we have actually increased all of the times for disposition. We are above the state average. We are at or better in terms of how quickly we complete the cases compared to all of the other big counties. We do it with two, three, four less judges. Yes. I am very proud of that.
- 8:34 M. Miller Judge Maurer, Steve Maurer, is our presiding judge. He has a very full docket today but he told me that if he possibly can he'll run over here and say hello.
- 8:51 Chair Ellis Thank you. Before we get started I am reminded of a personal story about Judge Holman whom I have known for a very long time. My wife grew up here in Oregon City. In 1962 we were planning to get married and I came to her family home a week before the wedding and I was a law student. Even though I was a law student nobody told me that you needed to have a license to get married. We got to the Friday before the Saturday the wedding was scheduled and somebody brought it up. I hadn't done anything and so that is when I met Ralph Holman. I came down to the courthouse. He was very kind and gave us the appropriate certificate so we could do this the next day. I have fond long-time memories of Judge Holman.
- Let me say just a little about the Commission and why we are here. We have for the last six years been engaged in a process of going out into various areas of the state and meeting with people that are part of the criminal justice system. We are trying to get a first hand look at how our provision of defense services is playing out on the ground. We have had, I think, a basic philosophy that we don't believe in the one size fits all approach. That means that we don't superimpose the same model on every area. That is because this is a very diverse state.

Obviously the population densities vary a lot. The kinds of issues that need to be addressed vary a lot around the state. On the other hand, we very much want to be, I would use the word “proactive.” We don’t just want to sit in Salem and have different communities lob in whatever thoughts they have as to how things ought to go and not actively share with them our thoughts how provision of indigent defense services can be done better, more effectively, more fairly, and we have twin goals of quality and economy. We try hard to address issues around the state to achieve those twin goals as might be best for the particular community. It is in that spirit that we are here and we very much want to hear from people in the area as to both how the system is currently structured and how we might do it better. I might just comment that Clackamas seems to me a very interesting circumstance. It is one of the largest dockets in the state. It is one of four or five metropolitan counties that have very large numbers of cases. I think it is the only remaining one that has a single provider, the consortium. That doesn’t necessarily mean that it is wrong, but it is something that we are very conscious of and want to examine and make sure that it is really serving this area best. It is, I think, the only large county that does not have a public defender type office here. It did, back in the early days and we even have an alumnus from that office some years ago. Historically, there was a point in time, and I am going to be weak on my dates, but I think it was around the early 80s.

13:31 Voice from audience

1983.

13:33 Chair Ellis

I am not that far off. Even though that office was a very successful office, and I don’t think anybody in the community really felt otherwise, there was a strong feeling on the part of a number of practitioners in the area and one much beloved judge, Judge Gilroy, that they wanted to make a change. The change did happen and that is when the consortium was started. The consortium has grown over time and is the single source provider today. I think we want to hear how it is going and satisfy ourselves that – I mean consortia have very positive characteristics. They can also have some areas where they are less successful. For example, a consortium is a model where it is frankly very hard to get younger lawyers into the defense system. It is a model that doesn’t do that as successfully as a PD does. Those are some of the things that we are here to listen to, and understand, and evaluate, and see how we proceed. I don’t know all of you. I don’t know which of you is here to speak from the standpoint of what is happening here in Clackamas County. We can, I think, if at any time we run out of presenters, move to the rest of our agenda, but we are here for a reason. If any of you are local and want to present we would very much like to hear from you.

15:28 I. Swenson

Mr. Chair, because of the difficulty of court scheduling there are going to be people coming by as they are able. At this point, we have a person who wasn’t planning to present, Ruth Boen, who is here from the juvenile consortium. Mike Clancy plans to come. Maybe the best idea would be to proceed to some other matters. We have the minutes to approve and in addition I want to introduce Matt Shields who is sitting in the back of the room this morning. He is our new liaison to the Oregon State Bar. He just assumed that position about a month ago and he inquired about our meeting place and time. He is here to serve in that capacity. We could also move on to our staff report.

Agenda Item No. 1

Approval of the Minutes of PDSC’s January 22, 2009 Meeting

16:43 Chair Ellis

That works for me. Let me know when your group is ready. On the minutes are there any additions or corrections to the minutes of the January 22 meeting? If not, I would entertain a motion to approve the minutes:

MOTION: Shaun McCrea moved to approve the minutes; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

17:12 Chair Ellis

Ingrid, what would you like to do?

17:15 I. Swenson Well, we could do either the staff report or the drug court piece and just interrupt that if people arrive that you want to hear from sooner.

17:24 Chair Ellis Why don't we do Item 5, the monthly report?

Agenda Item No. OPDS Monthly Report

17:35 I. Swenson Okay. Obviously the major news over the period of the last month or so has been the development of the state budget and its impact on the courts. We are talking about the 07-09 budget reduction piece which has now passed. I don't believe the Governor has signed it but it has passed both houses and it is expected to be signed. You are well aware of the impact that will be having on our courts which will be closing Fridays. The court staff will be on a 20 percent reduction schedule. They may not work Fridays or some courts may arrange that differently. I think the Chief Justice has worked with the presiding judges to keep things as uniform as possible in terms of how the courts deal with their business. There are some variations that will occur from one county to another. Those changes take effect tomorrow, Friday, and will be implemented at least through June 30. No one, of course, knows what the situation will be thereafter as we enter into the 09-11 biennium.

19:01 Chair Ellis My understanding is, in contrast to '03, the criminal docket will continue. You won't have the situation you had in '03 where a whole group of criminal cases were put on hold. Then we had the backlog that we had to process.

19:22 I. Swenson Mr. Chair, certainly at this point that is the expectation; cases in which public defenders are appointed have not yet been affected. The court may not have resolved that entirely in every county and how they prioritize things. I know I was speaking with Lane Borg earlier about meetings held yesterday in Multnomah County and they are in the planning stages of deciding how to deal with the reductions. We don't anticipate any effect on court appointed cases but it is not certain.

20:07 Hon. Elizabeth Welch One of the issues in Multnomah County is, unlike the state, people are losing their jobs. They are not cutting back 10 or 20 percent. They are laying off. The juvenile department is losing about a third of its staff by the end of this fiscal year, which is a lot of people.

20:24 I. Swenson That is why Peter can't be here today. He is very much engaged in finalizing the county budget. Of course those are county positions.

20:34 Hon. Elizabeth Welch So are the DAs. Aren't they losing staff?

20:45 L. Borg The latest word is somewhere between 10 and 11 actual deputy positions. There were some federal positions that they were going to lose anyway. Earlier in the week the belief was that the way it may affect the criminal docket is that they may start filing as many drug cases as they can as misdemeanors. We are going to see that minor felony group get pinched. That is the change we are anticipating but it hasn't happened yet.

21:23 Chair Ellis What will the effect be on your office?

21:24 L. Borg The misdemeanor section will start doing what the minor felony section was doing; the drug cases, some minor property cases. The head of the misdemeanor unit in the DAs office said he was told that he should not anticipate any cuts in FTE because there would just be a shifting of the types of cases. They anticipate doing a lot of cases as misdemeanors - the minor felonies. So the drug and property units are going to see fewer cases being filed. We don't anticipate much change in the major felony units. In terms of time to trial there is an adjustment in the misdemeanors from Friday to Thursday. That starts today. There has been

some recognition that there will be a little more difficulty in scheduling multiple day trials. They don't want to start them on Thursdays. Everybody is talking but it is a little early to see what the impact is going to be on time to trial or number of cases open.

- 22:40 S. Gorham I noticed in yesterday's Oregonian they talked about drug court. Is that totally gone, and if so, what effect would that have?
- 22:47 L. Borg No. I talked to Alex Bassos yesterday. He is now in charge of that unit. The real imperilment to drug court apparently is that the stream of funds for treatment comes through community corrections. The way it is most likely to go away is if the treatment provider goes away. Now that could change. We were talking about that within the office. I think the anticipation is that a lot of it would be Medicaid money from the stimulus package to a different provider. But right now the plan is community corrections is saying we are losing 44 percent of our budget. We are laying people off as Judge Welch said. The same thing is happening on community corrections. That is the question right now. We still have staff to do that. Judge Marshall, I think, is still interested and wants to have that happen. The DAs office hasn't pulled that deputy yet. Everybody else is there except the treatment provider and I think that is going to be the open question is whether they can continue to fund the treatment or maybe they switch revenue funds through a different source. I know that John Kroger has made noises about trying to support drug courts and programs. Maybe that will happen.
- 24:12 Chair Ellis Where are we on the 09-11?
- 24:18 I. Swenson The legislature is now ready to turn its attention to funding for that biennium. Some agencies have already made their presentations on that 09-11 budget. Ours is not yet scheduled, although we are expect it to begin the week of March 30. That is not certain. We, like other agencies, have been asked to respond to questions about how we would deal with a variety of reductions, five percent, 10 percent, twenty percent, so we will make those presentations like every agency and say this is what it would look like if that were the level of funding that was available. I would like Kathryn to talk to you a little bit about where we are in the 07-09 budget and any expectations she may have at this point about 09-11. Barbara Johnson is our first scheduled witness from Clackamas County. We can either continue this discussion or hear from Ms. Johnson.
- 25:53 Chair Ellis We are doing kind of an on again, off again day here.
- 25:58 B. Johnson I am Barbara Johnson. I am the Executive Director of the CASA program in Clackamas County. I happen to also be an attorney, although obviously not practicing. After I spoke with Ms. Swenson, I did call a number of our most experienced CASA volunteers to ask them what they would want me to share with you since I had this opportunity. I have a number of quotes. I want to start though by saying we have not always had a really good working relationship in Clackamas County between the consortium and our CASA volunteers. We have all really made efforts to improve that. A number of years ago Judge Darling offered to facilitate a meeting between CASAs and the consortium attorneys. That was sort of the beginning of our effort to improve our working relationship. We have had three or four of those meetings now. I did speak with Mr. Cohen last week and I think we will schedule another one. It has been a couple of years.
- 27:17 Chair Ellis What were the kinds of things that weren't going well? I am trying to get a sense when you say you didn't have a great relationship.
- 27:22 B. Johnson I think there continues to be some misunderstanding on the part of CASAs. They want the absolute best for the kids that they work with. They want attorneys who are getting paid adequately who have the time to do adequately everything a CASA would want to have done on behalf of a child legally. You know what the caseloads are for these attorneys. It is impossible for them to do everything a CASA would want them to do. It is that kind of a

conversation. The CASAs also feel that maybe attorneys don't always understand their statutory role. It is a conversation that is continuing and things have improved. I think we do have a pretty good working relationship. When I called Mr. Cohen last week he said, "Well, I haven't heard from you so I am assuming everything is going well." I said, "Well, that is not entirely true." I realized from talking to CASAs that they acknowledge, "I don't call them. I don't call them when there is a problem because one, I don't think it will do any good, and, two, he is one of them." I thought, "Okay, here is something we need to address." Mr. Cohen is willing to hear from CASA volunteers and I am sure other people call if they have any concerns. Yet I find that it is the CASAs who are not doing that. They do the same thing with DHS. They won't call the supervisor when they think the caseworker isn't doing their job because they don't want to damage the relationship that they do have. That is something else that we need to work on. I am just going to start with some quotes that I got from the CASAs. Some are really good attorneys, some not so much. A good involved attorney can make a real difference in the outcome of a case. There is not a lot of passion. This appears to be their bread and butter. It pays their overhead. Sometimes the same attorney can be effective on one case and not on another. They don't call CASAs back but they should at least call their clients back. If representation is more zealous on behalf of the parent, who is protecting the kid? So, you hear some of the primary concerns that CASAs have. CASAs believe there is a lack of contact between the attorneys and their clients. We only have our perspective and I admit it is pretty narrow but it maybe does inform you somewhat. Parents regularly tell CASAs they have trouble reaching their lawyers. Foster parents say that sometimes it is difficult, if not impossible, to get their calls returned and CASAs tend to believe them because they have the same experience. I had a CASA ask me if there wasn't some kind of audit procedure. If someone looked at the file couldn't they tell whether calls were being returned to clients? That was not a question I could answer. I have started a list of things we can talk about when we meet with the attorneys. CASAs have a concern that the social worker employed by the consortium to go out on the initial call often talks only to the foster parent, and while she provides a great deal of information, it is a snapshot. It is that point in time and the information is primarily from the foster parent. CASAs believe that that is the only contact attorneys often have until they're in the hallway outside the courtroom right before a hearing. CASAs have a concern that attorneys rely on one party primarily for the information they get. They align with the caseworker, or a foster parent, or a CASA, and don't get the broad diversity of information that there may be on a case. The CASAs think that maybe attorneys could sometimes file petitions on a case. That happens rarely and maybe it could happen more. Occasionally an attorney will file a termination petition when the state won't. I can think of two instances in all the years I have been here when that has happened. In those cases it was instrumental in forcing the state to do what they should be doing. I recognize how much time is involved in that, but on behalf of kids sometimes they need that. Then, particularly CASAs are frustrated when they share their information at a hearing and the attorney then presents information as if they are more aware of what is going on than the CASA believes they really are. Or when the attorney reads the CASA's report or speaks to them right before the hearing and then shares that information as it were first-hand information from the attorney. Then, I want to end on a more positive note because while I have shared some of the complaints and concerns CASAs have, they also want to work more collaboratively with the attorneys for parents and children. It is positive that our attorneys want that as well. CASAs noted to me that some of our attorneys, and you know it kind of depends which attorney, which case, work in a larger role like at family meetings and how instrumental that can be to a case having a positive outcome. CASAs would like to see more of that. They noted that attorneys don't regularly attend child safety meetings. I know at one point the contract was changed to allow our attorneys to be paid for attending CRB reviews. That has been helpful and CASAs wonder whether attorneys might not also be able to attend child safety meetings and other kinds of family meetings especially with declining caseloads in our county for dependency cases. CASAs recognize there is a need for legal protection for children and parents in dependency cases, but they wonder if we as a state have hit on the best method for protecting children's rights, especially in these difficult budget times. This may be a time to think more creatively and outside the box.

33:35 Hon. Elizabeth Welch As far as I know we have never met, but I think Ms. Johnson has just characterized the relationship between the juvenile bar and the CASA program everywhere. Those are very common concerns and complaints and very well stated, I have to say. I think it is an absolute roadmap to the issues.

34:03 B. Johnson I would agree.

34:01 Chair Ellis I would like to get your background a little bit. How long have you been with the CASA program?

34:11 B. Johnson I actually started as a CASA volunteer in Washington County in 1989. I was a volunteer for three years and then I was offered a position in Washington County. I have been with the Clackamas County program since it began in 1992.

34:27 Chair Ellis Can you describe the program a little bit?

34:29 B. Johnson The CASA program?

34:29 Chair Ellis Right.

34:30 B. Johnson Sure. CASAs are volunteers who are trained and appointed on dependency cases to advocate for the best interests of children. In Clackamas County we currently serve about 75 percent of the children in dependency cases with volunteers. That is higher than in some similar sized programs. We have one of the smaller caseloads in Clackamas County. We have less children involved in court proceedings in dependency cases, given our population, than most other counties.

35:05 Chair Ellis How many volunteers do you have?

35:07 B. Johnson We have about 150 volunteers in Clackamas County. Statewide, I think, there are 1,300 or 1,400, and Judge Welch is right that these are the same kinds of concerns when I talk to other CASA directors that they express in their county as well. I think we do have one of the better models for working with attorneys to address those issues openly. You hear a lot of complaining all the time but that is not very productive. I think both sides work to instill a more positive approach here.

35:47 Chair Ellis Are there questions for Ms. Johnson?

35:47 B. Johnson Did I answer your question about CASAs?

35:51 Chair Ellis You did.

35:52 B. Johnson Thank you again. I appreciate the opportunity. I need to be in Salem so....

35:55 Hon. Elizabeth Welch I was curious about your comment about thinking outside the box. Does anybody have any thoughts outside the box?

36:03 B. Johnson Sure. CASAs wonder whether we could look at appointing a CASA in every case and using attorneys for the legal issues that we really need them on. When I was first a CASA in Washington County not every child had an attorney appointed, but we had an opportunity as a CASA to inform the court and request that an attorney be appointed if there were issues. That worked well. I know, as an attorney, there are concerns about children's rights, but the CASAs say if the attorney really doesn't know what is going on and isn't really involved in

the case, which happens sometimes, are their legal rights and best interests being protected anyway?

- 36:52 Chair Ellis What is causing the decline in dependency caseload?
- 36:56 B. Johnson I think that is probably a more complex issue than we have time for, although the timing coincides with the implementation of the Oregon Safety Model in Clackamas County. From what I can tell it was implemented in a way that didn't happen in other parts of the state. Clackamas County DHS was really on board with implementing the safety model and tried to do it the way they thought was the right way to do it. They spend a lot more time working, providing in home services, trying to prevent removal of children and apparently that has been successful.
- 37:42 Hon. Elizabeth Welch That is something that has been supposedly coming for a long, long time. Oregon has amazingly high statistics for removal, outrageously higher than in other states. The percentage of the population of kids in foster care is very high. The obvious conclusion is either that we are just better than everybody else at protecting kids, or maybe we need to take a better look at what is necessary and appropriate. This safety model has been a very important step. I don't know if anybody knows yet what the implications are.
- 38:18 B. Johnson I would also say that our bench, Judge Darling particularly, is very strict in her reading of the statute and whether the state has met the bar for removal of children. Some people think that is good and some people think that is bad, but I think that also has an impact when you compare, for instance, Marion County, where a really high number of children are removed. One of the reasons some people believe is because – yesterday a director told me that a judge in her county said, “You know, children in Marion County if they are unaccompanied by a parent, get removed and put in foster care.” There are different thoughts about what is going on and I don't presume to have the answers.
- 39:13 Chair Ellis Any other questions? Thank you.
- 39:17 B. Johnson Thank you very much. I appreciate the opportunity.
- 39:17 I. Swenson Mr. Chair, Ron Gray is here.
- 39:27 Chair Ellis Ron, do you want to come up and share with us.
- 39:30 R. Gray Was I supposed to have a speech prepared?
- 39:33 Chair Ellis It doesn't have to be a speech. I think it would be helpful if you could outline the current status of the consortia, the number of members, and a profile the members. You weren't here when we started. I don't mean this in anyway to indicate that someone is looking to make an immediate change, but Clackamas County is unique. You are a single source provider of indigent defense and you are the largest county to not have a PD. That may be fine, or maybe it is something we ought to look at.
- 40:32 R. Gray We have been around so long I can't even tell you when we started.
- 40:40 Chair Ellis It was 1983. We have already covered it.
- 40:41 R. Gray The reason that I was late is because up until a few minutes ago I had a Ballot Measure 11 trial that was set to go today. Everybody was kind enough, including my client, to agree to a short reset of that trial so I could be available here today. I had to go take care of the reset date which is why I am a little bit late. The Clackamas County consortium basically grew kind of by the seat of our pants. We didn't have any model to look at or any guidelines to

look at. What we did have was a history here. When I started practicing in 1979, the court appointments were done directly out of the courthouse by personnel that were based in the courthouse. There was just this large list of attorneys and anybody could put their name on the list. What became apparent to me right off the bat was attorneys were picking and choosing the cases that they wanted to take, which seemed to me to distort the way that people were being represented and also that there were no qualifying standards for any lawyers to meet. It was just very haphazard. Before that system could be changed we actually had anger over that system result in bringing an office of a public defender for a while in Clackamas County. What happened was that because there was obviously going to be conflict cases a few of us put our heads together and formed small groups, one for felonies and one for misdemeanors and bid for the conflict cases. We got those cases. Eventually we pooled our resources into what became this consortium and bid for a higher volume of those cases. Fortunately, we were deemed to be much more efficient at what we did than the public defender's office and there were some breakdowns. Eventually we decided that we were going to be aggressive and bid for the whole contract. We did, and we were awarded it. There were several years of evolution that occurred. We have had a high of 30 lawyers when I was suckered into managing this. I guess I should say I agreed to do it because I thought there would be no more than about 15 lawyers and I could manage to herd that many sheep without getting too bent out of shape.

- 43:08 Chair Ellis Your border collie instinct.
- 43:09 R. Gray Because the caseload grew, and what we handled grew, we eventually ended up with 30. We are now at 27. Everyone is on a rotating list for cases so we have a rotation list for probation violations, one for misdemeanors, one for Ballot Measure 11 and a homicide rotation. They grow into those lists as their qualifications increase. The homicide rotation is the only one that is necessary.
- 43:44 Chair Ellis With your Measure 11 case rescheduled, are you able to stay most of the morning?
- 43:46 R. Gray Sure.
- 43:45 Chair Ellis Would you mind if we let a couple people with a conflict go in the middle. Just remember where you are.
- 44:10 R. Gray I think I'm in Oregon City, aren't I? Sure. No problem.
- 44:11 Chair Ellis Thanks. I understand that Mike Clancy and Gay Canaday are here today. My understanding is your time is short today. Come on up and we will hear from you.
- 44:12 M. Clancy Ms. Canaday and I were part of an original group of four lawyers that set up a corporation to do the juvenile work in Clackamas County, juvenile and mental hearings, basically. That ...
- 45:14 Chair Ellis You call it a corporation. I have always understood it was a consortium.
- 45:14 M. Clancy It is a group. It is not a corporation. That is true. It is a consortium of private attorneys who have basically banded together. Over the years we have grown in numbers, like you hear from Mr. Gray, basically based on a number of factors, obviously on conflicts but also on the caseloads and everything. We currently are doing the juvenile court work and Ms. Canaday does the mental health commitments. We have a rotating system for appointment that is used on a rotating basis with everybody in the group doing a combination of delinquency and dependency work, except that Mr. Cohen has kind of changed his focus. We have a drug court now through juvenile court that he is involved in. He also takes some delinquency cases but is not normally taking dependency cases at this point. That is something that occurred in the last few years when we ended up with a juvenile drug court. Everybody else in the group does a mixture of dependency and delinquency work representing both parents and children

and also representing clients on delinquency cases. We handle all varieties of cases, obviously, from the less serious to the most serious. I think the report says we are all getting a little gray in our group. I think that is an accurate assessment because I think most of the people in the group have been in practice for 20 years and some of us for more than 30 years.

- 47:08 Chair Ellis Do you have any experience bringing younger lawyers in?
- 47:10 M. Clancy We are in the process of doing that. I have one person at this point, Ms. Cross, who is coming in and taking some dependency cases. She has her first termination trial pending.
- 47:28 Chair Ellis Is she a sole practitioner?
- 47:30 M. Clancy She is a sole practitioner. What we have done in that arrangement is that I have just basically sat in with her and mentored her through the process in her cases. We recognize that it is going to be important to have some new people coming in because all of us are not going to be able to continue practicing indefinitely.
- 47:59 Chair Ellis In her situation do you have any mechanism for the experienced lawyers to help the inexperienced lawyer to learn the ropes?
- 48:11 M. Clancy Right. We do. In this particular circumstance it is a little easier than in some because she shares space in the office that we work in, so we have daily contact with her. That is the process that we have evolved. It is not large scale enough. We should probably have more people that are doing that but it is not a situation where we are having people working full time that are inexperienced that need that degree of mentoring. I think rightly it is noted in the report that that is something that we need to get a little bit better at in terms of basically bringing some people in. Periodically we will get queries from people in terms of doing the work, but I think we should actually be out soliciting people to do that kind of work. Obviously, people who do family law or criminal work are prime candidates for doing the kind of work that we do. The one other thing that I wanted to comment on that I saw in the report was a comment that was made that there aren't any motions to suppress filed in, I think it said, five years or so. I am a little mystified by that. I don't know where that came from. Well, I think I do know where that came from but I don't know how that remark was made. I was telling Mr. Cohen, who is the head of group, it was interesting. When I read that in the report I had just handled a case, a trial, where I had won a motion to suppress and the charge got dismissed. I also, last week, got a Court of Appeals opinion reversing a trial court denial of a motion to suppress that I had done. I don't keep track of other people in the group in terms of motions to suppress that they file. I know that probably in the last year I have done at least a half dozen. As everybody probably knows in the group too, it is not always necessary to file that motion. A lot of time cases are negotiated based on some deficiency in the search and seizure. The motions to suppress are usually on the contested cases that actually end up going to trial.
- 50:32 I. Swenson Mr. Chair, if I could just quickly comment. I did speak to Mr. Cohen about that comment in the draft of the report. It doesn't appear in your draft because I determined, after talking to Mr. Cohen, that motions had been filed so I removed it. However, what I am proposing to replace it with is a statement that they are rarely filed. Mr. Clancy may well file them frequently, but the perception of other people in the system is that on the whole it is a rare thing to have a motion filed in a juvenile delinquency case.
- 51:14 M. Clancy Those are the comments that I have. We obviously are more than willing to take any questions.
- 51:22 G. Canaday I can add a couple of things. I think the interesting part of our consortium is that we all kind of bring to the table a little different practice. For example, some of the attorneys are on the adult contract as well as the juvenile contract. Their expertise in criminal matters may be an

overlay that would assist in doing a good job representing youths that are charged with delinquencies. Mr. Cohen has expertise in social security disability. There are a lot of dependency cases where that expertise is helpful in informing the group if there any specific questions on SSI or social security. I deal with mentally ill people. That is kind of an overlay that is especially helpful in a lot of the dependency cases as well as the delinquency cases where there are mental health issues. We have a number of attorneys in our consortium that also practice domestic relations, which as you know is often a consolidated matter that follows dependency cases. I think Mike does a civil practice as well. That is another layer that helps in providing a variety of skills that I don't think you would get if you were just a one shop attorney practice. I think even though there may be some scheduling problems with the different types of practices, I think our consortium has been able to accommodate the juvenile court requirements and it is good to have a varied practice as opposed to a practice focused just in the juvenile law area. When we first started practicing we were going to call ourselves "The Four C's" because there were four attorneys and all our last names started with C. We have obviously expanded our group with the hope of having attorneys that are really dedicated to this area of law. I think that if you took a look at the people that are practicing in our consortium you would have to appreciate the fact that we are doing this because we really love the area. That, I think, is really key to providing good representation for our clients. I know that there are some issues in terms of whether or not people that handle murder cases should be involved in taking appointments and I think the board has dealt with that. If there is somebody who is going to be out of commission basically, because their focus is on a murder, then they would not get appointments for the time that they are restricted because of their commitment to the murder case. Then I think there have been instances where there have been medical problems. I think that our group has been able to handle that appropriately. I think the main complaints that we have heard about have been in scheduling, in having dual contracts, and in cases where somebody could not commit to the time requirements.

- 55:01 Chair Ellis My understanding is the way your consortium is structured you have a three person board?
- 55:07 G. Canaday Correct.
- 55:07 Chair Ellis Tell me a little how the board relates to the consortium members, how frequently they meet and what role they play.
- 55:14 G. Canaday Well, we meet, probably quarterly would be average for meetings of the board. After the board meeting if there are issues that we need to deal with, involving Judge Darling or the other attorneys that are involved in our group, the district attorney's office or the Attorney General's office, then we would have a meeting that all those parties would participate in. At the minimum we have done the larger meetings at least two times a year and probably more often. The group meetings for our 11 attorneys would be at least quarterly also.
- 56:23 Chair Ellis I don't think either of you were here when Barbara Johnson spoke. I want to ask you how you would describe your relations with the CASA group.
- 56:39 G. Canaday Personally I think we get along well with the CASA group. I know that there have been, and I'm sorry that we weren't here, but I know that there were some issues brought up with the CASAs that attorneys were not returning calls that CASAs may have made to respective attorneys. For the most part, however, I think that most CASAs are able to at least communicate with the children's attorneys. I suspect that there may be times when the CASA may not be able to get through to an attorney, but for the most part I think the working relationship is good. I know that the CASAs attend most of the CRBs. They attend family decision making meetings which the attorneys are usually able to go to and there is always an exchange. I don't think there is any disrespect of the CASAs in any way. I think the court values their judgment. My daughter is a CASA. It may just be on a case by case basis. Not always will the child's attorney agree with the CASA. The CASA obviously has a different

perspective because they can freely talk with all the parties. That isn't going to happen with most children's attorneys. I don't think there is anybody in our group that disrespects the CASAs. It may just be a frustration from the CASAs that they call the attorneys and the attorneys may not be in the office. We have talked with the attorneys in our group about being accessible. I don't know if Ms. Johnson's comments were based on something recent or if there were just a few cases.

58:57 M. Clancy

I can say too that there are some cases where we want to have more contact with the CASAs than we get. I get annoyed when I am representing parents and I see stuff in CASA reports that is inaccurate and things that could probably have been cleared up if they would have contacted the counsel for parents, also, if they have not sought or had any contact with the parents or are doing it off a third party report. I think there are actually times when I would like more CASA involvement. The other thing that we have done to try to bolster our relationship with the CASAs is we have done some joint meetings where we have gotten together just to discuss things in general and our relationship in particular. The other thing that we did is that we have a non-attorney member of our board, Mr. Bradway, and he is a CASA. That wasn't the only reason that he was picked. We thought that would help also in terms of our relationships with CASAs. He is a member of our board and is the only non-lawyer member of the board.

1:00:14 Chair Ellis

How long has he been a member?

1:00:15 M. Clancy

I want to say it has been at least a year, maybe two years now that he has been involved. That was one of our thoughts in terms of doing that too. We thought he would be a very good board member not just because he was a CASA. We thought because of his business background and organizational background that it would be a good fit for our organization. We also thought that that would certainly help in terms of our relationship. If there were issues that needed to be addressed they could even be brought to the board through him. I don't know if that has made a marked difference but that was one of our reasons for picking him to be on our board of directors.

1:00:59 Chair Ellis

There is a sentence in the report that I want to ask about. On our draft it is at the bottom of page 15 over to the top of page 16. The concept is maybe we should consider a change in the compensation structure which seems to focus more on hearing attendance and maybe less on the case as a whole. I don't know if either of you has a reaction to that?

1:01:28 M. Clancy

I saw that and I don't know how that would be any better for us or any better for the state, quite frankly. I don't understand the rationale behind that. We have a combination of things now as I think everybody knows. We get paid a case amount, for instance on a dependency, which is for the case, the initial case through the jurisdictional hearing, and then we are paid after that for subsequent hearings and everything else that is held after jurisdiction is established. We are paid for that. We are paid for CRB hearings. If they are talking about appearances before jurisdiction is established and everything else then that is different. I have read that but I don't understand the rationale.

1:02:22 Hon. Elizabeth
Welch

Well, I don't know exactly where that came from but the way I read it was that there is perhaps a misunderstanding by attorneys because you get paid after jurisdiction only for going to hearings, that is the only thing that is expected to be done. That might be why some of the other people in the system are critical of the preparation that lawyers do. At review hearings they sense that they haven't had contact with their clients between hearings, that kind of thing.

1:03:03 M. Clancy

We have heard that before. We try to address that in the meetings we have had with the group and everything else. The difficulty we have as attorneys is that sometimes these people are not very good in terms of staying in touch. We do have clientele that don't call, that don't show for appointments that surprise us when they show up for court hearings because we have

never heard from them. There certainly are a lot of cases where no amount of diligence ahead of time would have allowed us to talk to our client. But certainly to the extent that is happening where we have an involved client who is available and who hasn't been met with that would be a problem. I can tell you that the majority of the times that have been reported are the other situation where clients are not good in terms of staying in touch. It makes it very difficult to have those conversations. The other thing is Judge Darling's scheme of moving cases along. We call them JRPs, the judicial review, where there is a decision made as far as whether someone is going to admit jurisdiction or go to trial. Because of the guidelines of getting those cases to trial within 60 days from the time they are filed, those have been moved up. That kind of compresses the time period that you have to be able to meet with these people. Sometimes that has been difficult as well because you might have only two or three weeks from the time of the initial appearance. In other cases you get appointed late in the case when somebody shows up or they qualify for court appointed counsel. You might have a week or so in some cases. It would just be a matter of scheduling if you had somebody to get a hold of, to get them in to talk to in that time period. I think it a combination of those things. I don't see that as being a large scale problem. We get word by fax that we have been appointed on a case. I think most people use letters or phone calls. I know that we send letters out as soon as we get the fax in and the file set up. The first instruction to our staff is to get an appointment letter out. We get from the court a copy of the financial application that somebody has filed which is usually the best information in terms of phone number and address. We have that contact information right away which allows us to contact them without having to make a bunch of phone calls to figure out where somebody is. When we get that information I know the majority of us send the letter out immediately to whatever address is on there in terms of client contact to make an appointment. I think in the majority of cases that is done. I think there are some occasions where someone is perhaps meeting late with their client.

1:06:16 Chair Ellis

You spoke earlier about a younger lawyer coming in. There is, obviously, a passage in the report I want to ask you about. I don't mean to get into specifics but do you have a process that if one of your members is viewed as not performing at an appropriate level of removing him or her?

1:06:47 M. Clancy

Well, we do. It is kind of a progressive sanction type thing. We have not had to do that. If there is a weakness in our system it is that we do not have a full-time organizational person to basically run the herd like Mr. Gray does over his group. We are a smaller outfit. We are all solo practitioners. I think there is some valid criticism that we should have some better procedures in place. Over the years we haven't really had to resort to that because, again, of the experience level of the people that we have. In a lot of groups you are bringing in new people who you don't know very well. You don't know their work habits or their abilities. Then I think that it is even more important to have some kind of formal process in place.

1:07:45 Chair Ellis

It can be a problem, though. You talk about experience but people that have been in the system for a long time may be very reluctant to face a problem if one or more are not performing at an appropriate level. There tends to be self-protection. "There, but for the grace of God, go I." That kind of thing.

1:08:09 M. Clancy

I'm not sure that we have treated it that way because a lot of times the complaints that have come in have not been complaints that have necessarily been made against other people. I think what we have tried to do in that situation is to talk to the person regarding that. We had one concern some time ago that was raised with somebody that had been observed reading during a TPR trial, as a matter of fact. In that particular case we thought that was serious enough that we had a talk with that individual and just told him that if anything close to that ever occurred again that he was going to be automatically gone.

1:08:47 Chair Ellis

Now the "we" in that is who?

1:08:47 M. Clancy The board. That is Mr. Cohen, Ms. Canaday, and myself. We usually contact those people individually. It usually is something the three of us, and/or Mr. Bradway is involved in and Mr. Cohen is the contact person for that.

1:09:07 Chair Ellis Where the consortium model works well the members realize they all are impacted by the reputation of any of them. They all are affected by both the good and the not so good that others do and self-police. I am not sure I am hearing that that is happening fully here.

1:09:27 G. Canaday I think the key is that we know what has happened. There has to be some communication that there is a problem. In the cases that we have dealt with we became aware because of somebody informed the board that there was a problem. Then once we had the information we were able, as a board, to decide what should happen. Normally the first recourse would be to talk with the individual or talk to the attorney to find out what their perception is and then to put an end to whatever was going on. Probably the example that Mike raises is the easiest one to understand, because that was just inappropriate and should never have happened. The board dealt with that.

1:10:22 R. Boen I believe that we do have a fairly strong process in place with regards to responding to complaints. I liken that to a situation that occurred a little over a couple of years ago with regard to one of our attorneys not managing his calendar well, being late for hearings or not showing up for hearings, etc. The process was that Mr. Cohen, our director, was informed. He contacted the attorney to see what his perception of the situation was. He went back to the board, talked with the board, and approached the attorney again and set out some specific guidelines and even encouraged him to seek particular help with regards to scheduling the calendar, which he did. It was followed up with a letter. I believe that that is the way they typically handle these problems and it worked. I believe that we do have a process in place and it has been implemented. I think these attorneys, for the most part, have been around for a long time. I also want to the talk to the point of younger attorneys in the group. We do have two younger attorneys that are part of the consortium right now. One began in Mr. Clancy's office and that is where she received her training. So she was monitored, supervised, trained, and she has since then gone out of his office and into her own office.

1:11:54 M. Clancy This is a different lady. This is Ms. Scott.

1:11:58 R. Boen Another younger one that we have in the group began in Mr. Cohen's office under the same circumstances. He was there for a long enough period of time to be trained, monitored, taught, supervised, watched over, and has since gone out into his own private office. To that end too I believe that we have not been totally delinquent.

1:12:21 G. Canaday They are not as gray.

1:12:35 Hon. Elizabeth Welch I have one due process question. You noticed in there a reference to the substantial proportion of cases that are dealt with informally in this particular jurisdiction. When kids are remanded there is a petition. Do you get appointed before the prelims or after?

1:13:07 M. Clancy Well, during and after. During if we find out about it and, if not, we get appointed at the time of the preliminary hearing if the child qualifies for court appointed counsel.

1:39:17 Hon. Elizabeth Welch How much of a role do you have in effecting an informal resolution.

1:13:30 M. Clancy Very interesting that you should ask that question.

1:13:32 G. Canaday I just want to clarify. Are you talking about like to avoid the filing of the petition?

1:13:39 Hon. Elizabeth
Welch

I don't want to get into that particular statutory problem. Just in terms of coming up with the resolution of the case that does not involve adjudication on the charge.

1:13:53 M. Clancy

That is something that I think most of us try to do. There has been a bit of a change in that. Part of the problem that we had, that we continue to have, is that as you know under the statute the district attorney's office only has a right to object on certain grounds. Unfortunately, the juvenile department counselors, in our opinion, were following the lead of the district attorney's office. The district attorney's office files the petition. They are not filed by juvenile court. They were taking the position that they got to say "Nay" or "Yeah" to formal accountability agreements which we think is wrong. We think that they don't. We have been involved in a long discussion with the juvenile department. I think it has gotten better now to where juvenile court counselors will sometimes exercise their own discretion, which they are supposed to, in terms of formal accountable agreements. Then the problem that we had was that the district attorney's office said, "It is our petition and we are going to refuse to dismiss." We have actually had a number of cases that Judge Darling is aware of that we set out for three to six months. What we did under the FAA is we had a youth do all the conditions that they were supposed to do under the formal accountability agreement and left those on the trial docket and so far I don't think any of them have actually ended up being tried. It does appear to me now; based on the new people we have in the district attorney's office that that is perhaps going to be less of a problem than it was. That is certainly something we are advocating for for kids, trying to get things resolved informally without them having any kind of record in juvenile court. It has been more difficult under the last regime than it is now. A solution that we came up with is just asking that a case be set out for trial for some period of time in the future and have somebody complete anything that they would have been able to do even on probation.

1:15:52 Chair Ellis

I want to ask both of you if you have any suggestions how we can do our job better as it relates to your work. This is an invitation. How are your relations with OPDS? How are communications? How is the administrative side of our task being handled? Any suggestions?

1:16:23 G. Canaday

Well, I don't know – obviously we can pick up the phone and reach somebody. To me, in and of itself, that's a good start. I think the only thing that would be helpful to the practitioners, not only in our county but others, is if there was a list of professional witnesses that might be available on cases like termination cases, delinquency cases for aid and assist. It seems like the number of experts that we can actually call upon is not very big. The pool is so small that it is difficult to actually schedule time with them at the rate that they would be paid under the public defense. So if there was anything that I think would be a real positive is to maybe seek out a larger pool that would accept payment from PDSC and make that available to the practitioners in all the counties. It is just really difficult these days. We just have a handful of people that we usually call upon to go in as expert witnesses in TPRs. It seems to me that that is an area we are really short on.

1:17:58 M. Clancy

I can say in general that I think our relationships with the agency have been great, the day to day stuff in terms of the cases, and the case counting and everything else. Ms. Boen is here from our group and I think she would say that that communication is ongoing and very successful. It is very comforting to have Ingrid available also. She is always very accessible by phone. Any time we have a question or concern over something it is very unusual to be able to call the boss basically and get the boss on the phone. Ingrid is somebody who we all obviously know and respect for the many years that she spent. I think she is invaluable in terms of spearheading an organization. I can say that, just personally, if I am trying to figure out who to call, or trying to get some help, or assistance, or have a question, she and every else in that office are very accessible. I think we have had a very good experience with that. I think it is a very good system in terms of how it is set up.

1:19:09 J. Potter Just clarification. The three Cs

1:19:12 M. Clancy Four Cs.

1:19:15 G. Canaday Then one went to New York.

1:19:17 J. Potter Then there were three Cs and did I hear that the three Cs that were left were the board plus Mr. Bradway. So there are four people on the board right now.

1:19:29 M. Clancy Correct.

1:19:35 J. Potter At the risk of belaboring the issue about contact with children, the paragraph that the Chair referred to on the bottom of page 15 and 16 ends with two sentences, actually. "Some attorneys meet with foster parents, others don't. Some children are not seen by either their attorneys or their caseworkers." I think they addressed that and it is a little ambiguous, but those are in dependency cases. Then there is a stand alone sentence further down in the page that says, "In delinquency cases, the quality of representation is rated fairly high even though it was reported that lawyers don't always meet with their clients." Can you expand on what that means? That lawyers don't always meet with their clients?

1:20:23 M. Clancy I think that is a misconception. I think there was a perception that was for some kids in detention that people were not meeting with them soon enough. I have heard that complaint. The difficulty we have here is that the detention facility is in Multnomah County. Certainly telephone contact is easy to do but it is not always easy to get over there immediately to meet with somebody. I don't know that anybody has complained that we are not meeting with delinquent clients who are not in custody. I know there have been before and we raised it with everybody, there has been a feeling that sometimes with kids in detention they were not getting contacted. Going back to the sentence before that regarding the dependency cases, as I think Ingrid knows, and we have submitted some of the materials, as far as contact with kids in foster care is concerned we have a person, a retired DHS person, whom we use as an investigator who basically goes out and sees every kid that is in foster care and writes a written report that we get and pass on to the court and the caseworker. I can say that in this county it has gotten better but there are still some cases, and we are all over those, where either at the court hearing or the CRB it indicates on the reports that they are filing that DHS is not getting out and seeing the kids in foster care. We still have that concern and a lot of foster parents are concerned because they have minimal contact with DHS. Sometimes DHS is counting the contact they get when a kid is up at the office for visitation and you find out that they have not actually been out to the foster home.

1:22:09 G. Canaday I think that that is changing. There the model is so different now than it used to be.

1:22:15 M. Clancy I think they are trying harder but we are still seeing cases where sometimes that doesn't happen. We hired our investigator because this is a person that had retired from DHS who used to be, among other things, a caseworker and was also responsible for licensing foster care homes. She is much more adept at what to look for. She does a detailed report regarding services including neuro-psychs, things of that sort, where she thinks that those are important and gives us really good feedback in terms of what the kid needs and also any deficiencies in the foster placement.

1:22:53 Chair Ellis Thank you both. We have Judge Darling here and I understand her time is limited. Why don't we take a five minute recess and we will pick up later.

[recess]

Agenda Item No. 3 Post-conviction relief – Performance Standards, Task Force Recommendations, Training

- 1:32:54 Chair Ellis We are going to change our order just a little bit because Dennis Balske is here and he has a commitment and he has to leave relatively soon. Dennis, we appreciate your joining us again. I know we have heard from you on previous occasions. This is on the subject of PCR, and Paul, I see you are up there. Do you want to introduce the subject?
- 1:33:30 P. Levy As you know, Ingrid had asked for quite a while that the state bar look at PCR and performance standards and they finally agreed to do that, the Board of Governors did, and we were invited to help form a task force. You see the names of task force members in the report here.
- 1:33:55 Chair Ellis Pretty star-studded group.
- 1:33:58 P. Levy Indeed and practitioners from various areas of PCR practice. Steve Gorham was on that group. We were also very fortunate to have Mark Olive who is a national expert and Supreme Court litigator. And Dennis was on the group. Dennis chaired the group. The Board of Governors approved our recommendation. The Chief Justice wrote a nice introduction to the standards.
- 1:34:40 Chair Ellis He was himself a practitioner in the PCR work.
- 1:34:46 P. Levy Although it his case law that we find so vexing in this area.
- 1:34:54 Chair Ellis Welcome, Dennis.
- 1:34:53 D. Balske I guess I would start out my remarks by saying that Paul was really the moving force here and carried the load for the committee and did a tremendous job and should be complimented for his great work. We were pleased that in a relatively short period we were able to put together what we feel are really comprehensive standards that will hopefully both increase the quality of representation and also serve as a roadmap for lawyers who are new to the field. Basically you can read the standards and they are specific enough that I think they give the ABCs of everything you need to do and every source you need in order to do it right. We are very pleased with our end product. The toughest part of the committee's work, I think, once we got them together, both as we were formulating them and after we formulated them, the 64 thousand dollar question was kind of, "So what?" What good are they going to do if we don't have some mechanism to carry them forward? Right now what I think they do as a practical matter is to give the lawyers who are litigating the cases, in addition to a roadmap on how to do them, a guide to show to the judges who have a tendency to ramrod these cases through and see them as a low priority they can say, "Look. Here are my obligations. This is what I have to do to represent my client ethically and in a principled way." The judges will hopefully begin to give the lawyers a fairer shake in the cases in which they appear. Even over and above that in order to really provide competent representation at a level that the Attorney General's Office provides it, I think that the committee felt strongly that you all should take a serious look at how to go about coming up with a part of OPDS that serves post conviction representation, that specializes in it much like the appellate representation. Until there is some office that has lawyers that specialize in this we don't think you can really compete.
- 1:37:19 Chair Ellis I am sure you know you are preaching to the choir on that. We have had a package that we have never succeeded in getting the legislature to support of forming a specialized unit within OPDS to do that. You state the case that I always thought was out there. One is, PCR is the step-child not only of many courts as you describe, but I think of the bar as sort of betwixt and between. It is civil but it relates to criminal. There are very few who really have the expertise in it. It is one of those areas where a lot of cases are going to be processed and lead to no change, but the occasional case where a serious injustice has occurred, this is the way that that gets addressed. It is also the case that if we don't do it well in the state system then rights

under federal law get lost. That is just a trap for the unwary and it is a very unsatisfactory outcome when that happens. The final problem is the one that your report addresses that we have all thought about. Nobody has really come up with a very good answer on the venue problem. The place of detention is usually in a remote area and the place of the original conviction is in a more urban area. Typically the witnesses are going to be in the place of conviction but the individual is going to be in the place of detention. The court currently is at the place of detention which means a heavy volume of cases in sparsely populated counties. There certainly aren't going to be many resident lawyers able to handle these cases or interested in handling these cases. All of that seems to me to cry out for a specialized two or three, four lawyer group whether it is a FTE group or a contract group. We could do either. Until we get there this has been to me one of the most underserved aspects of indigent defense.

- 1:40:06 D. Balske Other than that we used it for educational purposes at a seminar this last weekend. We talked to the Oregon Criminal Defense Lawyers about the standards. You will notice another recommendation about having you all changing your qualifications so that people are required to be familiar with these standards. But other than that I think what the standards might hopefully do for you is give you something to say when you try to get the support to have that unit, how critical it is. We now have the standards that tell us how the cases are going to be done, but we have a gaping whole in the system and no way to provide those services unless and until we have this kind of a unit and that the unit plugs in somewhat to the venue problem. You are going to have the Attorney General and the lawyers being in the same town. I had a post conviction case out in eastern Oregon last year. One of my appellate issues was that there was a due process violation because they made me go to eastern Oregon and be in a closet, basically, where the video camera was with my witness Larry Matasar. My client was over at the prison patched in at another TV screen and the attorney general was in Salem with the judge in the same courtroom. I had requested specifically that I be permitted to appear in the same courtroom with the judge and the attorney general. They declined to allow that to happen. They get into all those crazy situations with the crazy venue that we have now. One of the selling points of having a unit is at least you might have all the players in the same town and the same courtroom. I can take you through the standards very briefly if you want but you have got them. I don't think that is necessary.
- 1:41:57 Chair Ellis I understood it and appreciate that.
- 1:42:00 D. Balske If you have any questions about that I am here to answer them. I don't know what else I can say except that I am part of your choir and send me out to preach. I am happy to preach anywhere I can, I guess.
- 1:42:15 Chair Ellis Any questions?
- 1:42:18 Hon. Elizabeth Welch You have had to have spent a lot of time (inaudible). What can we do without more money before that wonderful day when we will be able to have this unit. Are there any ideas that you particularly like that we could help advance in terms of some interim measures?
- 1:42:41 D. Balske I can't say that we did. We think this is a good stop gap measure and that it lays out the formula. One of the advantages of having Mark Olive and some really experienced people with us is that we were able to make the standards kind of a recipe book. We have given the lawyers the ABCs. Now we have to get the lawyers who have the time to do it. I don't know of anything more stop gap that we can do between this and what we are talking about. We are happy to listen.
- 1:43:16 P. Levy If I could address that. In writing these and thinking why are we spending our time on this, we had the model of the revision of the dependency standards which have been used to educate lawyers about how they really should be doing the work and also to remind specific

lawyers and providers about their obligations. These standards will certainly fill that function. Now there has been some more interest in dependency work than this area. It is a directive to the Commission and OPDS to continue to work and maybe to think of ways that don't involve a specific policy package to give better attention to PCR representation.

- 1:44:16 Chair Ellis Kathryn, this is unfair because there is no warning but you are up to it I'm sure. How much do we spend on PCR approximately?
- 1:44:32 K. Aylward Um, 1,700 cases a year times \$2,500 a case. Little help here. Whatever that is \$400,000 a year.
- 1:44:51 Chair Ellis The question that keeps coming up, because I think that is not very concentrated spending as I understand it - we have quite a number of people who take a few - is are we at a point of acknowledging that we are probably not going to get a package for this specific appropriation? Are we at a point of using money we are already spending, trying to develop a contract group that would be specialized, and do a lot of things instead a lot of people doing a few of these?
- 1:45:32 K. Aylward We have tried to make that happen. Originally we had a couple of Marion County providers that we were speaking to and encouraging them to pull together a consortium where they could actually monitor, and train, and we could centralize it. Although there was some interest, the people that we contracted with, specifically Noel Grefenson, was saying, "Well let me have a contract just for myself and then I'll think about whether I want to expand and what that would involve." I know that over the years Noel Grefenson and Dick Cowan have sort of discussed it. I think probably as individuals it sounds like there is no benefit to them to take this extra responsibility on. As Ron was talking about with CIDC, it is kind of a thankless job to be responsible for a consortium of attorneys. We haven't really made any progress on that. I am just glad - well I shouldn't say it that way. It is tough enough to get even one person to take one case. We are a long way away from having a centralized unit.
- 1:46:49 Chair Ellis It has always seemed to me what you say is absolutely correct. It is very hard to get one person to take one case because it is a specialized area and an orphan area. You can feel like it is very frustrating and all that, but if you had two or three that did it full-time and traveled to where they have to go to do it but they got really good at it, the potential there seems to be much better than the system we have. It is what the AG side has. They love this. We have this weird political relationship with them on this subject. Every few biennia somebody says that the state could save money, that PCR doesn't have a constitutional mandate and is just statutory. We could just cut that out. Who comes to our rescue? It is always the AG because the last thing they want is all of these being handled *pro se* which is a nightmare for them. They don't want us to be really good. It does seem to me that in this area if we can find the right few, and it is probably three people, to just take this on and become really good at it, virtually full-time, I think we would be so much better off than where we are right now.
- 1:48:27 K. Aylward We have had some of the Marion County contractors, a couple of them, that helped us out with eastern Oregon cases. They have taken those cases for us. That is my hope. I had hoped that some of the people we contracted with would become our circuit riders and our experts. It hasn't come to pass.
- 1:48:50 Chair Ellis Dennis, any thoughts on this?
- 1:48:46 D. Balske The frustration is when you start thinking about what kind of lawyers could do it, they are the better lawyers and they are making good money because they are good lawyers. They are not going to be able to take the kind of pay cut that it would take to get them to do it. That is what then brings you full circle back to thinking that a public defense kind of an office with somebody who is a good trainer who could bring in the young people and train them to become experts while they are young, anxious to get out there and conquer the world and train

them with the right tools. They could go out and do it, but that is why the model, to really make it work, has got to come through that kind of an office. I don't see you being able to pull in those people that are out there now who know how to do it. I just don't think it would work. One of the problems too is that you talk about eastern Oregon. There is no pool of lawyers in some of the key places. That is why I think you need to centralize them in an office. I am not much help to you. I think we can all agree what the right model is. Finding something in between there, practically speaking, I don't think is workable.

- 1:50:15 O. Thompson Thank you. I do some post conviction in Marion County. At this point virtually all the Marion County post conviction cases are handled by Noel Grefenson and Dick Cowan. That is their full-time work. I think the real problem is eastern Oregon. I won't practice there anymore because their rules are so crazy. You get stuck in closets in eastern Oregon. It is bad enough in Marion County. I think one of the problems is your client is on the phone. You can't have any way to talk to them. Despite what the statute says there is virtually no way to talk to your client at trial. Three people won't do it. The AG's office has six full-time AGs doing post conviction. I agree. You need to go see your client. If you are from Salem or the valley you have got to drive all the way over to Ontario.
- 1:51:17 Chair Ellis We now have video on computer that you can have a person to person conversation, faces showing, on a computer.
- 1:51:27 O. Thompson That is just not the same. These folks don't trust us to begin with. I'm not saying what you are aiming at is a bad idea at all. There are substantial road blocks from the client's viewpoint. They think our interview rooms are bugged, much less video. The other part is unfortunately, there is no pool of lawyers out there. That doesn't mean you don't start with two in Marion County and keep trying to find a third one elsewhere.
- 1:52:04 Chair Ellis It is not hard to admit that if we had a group of let's say three, one of whom resided out in eastern Oregon that you could do just so much better a job than I think is happening now in this area.
- 1:52:27 O. Thompson I agree.
- 1:52:27 Chair Ellis I agree.
- 1:52:28 I. Swenson We will continue to work on that problem.
- 1:52:32 Chair Ellis Thanks a lot.
- 1:52:39 J. Potter I have a question for Dennis. I did read the standards. I have sat on numerous groups that have developed standards. Sometimes when you look at standards you think that could take days, and days, in any given case. Yet as you know we have a contracting system for all cases that is based on law of averages. In trial cases we get paid a certain amount for these kinds of things. The notion is that if you take enough of them the law of averages will even out and you will have enough time to do an adequate job. In trial cases the cases get pled away and often times it doesn't take a great deal of time. In a post conviction case can you give us some idea; I think Kathryn said 1,700 cases.
- 1:53:32 K. Aylward That is completely wrong. That is way, way wrong.
- 1:53:43 S. McCrea Do you think it is high or low, Kathryn?
- 1:53:44 K. Aylward It is way high.
- 1:53:57 J. Potter Forget the number of cases. How long does it take in an average post conviction case to do the job that you would anticipate if these standards were followed?

1:54:08 D. Balske For me, because I am usually retained and they are usually more serious cases, they take a heck of a lot of work and hours. You would take a bath doing the cases that I am doing. Noel, on the other hand, when we had our committee meetings, said that he does occasionally have clients that after he evaluates them and lets them know he doesn't think that there is something there that some of those cases will actually drop away and average out somewhat.

1:54:42 J. Potter What causes a drop away in post conviction cases?

1:54:48 D. Balske You have got me. At the Federal Defender level, when I use to be there, we would see lawyers dropping issues and good issues not being found. We always thought that was a problem. Things shouldn't be getting dropped. I honestly don't know. I think it has to do more with some of the *Balfour* issues, frivolous issues perhaps. I honestly don't know.

1:55:18 J. Potter Don't you still need to do an investigation? Don't you still need to do a fair amount of work or no?

1:55:26 D. Balske I think they do. Again, without seeing the kinds of cases that he is actually talking about that drop away... Do you remember what kind of cases he was describing?

1:55:35 P. Levy This is referenced in the standards. There are some cases where if you were successful in vacating your conviction, which was a result of a guilty plea, then you would face serious charges and possibly greater consequences.

1:55:51 O. Thompson You don't want to win the case.

1:55:55 D. Balske Those are pretty much the only ones I can think of where you would want to be talking the client out of going forward.

1:55:57 Chair Ellis Be careful what you ask for.

1:55:59 D. Balske Exactly. We put in our standards that the lawyer is duty bound to right away have rapport with the client and explain to the client, "You're best not to be going forward." That is one small group of cases that drops out. I was surprised to hear from Noel that he thought he was coming out okay in the wash. I am a probation officer, I guess, for a lawyer who is under bar discipline who did post conviction work. The first time he walked into my office and I got a list of his cases I almost fainted. I looked at the numbers and thought no wonder you are in trouble with the bar. No human being could competently handle this kind of a caseload. To make it work, that is the problem. Some of the contract lawyers take caseloads that are way, way too big for them. The bottom line and I think you hit on this, is that it is a funny case. It is a hybrid case. It is sort of criminal but the civil tools that we have are important tools that allow us to do some serious good in litigation. Serious and good litigation takes time and so to do one of these right takes way more than \$2,500, in my opinion.

1:57:31 Chair Ellis Thanks. Ron, we are going to get back to you but after one other person. Judge Darling. We appreciate you coming.

1:57:47 J. Darling Sure. I need to do a little graphic and kind of explain to you the framework in which I get to operate. I did it when I talked to Ingrid and I think it was helpful to understand.

1:58:07 Chair Ellis Don't put an F down there.

1:58:07 J. Darling Well, that may change by tomorrow but the real world is we have an F. My world in juvenile is all day Monday and all day Thursday are what we call the grinding docket of juveniles. The reviews, the permanency hearings, the PVs, all the stuff on both sides that keeps juvenile going. In my world we have no trials on Monday mornings. If a trial is going to start it starts

at 1:30 Monday afternoon. CRB hearings are all day Tuesday. That is every Tuesday and they tend to dominate most of the docket. I do all of the juvenile on the Mondays and the Thursdays. Our TPR trials are downtown on the primary docket. The dependency cases, if they are contested jurisdictional hearings, go downtown unless I am available to take them. Contested delinquency cases can go on the general docket downtown unless I am available to take them. Our rule is if I can take them I do. I never take a TPR because they last too long. But our lawyers are doing it all. Imagine if a TPR trial starts on Tuesday and goes all week. Then I have no lawyer on Thursday. I have got three lawyers on the average TPR case. I have got nine, 10, or 11 in my contract so a third are gone. We are trying to schedule people in two different buildings 10 to 15 minutes apart. I have parking. They don't have any downtown so they like coming to me, I think. At least they can park their cars up there and there is fast food. On their 20 second lunch break they can have lunch. You are right about Friday. You add to it now that we can't try cases on Friday. We are really struggling to get our work out in any timely fashion in any reasonable way. Then when you look at the fact that many of the lawyers in my consortium are in others as well, and the criminal dockets that they are on are all running primarily in the morning or the afternoon, they are running back and forth. If I am just a few minutes late getting my cases out and they have banked on being out the door in a half an hour to get to the next one they can't. Every one minute delay is a half an hour problem. By the end of the day we are all messed up. My perception in court is we start on time and you are ready to go. What screws my day up is either the client is late, the lawyer is late, or there is no preparation in advance and they are out in the hall talking, for whatever reason, about the case and they need 10 more minutes. Their 10 more minutes is my half day. All 11 of them want 10 more minutes. There is this tension that goes on that is nobody's fault but it occurs. That is the framework that I come from on this. The other thing that I want to say before I get into more detailed comments is this is indeed a capable, experienced, gray haired group. I mean that in the kindest way to my friends over there. There is a wisdom of experience that allows, I think, for frivolous waste of time not to occur. They know exactly where to fight their battles and where not to. When a fire is flamed there is usually something to it. I respect them for that - not a lot of wasted time, not a lot of silliness that sometimes young lawyers can create. I did myself when I was a young lawyer. They are very efficient. Sometimes comfort doesn't cause you to push the envelope. That is a delicate balance. The other thing I would like to say about this group is they are very cohesive among themselves. They are very cooperative. If a lawyer isn't there and a case is going - because I start whether they are there are not. I figure they are adults and they know what time it is. If they haven't called to tell me where they are I am going - there is another lawyer in the background waiting for them who will stand right up and do what they can. They will cover for each exactly as you heard earlier. If somebody is out on illness they will take the cases and the person still gets paid. They will cover as best they can and they cooperate among themselves. I really appreciate that respect level among them. Where I think we suffer is the belief that any lawyer will do. As long as there is a lawyer there it is good. A lawyer there who doesn't know anything isn't a lawyer there. The client might feel kind of protected because there is this body sitting between them and the caseworker, whoever it is, but I hate those cases where I call them up - I am just picking names. Mr. Clancy for the child today covered by Art Slininger. Ms. Brisban for the mother today covered by Mr. Vess. Mr. Rosenbaum for the father today covered by Ms. Canaday. Then, of course, you add to it and the caseworker today, Ms. Smith, covered today by her supervisor. My next half hour is an absolute disaster. While they do a great job about it and they try to cover, oftentimes it is not a depth of coverage. I would say that we need to work on that. My perspective, and they may have a different one, is that we try very hard to schedule them efficiently on our days. I never schedule anything off a Monday or a Thursday without the lawyer present to tell me they are available. Then, of course, when they say later that they are not available I don't give them a reset because they were there when I set it. It is on the spot. Are you available? Does this work? Yes, yes and yes. Then what happens to them is they go downtown on their other contract and those judges down there are not quite so respectful of my calendar. They don't even know I exist, I think, unless they have come up once in a while to substitute for me. They just set stuff without regard to the fact that my

lawyers have already been booked. So we on the judicial side are not doing a good job of helping them be efficient and we will work on that. It is really tough to get as many lawyers as you need available when you need them to move cases on the timelines. Even if we get Friday back we are still not going to be able to do it, but without Friday we are in trouble. So that would be where I come from. The other thing that I want to talk about is solutions. If I could have my perfect world we wouldn't have lawyers in two different consortiums. We would have the ability for them to consult with each other. We wouldn't have lawyers doing juvenile cases and criminal cases. Half of them are in the criminal consortium and half are in the juvenile at the same time.

2:04:48 Chair Ellis

But there is only one juvenile consortium?

2:04:52 J. Darling

Correct. They know that I feel this way. I have been open about it since the beginning. I think it is very difficult to be in the criminal consortium and the juvenile consortium at the same time given the fact that we aren't even in the same buildings. So the running between courtrooms is a half hour process and not just four or five minutes up and down the stairs. There is no end in sight for us to consolidate our courthouses. We could bring juvenile downtown if we wanted to but then something else is going to go away. We don't have enough courtrooms. The separate places are always going to happen. I think we are invested that children should be separate from adults and family issues separate from what goes on in the regular courthouse. I don't see that changing. I wouldn't have much crossover, if any. I certainly wouldn't have people doing murder cases and doing juvenile cases. I appreciate, I think, what Gay said earlier that during the time that the murder case is going on they don't take cases. I suspect that is true but during the time the murder case is going on isn't the moment. It is the month before. If I appoint attorneys in the March for cases that are coming back to me in April that is the month that the trial is going on, so I skip them and it is always a month or two behind. I don't know if I have been clear about this. If I set hearings out six months and that just happens to be when the judge later decides the murder case, you can never manage when that trial is going to happen.

2:06:21 Chair Ellis

Let me understand what you are saying. It is not just that it is a murder case but any large preemptive, alternative demand.

2:06:28 J. Darling

Yes, which tends to be the murder case. If we have some of the sex abuse cases that go on two weeks we can work around that. It is when the lawyer is out for four to six weeks trying a murder case. How much prep time has been there been before? It is not just the moment of the trial. I think we have to think real hard about allowing that to continue.

2:06:48 Chair Ellis

What you are saying is beginning to emerge to me that a lot of the lawyers, apparently in the juvenile consortium, say only 50 percent of their practice is in juvenile.

2:07:04 J. Darling

I have no lawyer with more than 50 percent.

2:07:05 Chair Ellis

So would the world be better for you if you had fewer lawyers but they were 100 percent in juvenile?

2:07:14 J. Darling

If the volume was sufficient I think we could get there. You couldn't have enough lawyers to avoid all the conflicts. Because often now we conflict right out of the 10 or 11, so that won't work. What I think would work better is more lawyers doing it 25 percent of the time.

2:07:32 Chair Ellis

But then you run into the problem of their not having the specialized knowledge.

2:07:43 J. Darling

That is the problem. There is always a give and a take. I'll pick on Gay for a minute. If I have it right, Gay does the mental health hearings on Tuesday morning and Friday morning. Am I right, Gay? It used to be just Tuesday. In setting trials she knows she is not available on those mornings because she is in the mental health contract. She is great at it. She is great

at her juvenile cases too, but is this a good use of those resources? Then I have a few lawyers in the consortium that are either prosecutors or municipal court judges that are never available on a Wednesday. In trying to get all this stuff out and accommodate all these dockets they have found themselves trying to be in a lot of places at one time. There are times when it is real rough. There are other times when it works beautifully. The other thing I would like to talk about briefly, because I know we have a time issue, is considering - and I know the defense bar doesn't join me on this - specialty TPR lawyers. TPR cases take a lot of time and they are very different from the underlying day to day cases. As I have broached this topic with the attorneys their response has been "but the TPR lawyer doesn't have the relationship," which is true. But if the appointed attorney keeps the underlying dependency case, which is still alive during the TPR, let somebody go prepare this case for trial, do all that, analyze where you can win and join with the underlying lawyer that has the relationship to determine whether the case is really going to trial. I don't know if that would be more expensive but it is certainly something that I think has to be looked at. We tried to do settlement conferences in TPR for a long period of time and found them to be an utter failure. The parent wouldn't relinquish until they knew where the child was going and they couldn't get their mediated openness agreement until they knew who the resource was and DHS was never in line with the process. We are working at that end as well. The other thing I would look at is it time to specialize in children to parents. Our group does it all. It gives them balance, but in a recent case that I had I think it brought to light really where the lines are. The Hamblen case that was in the news there is a whole lot more to it. It involved whether or not the juvenile court records should be public, released to the press. They are dependency cases. There is a clear law that says "no." In talking behind the scenes after the case was pretty much resolved with the attorneys, one was very honest in saying, "Well, if I represent a child I want this, but if I represent a parent I want this. Well today I represent the parent but I know if I do what the parent wants the next day when I have the child that doesn't help me." Where I am going to go with this? While I think it balances them because they have to understand both sides, I think it creates potential conflicts as well. I think it is time we look at - if not JRP, a JRP like model for kids and then a JRP like model for parents. Our volume right now is low so it is bad timing.

- 2:11:20 Chair Ellis Give me a sense of the volume of TPR?
- 2:11:26 J. Darling It is at a lull right now. If you had asked me a year or two ago I would have said we were doing two or three a week. It is down now to maybe two or three a month. Our volume is real low but again it takes 12 months to get back to that.
- 2:11:45 Chair Ellis I am putting our hat on, trying to provide lawyers in both these areas. If the TPR volume is volatile or low it is very hard to do a specialized contract.
- 2:12:01 J. Darling It is just county dependent that is true. What if you could take some of the surrounding counties and join them up and have TPR experts. It isn't very far to Salem. It isn't very far to Multnomah County. Could we form a group of TPR experts?
- 2:12:18 Chair Ellis These cases are lengthy enough when they get tried.
- 2:12:29 J. Darling Back to your comment about the TPR. The AG has had TPR experts in the past. Then they had the underlying case experts. They have switched now to a model more similar to what we have which is start to finish cases. How long they will keep that model, I don't know. It was a change. I think we have to kind of look at every change where there are potential problems, but the model that exists right now in my court has been there for the full 14 years that I have been there and for all the years before. Now judges have been trained. Their urgency and involvement in cases has arisen astronomically in my 14 years, the urgency of all around us. DHS keeps reinventing itself and how it is going to process juvenile cases and where I am not sure we have focused enough time and attention on the role of defense bar and its response to the changes around it. Has it kept up?

- 2:13:30 Chair Ellis Evolved?
- 2:13:34 J. Darling Evolved sufficiently. With the exception of possibly one in this group, there is nobody that is incapable of doing the job. They are all capable and well informed. Where I will suspect you will hear comments is it doesn't feel at all times like they have used those skills to the ultimate of their ability. Now it is real easy to sit on the bench and say, "Gee it looks like this," and to be wrong. All the work that you weren't sure was done could have actually been done behind the scenes. You may be absolutely wrong in your perception that it wasn't. I think whether they are not prepared enough, as some of us users might think, or we just don't know it is unknown to me. But it appears at times that whether it be the client's lack of contact with the attorney or the attorney's lack of effort to get in the contact with the client, they are meeting out in the hall and coming in. Whether it is true or not, I don't know, but some of these same parents are showing up every week for visits at the same time and place. Some of these parents, and I talked to Judge Welch about it, are homeless and that is going to grow. Some of them are hard to get hold of. They come to court. They are there. How do they know to come? Usually it is a caseworker reminding them. I think a little more outreach. A little more hand holding. I can't tell you the last time I remember getting a packet of information, or a report, from a defense attorney in advance of hearing let alone in a hearing. I get these wonderful reports from DHS. I get these great reports from CASA. I get them, with luck, five days prior to the hearing. Then the lawyers get them and they figure that their job is to respond and go on the defense. I want my lawyers to be offensive particularly when they are representing children and parents. It is not enough, in my view, to respond to what DHS says they got on you. Get proactive. I think it has been easy as a system, and I am guilty too, to just wait to see what do they have and is it true? You have to ask parents what do you have and let's give it to them. Or kids, what do you need? The only thing I would like to say in closing is I think lawyers have done an excellent job of understanding their role in that interesting line between advocating for what your client needs when they are young, and advocating for what your client wants when they are older. They walk that line well and it is a hard line to walk. It is the one thing that CASAs don't understand that we have worked hard to educate them on. When I stand up for a lawyer for a 14 years old and say, "My kid wants to go home to his abusive parent," the CASA has to understand that I am doing my job the way I am supposed to do. We are working on that. The lawyer group has been responsive when I have asked them to come to meetings with me. We have done some relationship building with CASAs. They have been responsive. Ruth used to work for me in my office. We have a great working relationship there. I have known these lawyers forever. Many of them were lawyers long before me and taught me tricks. There is that little balance as well. That is all I came to say. I have a few things that I will send to you by email about the report that are just minor. I am here to answer any questions.
- 2:16:50 Chair Ellis Any questions for the Judge?
- 2:16:54 C. Lazenby What happens if there is no juvenile. You do everything else, right?
- 2:16:58 J. Darling I have drug court that I run every other Wednesday and they have allocated an attorney in my dependency drug court that does that. She gets some kind of special pay to do that. I have a teen drug court and I have allocated money for that lawyer to handle all those cases as well. The other Wednesdays I will just try whatever comes along. I am not just strictly juvenile although I get the vast majority of it except for TPR.
- 2:17:27 C. Lazenby How is this going to change when Friday goes away?
- 2:17:30 J. Darling We are not going to be trying cases. We are not getting stuff out at 60 days. TPRs are going to stay high priority because I think those are critical. Delinquency non-custody cases maybe next year. Dependency trials where the kids are at home, forget those. Shelter hearings are going to get a priority.

2:18:00 Chair Ellis Is your suggestion that we look at a specialized contract for TPR, because of the volume issue?

2:18:13 J. Darling Because I am guessing that the slump in TPR right now is not just Clackamas County.

2:18:18 Chair Ellis Is that driven in your mind by the scheduling issues that you talked about, or is it driven by the conflict issue that you talked about, or is it driven by the fact that it is a specialized area?

2:18:35 J. Darling I would say all. The schedule, obviously, is near and dear to me but we can work that out. The conflict potentially yes. I think it is more the knowledge of how to try those cases aggressively. If you are aggressively going after caseworkers and experts at a TPR trial, what does that do for your ability to work with these people in the next case? We all get hurt by that. This group has built relationships, by and large, with their community partners. Does it hinder, in some way, your ability to be aggressive when needed at the TPR?

2:19:18 Chair Ellis From your point of view as a judge, why isn't that issue conflict a healthy thing in the sense that advocates don't exaggerate their position because they can see that same position in another case may not be too good.

2:19:33 J. Darling It is healthy in that we don't waste my time, but is it healthy in the scheme of the system in doing the greater good for the clientele, kids and parents?

2:19:45 Chair Ellis A lot of lawyers have these issues. The client I have today this really helps. I know I have clients tomorrow that it may not be what they want. It tends to make, I would argue, the lawyer intellectually honest.

2:20:03 J. Darling I think that is true, but can you get lulled into not doing enough?

2:20:08 Chair Ellis Other questions for Judge Darling?

2:20:13 Hon. Elizabeth Welch You have obviously thought about several things that would make things better. What about a public defender?

2:20:23 J. Darling We had a public defender in Clackamas County for the criminal sector for awhile. Yeah, I think it is something that could work but it would obviously be public defender for parents? I think then there would be some conflicts. I don't know that one public defender's office – we would have to have outside lawyers and then we are back to the small scale.

2:20:51 Chair Ellis They are a unit.

2:20:55 J. Darling The beauty of the consortium is that while there are conflicts within it, because there are groups of lawyers that share space, share secretaries, and things like that, there is enough diversity that it is rare I get conflicts. Where I get conflicts, of course, is where there is one mom, five kids, six dads, and we have fired a few along the way. That doesn't happen very often. That is the nice thing about the way they have structured themselves. And for those lawyers that share an office, like Clancy and Slininger, they are very interchangeable in their ability to take care of each other's cases and be pretty knowledgeable because they are seeing each other in their own offices. There are benefits to this.

2:21:41 Chair Ellis Thank you.

2:21:40 J. Darling Thanks for giving me time and I will email you some things.

2:21:49 Chair Ellis Okay Ron.

2:21:58 R. Gray It has been too long and I can't remember where I was.

2:22:02 Chair Ellis You were in 1983.

2:22:10 R. Gray Let me just say one thing. I think that generally when people look at Clackamas Indigent Defense Corporation, the one way to tell you that people appreciate the quality of what we do is the number of people that have been contracting lawyers with us who are now sitting as circuit court judges, whether their background was prosecution and then defense or just defense. Right now Judge Herndon, Judge Selander, Judge Maurer, Judge Thom have all been members of CDIC prior to taking the bench. I am probably leaving somebody out. Judge Steele. Except for the present regime in the DA's office who refers to all defense lawyers as the dark side, there hasn't been any previous regime of district attorneys in Clackamas County that have perceived us as so much of an enemy that they demean the quality of our work or our futures as good quality jurists on the bench.

2:23:22 Chair Ellis How much of what you just said is facetious?

2:23:28 R. Gray Oh, it is not facetious at all. You are going to hear comments about some of the problems we have related to our relationship with the district attorney's office. It is not something that is in the report but it is something that deserves comment. I sat here and listened to everything that has been commented on up until now that has to do a lot with relationships. One of the things that keeps coming back to my mind is when I started practicing law and got into the administrative end of indigent defense, as they said just because I was the only one foolish enough to agree to take it at one time, and I had to learn everything as I went. We had the benefit of Judge Herndon who was a practicing lawyer. He helped us set up a non-profit corporation and take us through all of the tax issues, and all that, because he did that in private practice. We have been a corporation ever since. We had the advantage of starting out with a structure, with a board of directors, with officers, with an administration all part of that corporate structure that was set up with his guidance and assistance. We found out as we went along that actually that helped us as an organization. One of the things that happened historically, with previous district attorneys, was that they had enough faith in our relationship at an administrative level that if they were going to do restructuring in their office, even if it was just a courtesy, they would call me up and say, "Come in and have a cup of coffee. We want to tell you what we are going to be doing with our office. We are going to do some restructuring." There was a period of time when Jim O'Leary, previous district attorney, consulted with me and Judge Gilroy because they decided they were going to combine multiple charges in single indictments. Those that have been around long enough may remember that Clackamas County lost several positions in the clerk's office because of the efficiency of the DA's charging mechanism. The state determined that we didn't need so many clerks because there weren't so many cases in the system. It was actually the same number of defendants; roughly, it was just an efficient charging mechanism. Jim O'Leary went around and cried a lot about we got punished for efficiency which was basically true. He would call me up regularly and ask me to come in and talk to him and his chief deputies. We would talk about how they charge cases, that they were restructuring their teams inside office and what I thought about it from my perspective, how would it work in the court system? It wasn't because my opinion controlled. It was a professional courtesy. It also showed that we had a working relationship. When Terry Gustafson was the DA she continued that method of operation as far as talking to me. Under the present regime there is no such communication whatsoever. It is strictly us against them. The only time I ever see anybody from the DA's office administratively is at a court liaison meeting once a month. It is attended by the chief deputy if it is attended at all. It is not by the head DA. The only other time I see Mr. Foote is when we are both at the local Public Safety Coordinating Council together. That is in my capacity as a municipal judge, and a municipal prosecutor, that I am on that committee. There is no communication. Things change and ebb and flow within their office and we are always the last to know. The reason I am making that comment is because

of what we are faced with, of course, being closed on Fridays. We had a meeting recently with Judge Maurer about how that was going to happen in Clackamas. Basically, so far, the DA's office in Clackamas County doesn't care. They are just going to go ahead and file the way they have always filed. I told them quite frankly that there was going to be an impact on indigent defense and our ability to cover all cases at some point. I know that some district attorneys are sensitive to that. I know that some are taking a proactive role. I know from talking to lawyers in Portland that Mr. Schrunck, who I have the utmost respect for because of the work he has done to protect indigent defense in the past even though he is a prosecutor, is doing some things to look forward to what is going to happen there. In this county there is nothing happening. I was told by a deputy district attorney the other day that until it was put in the paper that the courts were going to be closed on Friday, there was no communication whatsoever inside of their office about any impending budget problems, any readjustments of any kind. I expect we are going to have some trouble in this county with structuring our docket unless it comes from the top down in an orderly fashion from Judge Maurer and I suspect that unless the court refuses to take certain cases the DA's office will not change one wit about what they do.

- 2:28:26 Chair Ellis Let me just say, and I'm not talking about the (inaudible) issues, but when District Attorney Foote was the president of the District Attorney's Association, we had, I thought, a very good relationships with him and with that crew.
- 2:28:47 R. Gray I'm not saying you didn't.
- 2:28:45 Chair Ellis In '07 they were very supportive of the defense community in Salem. I can't speak to the local relationship.
- 2:28:58 R. Gray I'm not saying that they weren't supportive of that. The one thing that they did agree on was that if we weren't there in the courtroom they couldn't do their job either. They approached it from that angle to try to persuade everybody. There has never been this local communication. It has bred more of an us against them mentality. Right now I am amassing from attorneys a pile of cases that I am going to do something about. I am going to be very aggressive about dealing with it where we have directly told prosecutors you cannot prove this case and here is the reason why and they insisted on taking them to trial. To the point where I recently had a judge actually tell the prosecutor, "I bet Mr. Gray told you you couldn't prove this case?" She said "Yes." He said, "Next time will you please listen?"
- 2:29:52 Chair Ellis Was her first name Sarah?
- 2:29:52 R. Gray No. What is happening is they have a policy in their office that if you are going to dismiss a case you have to justify it and file a memo up through the ranks. They are gun shy and so they are prosecuting junk cases. Now we are going to be pressured on time for the courts.
- 2:30:07 Chair Ellis I think if I were a young prosecutor I would rather file the memo to get the dismissal than to get beaten.
- 2:30:15 R. Gray It is not happening. When we are talking about economizing on cases it is going to become more apparent. I am just kind of warning you that there is going to be a bubble burst at some point. I have already told a young attorney in their office on a case that I have pictures to show them they are prosecuting the wrong person and they haven't dismissed yet. If they don't it will result not only in lawsuits but there will be a report to the bar.
- 2:30:41 Chair Ellis Can you address...
- 2:30:44 R. Gray I realize that I am getting a little sideways here but I want you know what we do when we are dealing with this court closure and economizing. I think we are going to have some problems in this county because of that attitude.

- 2:31:00 Chair Ellis In the draft report there is a description of your group as aging, which is true of all of us, but the implication was that the way it was structured young lawyers aren't coming into to the system.
- 2:31:22 R. Gray That is not true. Except for one lawyer who was in her fifties when we brought her in recently, every new lawyer that we have had has been young. The last several we brought in – two of them were in their twenties. One of them was a law clerk here and then worked in the DAs office in Linn County for a while and came into private practice here. We took on one who came from Texas. The other thing we have is an apprentice program. We have the ability to take on two apprentice lawyers at any given time with a limited number of misdemeanors. If they do well after that six month period of time they may be eligible to reup and take some low level felonies. They have to find a mentor lawyer within CIDC not to manage their cases but to be a resource attorney for them and who agrees to watch them in court. Some of the apprentice lawyers - historically we have had a couple who didn't work out - obviously weren't going to be criminal defense lawyers and had problems. They are not guaranteed that they are going to have a position with CIDC. It is a way to open up an office, get experience, and get some income. But they apply. We have had several apprentice lawyers over the years that have been brought in as contracting lawyers. We have one apprentice lawyer right now who just started. They usually kind of bounce around and use everybody as a mentor. It is like if we see them doing something and we think we can give them a tip we do. I end up a lot of times answering questions for them maybe more than their mentor lawyer because I am an easy target.
- 2:33:24 Chair Ellis Of your 27, how many of those would you say are 100 percent in criminal defense?
- 2:33:39 R. Gray I would say there are probably five or six that just do criminal work. I would say that there are probably half that do the majority of criminal work but it is spread out in other courts. For example, 90 percent of what I do is criminal but it is spread out between municipal courts and circuit courts. Then I do the occasional civil case. I am also an arbitrator on civil cases for Clackamas and Multnomah County. I do a lot of civil that way. Some of our lawyers, as you heard in the juvenile contract, are part time judges or do some defense or prosecution work in municipalities one day a week or a couple days a month. For most CIDC lawyers criminal is easily more than 50 percent of what they do.
- 2:34:49 Chair Ellis If you had your way, would you rather have a group where all are 100 percent, or do you think it is a virtue to have part-time?
- 2:35:00 R. Gray I actually think it is better to have people with a variety of skills. The selfish reason for that is we all get clients that need help in other areas. For example, you heard Marty Cohen is a specialist in social security law. I refer clients to Marty because I have a social security question on a court appointed client that clearly I am not qualified to answer. For a while a couple of our lawyers did a lot of worker's comp law. We always know who to send them to in the group. A couple of our lawyers are pretty good personal injury attorneys. If we have a question about that we tell them to give this particular lawyer a call about that issue. "I can't help you with that." It really helps to have that variety of background. The other reason I think it helps is me, for example. I am a prosecutor in Oregon City Municipal Court. I review probably 50 to 60 new cases a month for that court. I am up there four to five days a month where I am doing pretrial hearings or trials. I am a traffic judge for the City of Milwaukie. When people talk to me about the job I do as a prosecutor or as a judge I tell them that all these jobs seem to give me some sense of balance so I am not so radical in one position or another. It seems when you get people that have this kind of balance cases get resolved quicker. It is not that they give up on the case; it is that they are able to talk to their client more objectively. They take all the skill that they have and the know how to talk to the opponent because they have been in those shoes. It is not this us against them mentality that you get that interferes sometimes with the ability to settle cases which should settle.

2:37:05 Chair Ellis Let me ask this question because I have a memory of what I thought was kind of an odd circumstance affecting your group about four years ago when the United States Department of Justice thought they had come upon a huge antitrust issue out here in Clackamas County, Oregon. They said you guys colluded, that competitors formed a group, and in their view you were treading a fine line. I remember this with some humor because I thought it was over the top. We took the position that we are the people they contract with. We are quite able to protect ourselves. We are not feeling offended. We get along fine. With that background, my question to you is why should we have a large county, which this obviously is, and have a single source provider? Are we making a mistake?

2:38:19 R. Gray I guess the question is how many guys like me do you want to deal with, not that every administrator is aggressive as I am.

2:38:31 Chair Ellis I can say this, you are fine.

2:38:32 R. Gray What I am saying is if it is not an ethical issue, and it is not a legal issue, then the only thing you can look at is the quality of the service. The question is is there a problem with the quality of the service that is being provided? You can tell from the enthusiasm that I have about the work that I do and the fact that I am willing to be on committees for this organization...

2:39:00 Chair Ellis Even with DAs that are not too cooperative.

2:39:04 R. Gray ...that I was willing to take the time to draw up what I thought were some good ideas for best practices for consortia. One of the debates that we have always had in our meetings is, is there a difference between a loose organization of lawyers and a consortium? If you are going to call yourself a consortium you should have an aggressive manager. You should have somebody that is willing to look at a lawyer and say, "You screwed up and we need to fix it," who should be willing to go to the presiding judge and say, "We have a problem and I am not going to leave your office until we get it solved?" If you don't, then your quality of service is going to fail. It doesn't really make any difference if you have one provider or fifteen. It is the quality of representation that you are seeking without any violation of ethical rules. The other thing you are seeking when you are dealing with an organization is the economy of operation. In other words, you send one check to our group and we are responsible for paying those lawyers under the guidelines that we set up. You don't have to micromanage what we do. We are free anytime you have questions to answer them, but you have some faith in the quality of what is being delivered and the method in which it is managed and delivered. If you think that we need two, fine. If you think we need to have three, fine. I can't tell you if it is better. If it ain't broke I wouldn't screw around with it.

2:40:34 Chair Ellis Same thought process. I don't have a secret agenda. I want to ask this question. You are, I think, by far the largest county where there is no public defender. Are we right in letting it go that way? Should we reconsider that? What are your thoughts?

2:41:02 R. Gray Well, the only way I can answer that question is based on experience. It is not based on anything else. We had an attempt to have a public defender in this county.

2:41:19 Chair Ellis Not since the early 1980s.

2:41:22 R. Gray That is what I mean. That is when it happened.

2:41:25 Chair Ellis Some would argue with you that it didn't fail. There was a change made. Many people who were involved with it thought that it was a very good office.

2:41:35 R. Gray There were actually some people from that office that joined CDIC when the public defender went out. We actually heavily recruited some of them. I am not telling you that they weren't good lawyers. What I am going to tell you is it is not a question of one being better than the other. I think given the structure that we have, and given the rules that we operate under, we have these lawyers with all of these various jobs that they do, the various background and experience that they have and a lot of them are extremely well rounded in the things that they do. They can bring all that to the table and help their fellow lawyers even to the point of resources. "Who should I go talk to?" "Well, years ago I had this kind of case and I used Dr. So and So but it was a civil case." It gives us resources and access to information that if we were a closed shop and all we did was criminal, we might not have. The other thing is that I tend to think that as a general rule whenever you get into public defenders and DAs, unless you have extraordinary administrators you build an us against them mentality that is in large part unnecessary.

2:42:48 Chair Ellis Isn't that what you described to us has happened?

2:42:55 R. Gray In this particular county it has not been the defense that has created that world. I keep trying to chip away at that wall but I am not having much success. I caution our lawyers all the time that that doesn't mean that they ever sacrifice a case or an individual client because this battle exists, but where it clearly is a problem they should not be afraid to point it out as well.

2:43:21 Chair Ellis I am surprised that you made the statement that you just did because I would say that the major PD offices around the state typically, I think, uniformly have very good relationships with their counterparts.

2:43:36 R. Gray I can't speak to that because I don't know them all.

2:43:37 Chair Ellis What do you base the statement on?

2:43:40 R. Gray What I am saying is that it is all based upon the district attorney and the administrator of the PD's office as to what kind of relationship exists in that county. It is a two-part role.

2:43:58 Chair Ellis I thought I heard you make a statement that the likelihood of confrontational relationships is greater under a PD system.

2:44:04 R. Gray I didn't mean to imply that. I said it was based upon who was in charge. When I evaluated the public defender's office in Washington County, or was part of the team that went there, it was clear that the administration of the public defender's office wanted to have a good relationship working with the DA's office. The source of the conflict was the leftover regime in Washington County in the DA's office and the split that it caused in their office. There was an uphill battle going on there as far as perceptions back and forth between defenders and district attorneys. It was amazing who you talk to what perspective they have on those problems. I can't tell you that one is better for any given county than another. What I can tell you is in my experience because of the civil background and some of the other specialty backgrounds that our lawyers have and because they don't just do defense work, I think that they have a broad background that is appealing in this county toward the resolution of a lot of very tough cases. Also, they bring a lot of cards to the table when they have to go to trial. They have a lot of experience.

2:45:19 Chair Ellis You have been doing what you are doing, by my math which may be wrong, but 26 years?

2:45:29 R. Gray I have been involved in indigent defense for 29. I have been administrator in some form or another for about 26.

2:45:40 Chair Ellis Jack Morris is here so he is going to recognize where this question is coming from. The question is this; have you given any thought to what happens after Ron Gray decides this is not what he is going to do?

2:45:59 R. Gray Yeah. I haven't the slightest idea what will happen. No. I am talking about the organization. The reason I can tell you that I don't know the answer is because just the other day I was having this discussion with somebody. If it gets to the point where I decide that I just don't want to do that job any longer, is there anybody who is going to step up and be willing to take the job? Not only is there somebody who is going to be willing to take the job but are they, quite frankly, as willing to be as ornery as I have to be in order to keep things going? I think I told you once before one of the backhanded but best compliments I got was from Bob Selander when he said, "The only reason CIDC exists is because, Ron, once in awhile you are willing to be a son of a bitch." I think that is really what it takes. Sometimes you have to take the unpopular role with your lawyers and look them in the eye and just say, "This isn't working. We have to do it this way and here is why." I have actually taken the position with a couple of people who were complaining about things that I brought to their attention and said, "Hey, you want to try my job for a month? You can take what I get paid and you can do the job if you want to do it." None of the complainers have every said, "Sure." I wonder all the time what the transition is going to be. It is not that CIDC is strictly my thing. It is just that I have learned through all of this time where to push and where not to push. Sometimes I am wrong and I have to relearn it myself. I am a firm believer that a successful group of lawyers that has an administrator has to have a lawyer that is willing to be unpopular at times in order to make it work. I am not sure where that person is going to come from when I step down, somebody who is willing to take on the management and take on that tough job. I am sure there is somebody out there. I think there are a couple of people in our group that would be willing to do it if they were pressured to. But quite honestly I have asked myself that question a lot. What is going to happen if I just say that I am done? Is anybody going to be willing to face the other 27 lawyers and say, "I am willing to come and sit down and talk to them when I think there is a problem."

2:48:35 Chair Ellis How is your board selected? Is it self-perpetuating? Outside appointments?

2:48:48 R. Gray We had a very heated debate recently about what to do about that. We had two of our permanent board members, who were original incorporators, who retired from the board. We originally came up with the idea, and remember this was years ago ...

2:49:04 Chair Ellis Retired from practice?

2:49:05 R. Gray No. Retired from the board of directors.

2:49:15 Chair Ellis Was there some issue?

2:49:18 R. Gray No. Just time, probably. Basically, when we originally designed it the idea was that we would have five permanent board members and four rotating board members. That way any of the lawyers who were part of the group could be on the board. They could rotate in and help make board decisions and learn what it was like to administer? If they knew how to deal with all the administrative issues then maybe they would understand how this all worked. They would buy into this idea that this consortium has to be communicating and sharing information, etc. We just came up with that idea. I can't even tell which of our founders came up with it. We agreed to do it that. Every year, at the end of each calendar year, we have two openings. Anybody who is a lawyer with CIDC can put their name in the pot. The permanent board members made a conscious decision to make sure we rotate people so everybody gets on the board. Nobody is ever excluded.

2:50:28 Chair Ellis One outside board member.

2:50:33 R. Gray We did. He is the one that retired.

2:50:33 Chair Ellis You have no outside board members?

2:50:36 R. Gray At the present time we do not.

2:50:39 Chair Ellis Is there movement to change that or get an outside member?

2:50:49 R. Gray There is. How do I say this because board meetings are confidential? There is also pressure to make that change. We have quarterly board meetings, and we have specially called meetings, so we average about seven or eight a year. There are intense debates over board structure and always very intense debates over when it is appropriate to expand the number of attorneys and bring on new attorneys. There is just virtually never a calm board meeting where everybody walks in with a plan and agrees to it ahead of time. It is on the table at all times.

2:51:34 Chair Ellis In your experience have you terminated members?

2:51:38 R. Gray Yes. Well, actually they have gotten to the point where they knew it was coming and they walked away. It has happened. Interestingly enough, one of the things that is mentioned in the materials is that Brad Jonasson is working on a questionnaire for our clients. That is very close to completion now. We are going to be setting up a procedure to randomly poll clients about the performance of the attorneys.

2:52:12 Chair Ellis I think one of the hardest issues statewide for consortia is this one. You get an underperforming attorney and it is a very difficult issue. From our point of view we are very interested in how you address it.

2:52:34 R. Gray We have a series of steps that we actually step up. The first thing is if it is reported to me that there is a problem I immediately consult with the attorney. For example, the other day we had a question come up. Sometimes what will happen is a client will report to Janan, who does the case assignments, because they have that number to call to find out who the lawyer is, and say, "I can't get a hold of my lawyer." She has our authority to just immediately transmit that to the attorney and ask for a response. It is always copied to me. I don't have to do the initial contact. She forwards the concern on to the lawyer and asks for a response. In every situation we ask the lawyer to respond. Sometimes it is kind of what I expect the response to be and doesn't have to go any further such as, "This particular client calls me six times a day and they have some mental health issues. You can expect that they are going to complain and I just don't answer every single phone call that they make." Then we just say to do your best to calm them down, but if we have a lawyer who has a scheduling problem and can't learn how to manage the calendar and I forget the name, but it applied to both contracts. It happened to be a lawyer who was doing both juvenile and CIDC work. The problem was not being in either court when they were supposed to be. Both of us made the same recommendation but at different times. That was that there is a calendaring system that you can get for your computer and you had better get it. You need to know where you are supposed to be. After the first overture there wasn't an appropriate response. In CIDC's situation I talked to Brad Johansson who is the president. He and I both arranged to talk to the lawyer with the idea of saying, "This isn't a disciplinary meeting. This is a how are you going to fix it and here are some ideas to fix it." Then if it is not fixed it is taken to a board meeting and the board can then decide what to do. We have had two situations in the past where we have gotten to the point of taking it to the board meeting. The attorney saw the light that they couldn't fix the problem and they weren't going to be able to perform. They just submitted their withdrawal from CIDC. In both of those situations the underlying conflict was the fact that they had started to build such a large civil practice that they weren't doing their work for CIDC. We simply told them you have to make a decision. We can't have this occur. We didn't have to fire them but they saw the writing on the wall.

2:55:35 Chair Ellis How do you assign cases?

2:55:35 R. Gray It is random. There are a couple of exceptions to that rule. This just recently happened. I do video arraignments in the morning from prisons and I am kind of the front man to do that. We do them at 8:15 in the morning and most lawyers aren't even up at 8:15 and they don't get to the courthouse until 9:00. I am right across the street and I walk over and do the video. A man came up on the video and I had already been appointed to represent the co-defendant. I advised the court that he would be assigned another lawyer. I went down into Room 200 where the ladies do the verification and simply said while he was on the screen he said he had just finished a case with Brad Jonasson. If Brad is anywhere near the top of the rotation it might be smart just to have him get the case. He knows the guy and he has worked well with him. Other than that, or if you have an ongoing case and you pick up another case, it is all done on a rotation basis.

2:56:41 Chair Ellis So Measure 11 just blended in?

2:56:46 R. Gray It has its own rotation. We have a rotation for probation violations, a rotation for misdemeanors, a rotation – now because they are paid differently, for B felonies, C felonies, A felonies, Measure 11s. That is what Janan runs on a daily basis.

2:57:08 Chair Ellis So, it is rotation within those groups?

2:57:08 R. Gray Within those groups. At times she will say to me that somebody got a multi-case felony, five-count felony. Five different dates, different victims, all indicted in the same indictment. That puts them so far out on the felony rotation but I haven't been able to give them a PV for like 30 days because they are so far out ahead of everybody and we try to make the compensation at the end of the year equivalent. She will ask me to intervene and talk to the lawyer. That one felony is worth so many PVs. If we shift one felony off the felony grid and include it on the PV for so many PV credits, but mention that it is actually a felony case that you took, then you can get another felony sooner when the rotation comes around rather than be five ahead of everybody else. Sometimes we will agree to adjust that way with the idea of giving roughly the same amount of work and same amount of compensation to everyone toward the end of the year.

2:58:15 Chair Ellis How much of a problem here is substitution? In other words, the lawyer gets started on a case and a conflict that had not been detected is detected and the lawyer withdraws. That is very expensive from our point of view.

2:58:40 R. Gray No, because the money shifts. It is expensive for the lawyer because they don't get paid when the money shifts.

2:58:49 Chair Ellis How big an issue is that?

2:58:50 R. Gray Once in awhile I hear a complaint about it. Everybody has got it in their head that it is going to happen to all of us at some point or another and it balances out. Inside our contract we actually built in what is called a fee split paragraph. It has nothing to do with the state. We gave the lawyers the option of splitting the money between the new lawyer and the old lawyer and telling us what they agreed to. Initially everybody was doing that and we got a lot of requests to split. Now we never get them. When I get off of a case I realize that sooner or later it is going to happen to Brad and Brad is going to give me the case. I am going to get the money for finishing the case. Then he is going to get some case from somebody else and it all just eventually evens out.

2:59:45 Chair Ellis I am interested in what you say. In other parts of the state my impression has been that we end up paying both lawyers.

2:59:50 R. Gray Once in awhile we will negotiate a special deal if there has been a lot of work done.

2:59:59 Chair Ellis But in your contract it is all one unit.

3:00:00 R. Gray The state has been kind enough, on a few occasions, where there has been an extraordinary amount of work where we have gone back and asked them to give an extra felony unit for this case because this lawyer did so much work before the case got shifted. We have negotiated some of those but those are really pretty rare. Interestingly enough, Judge Maurer...

3:00:24 Chair Ellis Speaking of...

3:00:25 R. Gray ...Judge Maurer is the guy who decides conflicts. Whenever we have a situation where somebody wants to resign from a case, because he is the presiding judge, the motion gets filed and he has to consider it. I don't want to misstate this, because I was going to use this as an example and not a criticism, but I was joking with Jack Bernstein the other day about the fact that once you get too far from CIDC, because he used to be part of our group years ago, you sometimes forget how we handle stuff internally. One of our lawyers was in front of Judge Maurer to withdraw from a case for what he perceived to be a problem. He told me they had had a discussion about whether the money shifted and whether there was a payment to the new lawyer. I said, "No. You need to remind the judge, whenever you are up there, that the money doesn't get shifted." If you have done 50 hours of work and then the client burns you ethically, by contract you don't keep the money. You are out. You are hoping that somewhere down the line that will balance out in all of the work that you do. It goes to the new lawyer.

3:01:41 Chair Ellis Do you have many substitutions based on of incompatibility between client and lawyer.

3:01:47 R. Gray No. There is a certain class of defendants who are just going to be problems no matter what and they will try to play the system. One of the things our judiciary has done is try and limit these people from doing this. They tell them that, "If I let you off this case then the next lawyer is the last one. We are not going to play this. You are going to represent yourself but you are not going to bounce around from lawyer to lawyer." I have heard judges repeatedly tell people that. I think it is a message that needs to be delivered. I think that has helped cut down some of that. The other thing is that there are, quite frankly, a few lawyers in CIDC who have agreed to take, forgive me, the hard asses. I am one of them. I have no problem. At some point Janan will call up and say, "Look, it is not really your turn on the rotation but this guy has tried to burn several lawyers and the judge has said he gets one more." Steve Vess, or Brad Jonnason and I have agreed to say we will take them. You just approach them differently. We also expect that PCR is coming along down the line no matter what you do. I had a guy who tried to PCR me when he got acquitted on all charges because he and I hated each other so much.

3:03:20 Chair Ellis What is his relief?

3:03:20 R. Gray Don't know. What happens is you get that certain segment of the population to whom it doesn't matter who the lawyers are they are going to try and create conflicts and animosity. But outside of that group generally it is if the lawyer perceives there is an ethical problem or that they are being set up for one. It happens once in awhile. I had a case, for example, about a year ago where the guy right on the day of trial tried to set me up to suborn perjury from his brother. He was a problem client on a multi-count sex case. I was like the third lawyer in line. This guy and I did not get along but I put in hours, and hours, and hours or work to prep him for trial. He tried to set me up for that right on the eve of trial. Judge Rastetter was the trial judge. The way we solved the problem was we agreed to do an in-camera review in front of Judge Maurer on just the ethical issue. Judge Maurer then talked to me, talked to the client

and asked appropriate questions so it didn't taint the trial judge. He basically laid the law down to the defendant that you basically can't be doing this and your lawyer can't buy into it. Either he represents you as planned or you represent yourself. The guy said, "Okay, I'll take Mr. Gray." Then we went and tried the case. If the judges are willing to be proactive in that sense it can solve a lot of problems.

3:04:59 Chair Ellis

What comment, if any, do you want to make about how we could do our job better? How PDSC and OPDS are relating to the work you are doing and any requests?

3:05:17 R. Gray

Well, considering that I am on a couple of committees for you it would be hard for me to critique you. In my experience I have never had a question go unanswered. I have never had a delay in a response whenever I needed help with something. I think the same is true of our people down through accounting, and with Janan who does the day to day assignments and a lot of times speaks for me in trying to make sure that everything balances out and all that. She had an accounting background and I didn't. It was good fit for us when she was my personal secretary. She is now independently contracting but it is like she is there half a day. We never have any complaints. We have a great working relationship. My biggest problem now is with my heavy schedule I don't have time to go to all the committee meetings that I would like to go to. That is not a criticism. It just means that I enjoy the involvement that I have. I don't have any problems whatsoever. I feel like we always get advised of everything we need to know and everything is very timely. I have never, as I said, had a question go unanswered.

3:06:32 Chair Ellis

I do want to say we appreciate the contribution that you personally make to the system as a whole. Other questions or comments to Ron?

3:06:54 R. Gray

I don't mind criticism. I am just ornery so people think that they shouldn't criticize.

3:07:11 Chair Ellis

Let's take about a five minute recess.

[recess]

3:15:11 Chair Ellis

If we can call the meeting back to order. Judge Maurer, we appreciate your coming. We could have met on a Friday and you would have had all day.

3:15:31 J. Maurer

I would have had a lot of time.

3:15:35 Chair Ellis

So are all presiding judges Maurer?

3:15:42 J. Maurer

No. Contrary to popular belief that is a greater rarity than it might seem to some practitioners. I appreciate the Commission being here in our humble surroundings and appreciate your work. I don't have any really lengthy prepared remarks. I have a couple of observations and then would be happy to answer any questions that you may have about how our indigent process is working in Clackamas County. I think to start that I confidently speak for all of my colleagues, as well as myself, that we have a very high level of satisfaction with the way that our current consortium, CIDC, operates. How they screen the participants in the provision of these important services and the level of competence that they bring and the level of commitment that they bring to the cases they are called upon to defend. I think we are fortunate perhaps, and I haven't done a survey of other counties, but I think we are very fortunate in that several of our current judges, myself included, worked in prior iterations of CIDC. I think we continue to have from the bench a certain investment and interest in seeing that we provide indigent defense services of high quality and have attorneys with a high level of competence and experience. We have been very appreciative of the work of Ron Gray for the number of years he has been in charge of the consortium here. We work very hard to have a cooperative arrangement between the district attorney's office, the bench, and the indigent defense providers and the bar at large as we approach various challenges that we have in the

operation of the court itself, including trying to maintain some of the efficiencies we have been able to achieve in terms of our docket. We are a very busy court with probably fewer judicial resources by several than most measures would suggest we have. I think that in terms of providing you any information that might suggest areas where you could improve the process, I am not able to offer too many which is the good news. I am happy to answer any questions. I think the one point that probably most interests you, and most providers of indigent defense services, when there are problems what happens and is there some mechanism by which you can avoid inadequacy of representation with great risk to the individual involved. We, on that score as well, have felt very comfortable that when there have been concerns we have been able to address those with Mr. Gray. He and his more senior colleagues among the group have done some mentoring. I know of some of the younger, newer participants. There have been occasions when people have simply been found not to be up to the task and have been removed from their ranks. That is something we take very seriously. We see from the bench that it our responsibility to be overseeing the provision of these services. We are very quick to identify problems and to work with Ron to see that they are addressed. Fortunately, among these groups we have a greater level of continuity than many because so many of the participants have been doing this work for a long, long time. Some from as long ago as when I was doing it. I think we are very fortunate there. I think that provides a good atmosphere, especially for new participants coming into the process and joining the ranks.

3:20:28 Chair Ellis

Do you have any new participants?

3:20:29 J. Maurer

Only just a few over the last couple of years. There has only really been a handful because I think the economics are such that they maintain a numerical limit to the size of their group. Over about the last five years I can think of only three or four new members and actually a couple of them with prior experience in other areas.

3:21:04 Chair Ellis

One of the issues we struggle with is how do you bring new lawyers in a way that gives them some mentoring, some experience, some supervision, before they are permitted to take on cases more independently? The PD model allows for that. They typically do recruit young lawyers. They have a management structure and a training structure that is able to bring that younger lawyer up to a point where he or she really is able to practice effectively. A typical consortium, and I'm not saying this one is because this is almost a unique consortium in the state given the strength of the manager, but typically in a consortium model it is much harder. You aren't going to bring in as a fully practicing member somebody who doesn't have training and experience. Unless you have a firm within the consortium that does this it is very hard to get younger lawyers involved. How do you see that playing out here in Clackamas County?

3:22:35 J. Maurer

That is really important point because as I indicated only a moment ago we have really only had a handful of new participants here. A couple of them, Ben Kim comes to mind, spent several years in a major crime position with the LA County's DAs office. He had lot of experience coming into the process. I know they have tried a couple of different models over the years of having a short-term trial period where they have – them being new members – hook up with an individual member of the group and participate in some trials and do some misdemeanor work as a gradual training process. I think we have had several of those people who did not continue on. We have had some members that went through that process and I think they struggled initially. Over time they gained some experience but not without some slips and falls along the way. I don't think it is too dissimilar really from even the public defender model. There is certainly a greater level of ability to provide in-house training and mentoring. On the mentoring piece I think our particular group here in Clackamas County is a close enough and cohesive enough group that that occurs. The dynamics of their group include their organizational meetings where they talk about some of these things and do some CLE programs as well. It is certainly problematic and I think in this particular group we have only a small number. You raise a point that I have actually thought about here on many

occasions and that is succession planning. I think ahead to where we are going and I look around in court everyday and see many of my contemporaries that are doing this work and have been since I was doing it was well. I know we are going to be in a position here at some time in the not to distant future where many of these folks are going to be looking to retire. We do not have, currently, it seems to me, a plan or at least an organizational structure that really will allow for just automatic transitioning into the same quality of service.

3:25:35 Chair Ellis

You are talking about the practitioner level. CIDC has functioned as well as it has in significant part because Ron Gray has been willing and able to play an unusually strong, management role. You have the same succession planning there at some point.

3:26:00 J. Maurer

Right. Both in the practitioners and the management. That will be a challenge to address. Kind of a benign neglect has been my approach thus far. I have been concerned and I am not sure how that is going to look when we get to the point where these folks and Ron in particular, because of his strong management, begin to retire. I am kind of hoping and not addressing this too directly that as individuals retire they won't retire in mass and we will be able to do some filling in here and there. I don't get involved with Ron in the nuts and bolts of their management so I am not sure what he has done in terms of looking to a potential replacement.

3:27:05 Chair Ellis

We asked him that question directly and he gave us a remarkably evasive answer.

3:27:13 J. Maurer

Well, that is the defense lawyer in him. That is an area of concern long range. Although currently we have a number of concerns long range and short range, that is one that has certainly not escaped my notice and one that I am concerned about. There is probably a core of maybe 10 or 12 people that have been there for years, have literally been the backbone of that organization.

3:27:38 Chair Ellis

I can tell you that other defense organizations around the state have in common the fact that they all started 20 or 30 years ago. Several of them had a dominant personality for many, many years. In the ones I am thinking of we have had two very successful transitions to new leadership, but they were both the PD structure where you had a board, you had outside members on the board, and on PD boards the members are not practitioners. I don't know how it will go here, but I think that that day is coming. From our point of view we are a little bit at risk because this is a single source provider that we are contracting with. Ron on the defense side is saying, "Well, if it ain't broke, don't fix it." I share that, but I think our Commission is concerned that where you have a consortium group that currently has no outside directors, you have no apparent successor, it is a situation that we could have real problems with.

3:29:17 J. Maurer

I think that is true. A couple of observations there: one, I think our county historically has preferred this single provider approach generally, but I also think the bench for whatever reason, historical or otherwise, has had a greater sense of responsibility – that may be overstating it ...

3:29:48 Chair Ellis

Do the initials PG come to mind?

3:29:54 J. Maurer

There has been a very active involvement and not that any other benches are not appropriately concerned and involved where necessary. I would see it in terms of the process when Ron is ready to retire. For example, I would see our bench being involved - myself or my successor - involved in the process of developing an appropriate individual to take over that role or a group of individuals if they were to change that specific approach to the management of the organization. I would see our being involved and having input into that process. Not because we have any specific contractual part of it ...

3:30:45 Chair Ellis

But they are a big part of the system.

- 3:30:45 J. Maurer ...but because it is so important to all of us and because that has simply been the nature of our approach, generally, to problems associated with the criminal justice system. We obviously would not involve the DA in this but we tend to try and do these things collegially. There are a couple of people that I think might well be people who could take on that role. It would just be a matter of the timing for Ron. He has not suggested that he has contemplated retiring and getting out of the position anytime soon. We have talked generally and when and if that time were to come him I would expect that he would let me know sufficiently in advance, a year or more, and I'm certain he within his organization and I for whatever help I could provide certainly would anticipate looking toward structuring some sort of succession planning and transition so that there isn't an interruption in what is not broken.
- 3:32:02 Chair Ellis What is your own feeling whether a PD model would work well in Clackamas.
- 3:32:15 J. Maurer We were very resistant, and I say "we" when I was amongst the leaders of whatever it was we called ourselves at that particular time in providing indigent defense services. We felt that we were a group with an investment in the community and that those of us who had practiced in the area for a long time were really the best group.
- 3:32:45 Chair Ellis Was the issue that it was a branch of MPD or was it PD versus consortia?
- 3:32:52 J. Maurer I think it was really just a PD model versus the practitioner. We saw some benefit in actually having individual practitioners. They had other connections with the court through other areas of practice and were not simply an organization that was parallel to the district attorney's office doing one type of work. Our approach as individual practitioners seemed to be a stronger and better approach. When we had the public defender's office out here, I don't think that there was any antipathy at all. The people that were out here we all thought highly of - Ron Cinniger, a young David Falls, Rich Wolf, some of those folks. We all thought well of them and had good relationships with them. As judges we thought they did a good job. It wasn't that they weren't capable or that there was something inherently wrong about the process. We just simply felt, and I continue to feel, that the way our county has evolved, and the group providing this service has evolved, that we have simply been able to maintain what I think is a consistently high quality of representation for people on an indigent basis. I think the group currently providing the service matches up pretty well with any PD around. I would challenge anyone to find a group that provides a better service.
- 3:35:02 Chair Ellis I don't think that anybody is arguing that. I think there are two concerns that kind of come to mind that might be better managed going the other direction. One is the training, supervision, entry of younger lawyer piece that we talked about, and the other is - it isn't just the succession planning but the notion that there is a board that has links to the broader community that is the responsible group. There is a lot to be said for that. There is a little bit of concern by some and I don't have an agenda here. I'm not saying that someone is thinking of doing something radically different, but there is a risk when you have a consortium that is managed by a board that is really just consortium members. It becomes defensive, protective, and static, and not able to respond to change as well as a more unified agency would. That is just a broad concept.
- 3:36:19 J. Maurer On the first point, which we have talked a little bit about before, bringing in new members, I think that what will happen and what happens historically with this group is that they will bring people in as needed in order to broaden the numbers as we have people retire. Certainly there will have to be developed a more specific and comprehensive recruitment process to find lawyers that would be interested in doing the work either amongst those that are in the community currently and maybe just coming in and starting practices, or recruiting in the broader metropolitan area. I am not sure exactly how that will take place.

- 3:37:09 Chair Ellis You can see a difference between recruiting if you are part of an organization where you have a salary to pay versus, “Come on out to Clackamas County and start your own practice. You may get 25 percent of your work out of a consortium.” That is very different.
- 3:37:33 J. Maurer Oh, I agree. Our county is growing and there are a number of people who are coming into the county and practice in the Lake Oswego area, Sunnyside area, some of these areas where there has been significant growth. When I say recruitment I don’t necessarily mean that consortium membership would provide enough an incentive to entice someone from a law school in another location. Certainly a salary would be a greater recruitment device. What I am talking about is the group that is already here, the young lawyers that have already committed themselves to this area and have some investment in the community at large can be brought in and then mentored through this process. Or, as I said, periodically we have been lucky enough that we have had practitioners - Ben Kim is the most recent example - but we also had Jenny Cooke as a member of the consortium. She case from Multnomah County and established an office out here. That is not to discount the differences and the greater ability to recruit. I think that there is within this model still some ability to identify the people who would be interested in doing the work on a part-time basis. The economics of the law practice are such that there are many, many people that would be benefited by this.
- 3:39:35 Chair Ellis I think a lot of people would argue that the economics work the other way. That the current practitioners would view the new recruits as a threat not a benefit and might be inclined to just hold on to what they’ve got. They age and then it leaves you and us in the lurch.
- 3:39:54 J. Maurer Well, I think we have new lawyers coming in all the time and establishing practices in this area that don’t have a practice that is complete enough that they would not benefit from a portion of their practice being devoted to indigent defense, that would provide a certain foundation for that practice. It would allow them over time to expand other areas of their practice. It might mean that eventually they would phase out of indigent defense and that is certainly a possibility. In our particular community, for whatever reason, we have folks that have done precisely that. Having started years and years ago with indigent defense being simply a portion, 35 percent, or half of the practice, or whatever it may be, many of them decades later are continuing that same practice model. I think recruiting is somewhat different and the enticements are somewhat different, but to some extent I think there is also some benefit for a young practitioner having some portion of their practice being guaranteed to pay a portion of the overhead and bills. It gives them an opportunity to interface with the courts on a regular basis and the other practitioners in the area that are not just doing exclusively criminal work but also have other components of their practice. I think there is some benefit there that simply taking a position and being a full-time criminal defense lawyer in a public defender model that at least in terms of longer term career planning can be less attractive to some people. You are going to recruit perhaps a different demographic group of the new practitioners coming into a particular area. I see it as different. I don’t necessarily seeing it that one will be better in the longer term.
- 3:42:08 Chair Ellis Other questions for Judge Maurer? Thank you.
- 3:42:16 J. Maurer Thank you very much. I appreciate it.
- 3:42:15 Chair Ellis Where are we, Ingrid? Any other presenters?
- 3:42:23 I. Swenson I don’t believe so. That is everybody who planned on being here and could be here today.
- 3:42:33 Chair Ellis The piece that we didn’t get to is the drug court.
- 3:42:33 I. Swenson It is true and there is nothing urgent about that. We can certainly revisit that at another time. I assume that of the items on the agenda the only one that may be of more direct and

immediate interest is Kathryn's discussion of the budget. We could do that over lunch or we could do it quickly and then you could take your lunches with you. Whatever you prefer.

3:42:56 J. Potter I would vote to do it over the lunch.

3:42:59 Chair Ellis Let's do that.

Agenda Item No. 5 OPDS Monthly Report

3:49:43 K. Aylward Thank you. As Ingrid said we have just finished concluding the current biennium adjustments. We talked about this at our last Commission meeting. Nothing changed. We did end up with the cuts that we had discussed with Legislative Fiscal Office and cuts that we told them we could make without a reduction to services. That was a huge relief. In addition, there are the reductions for the 09-11 biennium. As Ingrid said we were asked to do the "What if" scenarios of a five percent, 10, 15 and 20 percent. We did something a little different. It was consistent with what we did for the current biennium to simply to put forward something that said, "Here is the amount of money you can cut without a reduction in services and then here is what would happen if you did it differently." We revised our expenditure estimates. Obviously, because we don't need as much money this biennium we presume that that would continue and, therefore, next biennium we don't need as much. We told LFO the amount that you can cut without a reduction in services is about \$9.2 million. When you go beyond that then you talk about an inability to cover the public defense caseload if nothing else changes. There are a couple of workgroups that are looking at ways to shrink the system as a whole - finding low level misdemeanors that could possibly be decriminalized, looking at first offense drug possession charges. There are people looking at the death penalty and the costs associated with that. I really think the system, as a whole, needs to make major cuts in what we are required to pay for. As far as how we know how it is looking, I don't know. I just personally think grimmer every day. One of the things that we are thinking about in the office, and we haven't necessarily discussed this with contractors, but I think there needs to be some kind of transition. You can't have a big "ramped up" contract and then January 1 suddenly have it drop 20 percent. We will be looking at contracts and possibly amending current contracts effective July 1 for that last six months of the contract, to see if there are some adjustments we can make to the contract that won't have a horrendous impact on contractors but can ease them into what is inevitably going to be a smaller contract. I really do not want to go through that first week in December, and tell them, "Guess what? You have no contract in two weeks time." We know it is coming so we might as well start those discussions now. Any questions about the budget or money? I would like to segue into the office report just because I am excited about it and I am just really pleased. Our office began efililing last week. We had our first efililing. It is straightforward enough to sign onto a system and upload a document ...

3:53:27 Chair Ellis This is efililing in ...

3:53:28 K. Aylward In the Court of Appeals, yes. The real issue for us with the volume of documents we produce and the number of attorneys is really a document management issue. If you can imagine now, as a paper based system, you can hand a piece of paper to an attorney and say, "Read this, sign this." They can hand it back to you. All of those document flows are triggered when it is paper based. We want to avoid even creating paper in the first place and we have now devised and begun to implement a system that is automated to the extent that emails are sent when a document is sent. There is an electronic signature of the document that then sends the document back to staff. It took a long time to do and it was very complicated. I am pleased and proud because I think we are far ahead of what the AG's office is doing and even some of the local trial courts in terms of preventing things from becoming paper in the first place. We thought there would be a tremendous amount of resistance from the attorneys who like paper, but they have been fabulous and the secretaries have been fabulous.

3:54:46 Chair Ellis You must have young lawyers.

3:54:54 K. Aylward I think people see the advantage. I said at the last staff meeting my motto is cut paper not people. We have to look to that. We spend \$6,000 a month on paper, copying costs, postage, and the only thing we should be putting in the mail is a letter to the client. That is the only thing, in my view, that needs to be a piece of paper. Everything else we can do electronically.

3:55:21 S. McCrea I love the efilings in Federal Court. I don't have to make a bunch of copies. I don't have to walk over to the courthouse. They can do it at any time. I can go look stuff up on other cases.

3:55:36 I. Swenson You need to know that Kathryn did all the development work on this.

3:55:38 S. McCrea Yeah, Kathryn!

3:55:40 K. Aylward You know a lot of things are just falling into place at the same time. We are getting transcripts sent to us by email. Now that we have registered for efilings the AG's briefs are coming to us by email. The trial courts are now starting to scan their files so we will get court files by email. It is not a question of taking a big stack of paper and scanning it. We are getting these documents already electronically.

3:56:09 Chair Ellis How do you handle the filing in terms of keeping fundamental records?

3:56:18 K. Aylward When you say filing are you talking about a piece of paper?

3:56:25 Chair Ellis Well, three years from now somebody says, "Show me the file in X case."

3:56:29 K. Aylward All of our files are in PDF Adobe portable document format which is pretty much of a standard. We can keep the files in that format. Storage is cheap electronically. It is very easy to extract a portion of the file so if the trial attorney wants a copy of a motion you can click a button and it will email it to him. That will be the file electronically. Even when a PCR attorney wants a file, you just email it and you still have your copy.

3:57:11 S. McCrea The storage is backed up? Is it on the net?

3:57:15 K. Aylward It is on a server in our building. There is actually an online backup that happens at noon and 5:00 everyday. Then there is taped backup. We actually take a tape offsite daily and it actually goes to – it is Iron Mountain I think is their name, a security company that takes it to a vault in Portland. Even if all of Salem were destroyed we have our tape. This is what CBS has been doing for six years now. We are comfortable with the idea. The minute that something comes in the door it is pretty much shredded. It is very exciting for our little office to be so high tech.

3:58:09 Chair Ellis And the lawyers aren't fighting back?

3:58:09 K. Aylward We only have had a few of them actually start with their efilings. A little pilot pod, but they love it. Part of the reason they love it is because we have access to our network from any computer on the planet, which means if you are stuck at home with a sick kid and you didn't bring a file with you, you click a button and it is on your screen. The other thing we are getting and I know we are not supposed to be spending money, but if we are losing FTEs next biennium, which is likely, then we have to be as efficient as we possibly can. One thing which our office has sorely needed for a long time is an adequate brief bank. They spend a lot of time asking, "Does anybody have a brief on ...,?" and then 40 attorneys stop what they are doing and say, "I think I do." We really do need to get this into place. We are looking at a product that Westlaw sells. The nice thing about that is attorneys are very familiar with Westlaw. They know how to search and the look and the feel of it. We will probably be getting that within the next two to three months, I would think. In the current biennium we

did lose some FTE positions. We lost two positions or 1.55 FTEs that were removed from our current biennium budget.

- 3:59:35 Chair Ellis But they were unfilled positions?
- 3:59:34 K. Aylward We did have an attorney in our juvenile unit leave. This was a person who lived in Sisters and the commute was overwhelming. Now this person will be on our juvenile panel. We will still have the benefit of her skills, and experience, and talents, but she won't be driving over the pass all the time. That means our juvenile unit, which took so long to pull together, is now down to just two attorneys. We are hoping to rotate someone in from the criminal side that has an interest in learning juvenile law too. We are basically going into next biennium with at least three vacant attorney positions. If it comes to it, and we have to lose three positions, we are not losing bodies.
- 4:00:37 Chair Ellis Questions for Kathryn?
- 4:00:38 J. Potter Can we go back to the budget? You stated \$9.2 million without loss of services. If the legislature says we are going to take more than that what are we telling them? Are we saying this is what you will be able to buy with a \$15 million cut? You will be able to buy this amount of services and we will stop those services on this projected date in 2011?
- 4:01:09 K. Aylward All of the information that we have provided, in the absence of any other solution from the legislature, we have said we don't have any flexibility in the services we are required to pay for. It cost us \$8.5 million a month to run. So for every \$8.5 million you take you have lost four weeks of services. I would love it if somebody would solve the problem. I don't want to go through some BRAC like episode. I don't want to deal with contractors having to take sudden cuts. We would love a solution but we have no abilities to make reductions.
- 4:01:55 J. Potter Let's say the legislature hands us a \$15 million cut. You have decided that is going to be the end of services in May of 2011. How do you allocate the funds then to the contractors? Is it still on a 24-month basis, or is that on a 23-month basis?
- 4:02:22 K. Aylward Whatever the Commission directs me to do at our June meeting. I haven't given it any thought. Generally, our contracts run two years so they would, in fact, run for seven months beyond that. Like with BRAC you had sort of a four month gap in services where they were reduced, but then July 1 we want you up and running and carrying on. I don't know how we would do that. If you are going to save any money the only way to do it is to not pay it to contractors. To say to them to plan your vacations in June, you won't be working and you won't be getting paid.
- 4:03:15 I. Swenson We don't know how the legislature is going to deal with this crisis. They may meet periodically. They may ask the E-Board to monitor those developments. It could be a moving target so that even when we get a budget it may not be our final budget.
- 4:03:39 Chair Ellis On the amount you told the legislature you could cut this much in services. What is it we gave up?
- 4:03:53 K. Aylward We re-projected the required expenditures given current caseload. It is a combination of a first time ever actual drop in caseload, so we are now looking at caseloads and basically an exercise for the analysts in the office was looking at the picture right now, starting June 1, and asking, "What amount would you set for a quota for the contracts given what you see now?" Then we looked at those projections and it was \$9.2 million less than our essential budget level.
- 4:04:38 Chair Ellis So, it all depends on the caseload drop?

4:04:43 K. Aylward Yes, because there is nothing else to drop, in my view.

4:04:55 Chair Ellis A lot of people have a belief that in trying economic times property crime rates go up. What happens then?

4:05:03 K. Aylward Well, I think like with any biennium, if necessary, we go back to the Emergency Board and say, "Our budget was based on this caseload. Now we are seeing this caseload, therefore, we need additional funds." I did feel quite queasy about sort of saying that there is \$9.2 million that is no longer necessary in our essential budget level because we think we have other needs, but I felt quite strongly that if we are going to go to an Emergency Board when caseload goes up and say, "We need more money," then if caseload goes down we have to march in there and say, "Here you go. We don't need this because of caseload. Now, by the way, we do need it for a lot of other things like juvenile representation, post conviction relief parity, an hourly rate increase, we need it for a lot of other things, but you gave it to us based on the caseload so I have to give it back to you because caseload isn't there." That is the only way to deal with that. I will remind them, "Remember that \$9.2 million I didn't need? Well, I need it now if caseload goes up."

4:06:15 J. Potter Caseload increases are pretty tough. Caseload decreases in this economy are even tougher to try and measure, whether property crime goes up or Measure 57 has an effect. (inaudible). Let's say if they don't understand it they will understand it.

4:06:48 Chair Ellis Anything else?

4:06:54 I. Swenson No. We will just have to see what the situation is next month when we report to you because it may be very different. That is what it is looking like right now. We do expect our budget hearing very soon. That will be a good time to discuss these things with the legislators. We have already met with them and found them very knowledgeable about our situation.

4:07:19 Chair Ellis Is it pretty much the same group?

4:07:23 I. Swenson It is a little bit different. About half the members are new to the Public Safety Sub this term.

4:07:30 Chair Ellis Who is old?

4:07:30 I. Swenson Well, Chip Shields continues to co-chair. Senator Verger from Coos Bay is now the co-chair of that subcommittee and is very experienced but not in this particular area. Jeff Barker is a continuing member. Vicki Walker is a new member from Lane County. Representative Nathanson is a continuing member as well. Among the new members are Senator Walker and Senator Whitsett from Klamath County, Representative Greg Smith from Umatilla County. Tim Freeman is from Douglas County and is a brand new legislator. Representative Kahl is from Portland. A good group.

4:08:49 Chair Ellis Any other business? Is there a motion to adjourn?
MOTION: Shaun McCrea moved to adjourn the meeting; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Meeting was adjourned at 1:11 p.m.

Attachment 2

**OPDS's Draft Report to the Public Defense Services Commission
On Service Delivery in Clackamas County
(March 2009)**

Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. From 2004 through 2008, the Commission completed investigations of the local public defense systems in Baker, Benton, Clatsop, Coos, Curry, Grant, Harney, Jackson, Josephine, Lane, Lincoln, Linn, Malheur, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of the public defense system in Clackamas County undertaken in preparation for the PDSC's public meeting in Oregon City on Thursday, March 12, 2009.

PDSC's service delivery planning process

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

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

Third, after considering OPDS's preliminary draft report and public comments during the Commission's meetings in a county or region, PDSC develops a

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

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

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

Background and context to the service delivery planning process

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

PDSC is committed to undertaking strategies and initiatives to ensure the competency of those attorneys. In the Commission’s view, however, ensuring the minimum competency of public defense attorneys is not enough. As stated in its mission statement, PDSC is also dedicated to ensuring the delivery of quality public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

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

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

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

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

Another area of practice in which significant concerns about quality of representation have been raised by the Oregon State Bar and others is post conviction relief cases. In March 2008 PDSC heard from judges, the Department of Justice and a number of attorneys whose practice includes post conviction relief about the need for improvement in the quality of representation being provided by public defense attorneys. A work group was convened by the bar at the request of PDSC to create performance standards for attorneys in these cases. Those standards are expected to be approved by the bar's Board of Governors in the near future. The work group was also asked to make additional recommendations to PDSC for improving services in this area of practice. Those

recommendations will be presented to PDSC at its March 2009 meeting.

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

The Commission is also concerned about the “graying” of the public defense bar in Oregon and the potential shortage of new attorneys to replace retiring attorneys in the years ahead. More and more lawyers are spending their entire careers in public defense law practice and many are now approaching retirement. In most areas of the state, no formal process or strategy is in place to ensure that new attorneys will be available to replace retiring attorneys. The Commission has also found that the impact of such shortages is greatest in less populous areas of the state, where fewer lawyers reside and practice, but where the demands for public safety and functional justice systems with the requisite supply of criminal defense and juvenile attorneys are as pressing as in urban areas of the state. As a result, PDSC is exploring ways to attract and train younger lawyers in public defense practice across the state.

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

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

Most of PDSC’s other strategies to promote quality and cost-efficiency in the delivery of public defense services described above focus on the “performance” of public defense contractors and attorneys in the course of delivering their services. Performance issues will also arise from time to time in the course of the Commission’s service delivery planning process. These issues usually involve individual lawyers and contractors and present specific operational and

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

management problems that need to be addressed on an ongoing basis, as opposed to the broad policy issues that can be more effectively addressed through the Commission's deliberative processes. OPDS, with advice and assistance from its Contractor Advisory Group and others, is usually in the best position to address performance issues.

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

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

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

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

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

PDSC intends, first, to review the service delivery system in each county and

develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county's or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

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

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

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

While some of Oregon's public defender offices operate in the most populous counties of the state, others are located in less populated

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

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

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

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

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

³ Id.

retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

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

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

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

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

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

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

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

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

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

5. Individual attorneys on court-appointment lists. Individual court-appointed attorneys offer PDSC perhaps the greatest administrative flexibility to cover cases on an emergency basis, or as "overflow" from other types of

providers. This organizational structure does not involve a contractual relationship between the attorneys and PDSC. Therefore, the only meaningful assurance of quality and cost-efficiency, albeit a potentially significant one, is a rigorous, carefully administered qualification process for court appointments to verify attorneys' eligibility for such appointments, including requirements for relevant training and experience.

PDSC's Preliminary Investigation in Clackamas County

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

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

In February 2009 OPDS Executive Director Ingrid Swenson, accompanied on some interviews by OPDS General Counsel Paul Levy and Clackamas County CBS Analyst Amy Jackson, visited with stakeholders in Clackamas County. In addition to talking to PDSC's contractors in the district, they met or spoke by phone with six of the Circuit Court judges, a pro tem judge, the District Attorney and his chief deputy, the Citizen Review Board coordinator, two DHS managers, the Juvenile Department Director, the CASA director, and one of the Assistant Attorneys General assigned to the area.

This draft report sets forth the information obtained in those interviews and recommends areas of further inquiry for Commissioners at the March 12, 2009 meeting in Oregon City.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in a particular judicial district turns out to be the single most

important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for a particular area.

OPDS's Findings in Clackamas County (Judicial District No. 5)

The Circuit Court and the District Attorney

There are eleven Circuit Court judges in Clackamas County. Judge Steven Maurer is the presiding judge. Judge Deanne Darling is the primary juvenile court judge. The Trial Court Administrator is Mari Miller. The County has seven specialty courts.

John Foote is the District Attorney and Greg Horner is his chief deputy. There are currently 29 deputies and the number of positions is expected to remain stable. While, as noted below, the defense bar rarely adds new lawyers, the District Attorney's office does have turnover in its staff and has become the point of entry for new attorneys seeking criminal law experience in the county.

Procedure in criminal cases

There are five special courts for criminal cases. The adult drug court is designed for defendants with significant, long-term drug or alcohol addiction. A guilty plea is required for the defendant to participate in the program. One Clackamas Indigent Defense Consortium (CIDC) attorney is assigned to cover the drug court. The mental health court is limited to defendants charged with non-violent offenses whose behavior is principally attributable to mental illness rather than substance abuse or anti-social behavior. There is also a DUII Court, a community court and a domestic violence deferred sentencing program. CIDC lawyers cover these courts as well.

A consortium attorney is present in court for felony and in-custody misdemeanor arraignments. Each case is generally assigned to a particular attorney on the same day as the arraignment. That attorney checks for conflicts, and if a conflict is found the case is reassigned to another consortium attorney.

Arraignments for clients who are in custody, either at the Clackamas County jail, at the Inverness jail in Multnomah County or in a state correctional facility⁴, are generally done by video. Only a few prisons (such as the Columbia River Correctional Institute) do not have video capacity.

Three of the Clackamas County courtrooms are fully wired for video appearances and there is a portable "polycom" unit that can be used in other courtrooms. While the capacity for confidential communication between attorneys and clients is limited, the video system is used principally for routine appearances.

⁴ Arraignments from the state institutions are usually on warrants.

The county uses a master calendaring system. There is a court liaison team which includes CIDC, the district attorney's office, the bar president, the trial court administrator and the judges which addresses system issues on a regular basis. Based on the recommendation of this group the county has been using a "case manager" system for scheduling criminal cases since 2003. Except for serious cases such as Measure 11 cases, the parties are expected to resolve cases or set them for trial by the 35th day after the first appearance. The district attorney's office is required to include a settlement offer when it provides discovery to the defendant. Motions must be filed 21 days before trial and are generally heard on Mondays. There is no trial docket call but lawyers are required to notify the court 24 hours in advance whether their cases will actually be going to trial.

The state issues subpoenas in only about 15% of criminal cases. The trial rates in Clackamas County, however, are higher than the statewide average.⁵

Clackamas County is growing and the court anticipates that the criminal caseload will continue to grow as well. Jail capacity has been an issue in the county. In 2005, the Circuit Court judges sitting en banc issued an order prohibiting the sheriff from closing additional beds. After the voters approved a levy in November of 2006 the Clackamas County Board of County Commissioners unanimously agreed to devote \$50 million towards construction of a new adult jail and to construct the first phase of an expanded jail at another site with a planned completion date of 2010. There are currently approximately 400 jail beds available in the county.

OPDS contracts with CIDC to handle 6,844 cases per year. CIDC is currently just slightly under quota. The district attorney's office notes arrest rates have been fairly constant for the past eight years in Clackamas County even though the crime rate appears to be dropping.

Procedure in juvenile cases

The Clackamas County Juvenile Court is located with other county offices in a group of buildings several miles from the County Courthouse. Mondays and Thursdays are the principal juvenile court days, although preliminary hearings are held daily as needed. There are two juvenile drug courts, the juvenile dependency drug court and the delinquency drug court. Both meet on Wednesdays and are staffed by Independent Defenders, Inc. (IDI) attorneys. Citizen Review Board hearings are held on Tuesdays.⁶

⁵ From January 1, 2008 through June 30, 2008 the statewide trial average for felony cases was 5.4% and for misdemeanors, 4.4%. In the same period the trial rates in Clackamas County were 7.1 for felonies (39 to the court and 37 to juries) and 6.7% of the misdemeanors (53 court and 87 jury).

⁶ Clackamas County is one of a very few counties where the Citizen Review Board has been able to schedule its hearings to accommodate attorneys' schedules. Instead of having review dates scheduled automatically in accordance with the DHS calendar, the Clackamas Board schedules

Attorneys are not present for preliminary hearings in juvenile dependency cases. Attorneys generally receive notice of their appointment, however, on the same day as the preliminary hearing. Dependency cases are scheduled for “judicial review of the petition” 30 days after the preliminary hearing. This hearing serves as a settlement conference. Once jurisdiction is established (either by trial or by admission) a review is scheduled before the Citizen Review Board at five months. Upon the court’s instruction, the CRB focuses its attention at this hearing on creating realistic concurrent plans to be implemented if the primary plans cannot. Since these hearings are scheduled with input from the attorneys, attorneys are almost always present. The court then conducts a review at approximately eight months and a permanency review at thirteen months. A second CRB review occurs prior to the permanency hearing at ten months. This hearing is scheduled at the time of the first CRB review, which, again, allows attorneys to participate in the selection of the hearing date. There are two DHS offices in Clackamas County, the North Clackamas office and the Oregon City office. Both DHS offices are reputed to do a good job of transitioning cases from the initial protective services worker to the on-going worker, both of whom usually appear at the dispositional hearing. There is an active CASA program in the county and individual CASAs are assigned in approximately 60% of the cases.

Ellen Crawford is the Juvenile Department director. There are twenty-three counselors who work under her supervision. This department makes extensive use of formal accountability agreements and other informal approaches based on a comprehensive case management system. Low risk youth are generally referred to diversion programs. Higher risk youth are referred to juvenile counselors who may still recommend a formal accountability agreement. There are three deputy district attorneys assigned to juvenile court cases. It is the district attorney’s office that files the petition after receiving the police reports from the juvenile department in those cases in which adjudication is sought.

An attorney from IDI is present for delinquency preliminary hearings. At the preliminary hearing the court sets an “adjudication and disposition” hearing approximately 30 to 60 days later. If the youth wants a trial the attorney notifies the court of the need for a trial date. Few youth remain in custody pending trial. The county has access to fourteen detention beds at the Donald E. Long facility in Portland. Youth are rarely held for more than a few days. Youth who are in custody sometimes appear for initial hearings by video transmission.

The delinquency drug court currently has fifteen clients. The program serves youth who are fourteen to eighteen years old. The drug court team continues to refine the structure and operation of the court.

its hearings at the time of disposition when the parties and their attorneys are present. The second review is scheduled at the time of the first review. The Citizen Review Board of Washington County has also moved to this system and the Marion County CRB is exploring the use of a similar system in that county.

Probation violations are used sparingly in Clackamas County juvenile court, and only after other alternatives are exhausted except in cases of new criminal activity or a significant risk to public safety. Attorneys are notified when informal sanctions are imposed on their clients.

Public defense contractors

There are two public defense contractors in Clackamas County, the Clackamas Indigent Defense Consortium (CIDC) which contracts with PDSC to handle criminal cases, and Independent Defenders, Inc. (IDI) which contracts for juvenile and civil commitment cases.

CIDC

CIDC has 27 members. It has a board of directors, five of whom are permanent members. All members are currently consortium attorneys. The board was recently restructured when two of its permanent members resigned. Their positions were taken by two younger members. The board has a president who serves at the pleasure of the board. The current president is Brad Jonasson. Every year two members of the board are replaced with other non-permanent members. CIDC operates under written bylaws; executes written agreements with members and has a manual for attorneys.

Ron Gray is the administrator of the consortium. Mr. Gray serves on two advisory groups to OPDS, has served on site review teams, and, at OPDS's request, prepared a list of best practices for consortia which is attached as Exhibit A. CIDC uses a portion of its PDSC funds for administrative functions and sets aside a certain amount to cover supplemental compensation for lawyers who handle particularly complex cases. Mr. Gray is assisted by Janan Billesbach, who has worked for the consortium for many years. Currently she is partly retired but continues to work half time from her home where she has a dedicated phone line and computer and is able to make consortium appointments on a daily basis.

The consortium president has assumed responsibility for creating an attorney evaluation process. He has assembled a committee which is working on a questionnaire to be sent to clients and a questionnaire to be sent to system representatives. Among the factors that will be analyzed in terms of attorney performance will be trial rates.

The work of the consortium was reviewed by an OPDS site team in 2004. OPDS has also conducted two statewide surveys that included Clackamas County. In the most recent of those surveys, the respondents were principally the local Circuit Court judges. They described the work of CIDC on average as good. Comments noted that the range of skill varied from one attorney to another and that there was some frustration with the less skilled attorneys.

Comments received by OPDS staff prior to this review from members of the local criminal justice system indicated that: CIDC has a lot of very good, experienced attorneys; they maintain a good relationship with the district attorney's office and the court; the county is fortunate to have them; Ron Gray is responsive to concerns from the bench and court staff; the consortium is able to provide mentoring when attorneys need it; the judges' workload is very high in Clackamas County and it is very helpful to have a provider that is as flexible as CIDC; it would help to have more attorneys; members cooperate with the court to make the system work, as does the district attorney's office; CIDC has also been a "partner" in the creation and operation of the treatment courts. Although there is a range of quality, on the whole it is very good with only a couple of attorneys who are problematic. CIDC attorneys are, on average, significantly more experienced trial attorneys than deputy district attorneys in the county.⁷

IDI

There are currently eleven attorneys in the consortium. Most of them have been part of the consortium for more than 20 years⁸. The consortium has a board of three members, one of whom is not a consortium member. The consortium has hired a former DHS worker who uses her expertise as a child welfare specialist to assess child clients' circumstances, advise attorneys about appropriate services for children, review DHS files and otherwise assist attorneys in representing children. The consortium does not sponsor trainings for its members. Members are active participants in juvenile court system-wide meetings and trainings, however.

Marty Cohen is the administrator of the consortium. Concerns about performance by consortium members are brought to his attention. He handles delinquency cases and staffs the juvenile drug court. He and the attorney with whom he shares office space both have a significant private practice.

In view of the declining juvenile caseload⁹, Mr. Cohen has advised other members of the consortium to take on private cases.

OPDS conducted a quality assessment site review of IDI in 2007. Responses to the 2008 statewide survey indicated that representation provided by this group varied from good to excellent in both dependency and delinquency cases. Caseloads were deemed to be "about right to somewhat too large" in dependency cases and "about right" in delinquency cases. Specific comments

⁷ Only 4 of CIDC's attorneys were admitted to practice within the last 15 years; more than half the members have been practicing for 25 years or longer.

⁸ One of the senior attorneys is currently training a new lawyer in juvenile representation however.

⁹ All categories of juvenile cases appear to be declining in the county. In the calendar year 2008, the consortium received credit for a total of 2,574 cases.

noted that most juvenile lawyers were involved in other kinds of practice and that too often they met clients at the courthouse, did not meet with foster parents and didn't have sufficient contact with clients.

Comments received during visits to the county by OPDS staff prior to this review indicated that the juvenile attorneys are "top notch" and do a great job; some of them have too many court appearances although this is getting better as the caseload declines. (It was acknowledged that their income from public defense cases has declined and that they are probably required to do other kinds of cases. It was also noted that they do a good job of making sure that someone appears for them if they cannot be present for a hearing, although the substitute attorney does not always have the needed information.) One commentator said OPDS should make sure attorneys understand the extent of their duties to clients, especially with respect to contacting them and keeping them informed about the status of the case. It was also suggested that OPDS consider changes in how it compensates lawyers in dependency cases. Some attorneys believe they get paid only for attending hearings, not for continuing representation of the client while the case is open. It was also recommended that the consortium consider terminating one of its members. Marty Cohen is generally considered to be responsive to concerns about members and willing to intervene. Another commentator noted that some of the attorneys are very effective at getting appropriate services for their clients while others seem disengaged. Some attorneys meet with foster parents, others don't. Some children are reportedly not seen by either their attorneys or their caseworkers.

One of the effects of limited attorney availability is the lack of representation at shelter hearings in dependency cases. DHS indicates that this is a disadvantage to the consortium's clients because DHS cannot work closely with the parents until the parents have met with their attorneys and decided whether or not to contest the petition and whether or not to cooperate with DHS in service planning. If attorneys were present at shelter hearings they could also argue against removal or in support of a particular placement.¹⁰

Many attorneys apparently do not have sufficient time to meet with their clients before the judicial settlement conference. While it is reported that attorneys are generally familiar with the case and the documents prepared by DHS, they often have not discussed the case with their clients before the court hearing.

Attorneys do participate on a regular basis in child safety meetings. Now that the Oregon Safety Model¹¹ is in place, decisions about placement are generally not made at these hearings but attorneys who are very committed, especially to child

¹⁰ It should be noted that despite the absence of attorneys at these hearings they can sometimes be quite lengthy when the court requires DHS to produce evidence of the need for removal and proof that reasonable (or active) efforts have been made to prevent removal as required by ORS 419B.150.

¹¹ The Oregon Safety Model approach to child protection was adopted by DHS in March of 2007.

clients, nevertheless attend and participate. It was reported that it would be helpful to have one of the attorneys specialize in the representation of older children who will transition out of foster care to independent living.

In delinquency cases, the quality of representation is rated fairly high even though it was reported that lawyers don't always meet with their clients prior to the adjudication and disposition hearing and that there are few motions filed and few trials. It was also reported that the attorneys' level of experience and good working relations with the juvenile department, the district attorney's office and the court are appreciated.

OPDS's recommendations for further inquiry at PDSC's March 12, 2009 meeting in Oregon City

Based on the information provided to OPDS during its visit to Oregon City, OPDS recommends that the Commission consider the following in developing a service delivery plan for Clackamas County.

The structure

The current system includes two consortia, with overlapping membership, that handle criminal and juvenile cases, respectively. The structure appears to be working satisfactorily although a number of commentators point to the need for additional attorneys and for better quality monitoring.

Attorney evaluation

While CIDC attorneys are given credit for providing high quality representation in most cases, some of the judges express concern about the attorneys' availability, about the need to be bringing in and training new attorneys to eventually replace current members, and about the need to consider removing some consortium members on performance grounds. As the Commission is aware from its service delivery reviews in other areas of the state, one of the weaknesses of the consortium model is that consortia often lack a system for evaluating the work of the attorneys and methods for addressing underperformance. It appears that CIDC is undertaking to create such a system. Ron Gray and CIDC have provided statewide leadership on quality assurance procedures. The Commission may want to follow closely the development of an attorney evaluation process in this county as a possible model for use by other consortia around the state.

Need for Additional Attorneys/Compensation

In Clackamas County, there is a significant discrepancy between the general assessment that the lawyers in juvenile cases are skilled and experienced and

the frequent observation that they are not having timely and adequate communication with their clients.

In juvenile cases, the need for attorneys to handle cases in addition to their public defense caseloads may affect their availability for court hearings and the ability of some of them to provide appropriate representation. It appears that the principal dilemma for these providers is that PDSC's case rates do not permit attorneys to limit their caseloads and add new members without finding supplementary sources of income. Significant additional funding for juvenile representation as proposed in PDSC's Policy Option Package No. 100 and SB 450 sponsored by Sen. Jeff Kruse¹² may be needed to ensure that attorneys are meeting their obligations to their clients.

While the burden of high caseloads is understood, attorneys should not allow their caseloads to prevent them from attending shelter hearings, meeting with clients before court hearings, meeting with youth, child clients and foster parents, litigating motions to suppress and taking other actions that may be necessary for good representation.

If current funding undermines attorneys' ability to comply with PDSC contract provisions regarding timely contact with clients, representation at hearings and the like, the contractor needs to raise these issues with the Commission and with OPDS prior to and during contract negotiations.

Service Delivery Plan for Clackamas County

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

¹² SB 450 proposes an increase in funding to PDSC specifically for the purpose of improving representation in juvenile dependency cases.

Attachment 3

PUBLIC DEFENSE SERVICES COMMISSION
QUALIFICATION STANDARDS
FOR COURT-APPOINTED COUNSEL TO REPRESENT
FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE

Revised 10/17/08 [new date]

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[pagination will be updated]

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PUBLIC DEFENSE SERVICES COMMISSION
QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL
TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE

The Public Defense Services Commission ~~adopts~~ the following standards ~~are adopted by the Public Defense Services Commission~~ pursuant to ORS 151.216(1)(f)(F). ~~effective March 1, 2007.~~

STANDARD I: OBJECTIVE

The objective of these standards is to ensure ~~the provision of that~~ competent and adequate legal representation ~~is afforded~~ to all financially eligible persons entitled to court-appointed counsel by state or federal constitution or statute.

STANDARD II: ATTORNEY CASELOADS

Attorneys appointed to represent financially eligible persons at state expense must provide ~~each client the time and effort necessary to ensure~~ competent and adequate representation ~~to each client~~. Neither defender organizations nor assigned counsel ~~shall~~~~should~~ accept workloads that, by reason of their size or complexity, interfere with providing competent and adequate representation or lead to the breach of professional obligations.

STANDARD III: GENERAL QUALIFICATIONS TO SERVE AS APPOINTED COUNSEL FOR FINANCIALLY ELIGIBLE PERSONS

Subject to the provisions of Standard V, the appointing authority shall appoint only those attorneys who:

1. Are active members of the Oregon State Bar or are attorneys of the highest court of record in any other state or country who will appear under ORS 9.241;
2. Either:
 - A. Meet the qualifications specified in Standard IV for the applicable case type; or
 - B. Possess significant experience and skill equivalent to or exceeding the qualifications specified below, and who demonstrate to the satisfaction of the Office of Public Defense Services that the attorney will provide competent and adequate representation; or
 - C. Work under the ~~direct~~ supervision of an attorney who does have the requisite qualifications or experience ~~in~~~~at~~ a public defense organization that certifies to the satisfaction of the Office of Public Defense Services that it will provide ~~management and~~ oversight of attorney performance, ~~regular~~~~frequent~~ attorney trainings, and routine performance reviews in order to ensure competent and adequate representation. On request, an attorney qualifying under this section may be required to provide a written statement explaining why the attorney believes he or she has the qualifications to handle the case types to be assigned to him or her, and be required to provide up to

five letters of reference, at least two of which are from judges, attesting to his or her expertise and competence.

3. Have adequate ~~facilities such as sufficient~~ support staff or answering service/machine and email capability to ensure reasonable and timely personal and telephonic contact between attorney and client, and between the court and attorney;
4. Have adequate legal research access through an online service or other electronic means or by being located near a law library of sufficient size to ensure the attorney has ready access to legal references and research material; and
5. Have reviewed and are familiar with the current edition of the Oregon State Bar's Indigent Defense Task Force Report, "Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases," available at www.osbar.org. (~~Exhibit B to this policy statement.~~)

STANDARD IV: MINIMUM QUALIFICATIONS BY CASE TYPE

1. Misdemeanor Cases, Contempt and Misdemeanor Probation Violation Proceedings in Trial Courts

An attorney ~~or certified law student~~ is qualified for appointment to misdemeanor and contempt cases and misdemeanor probation violation proceedings if he or she:

- A. Has reviewed and is familiar with the current version of the ABA Standards for Criminal Justice relating to representation in criminal cases; the Oregon Rules of Professional Conduct; the Criminal, Vehicle and Evidence Codes of Oregon; the criminal drug offenses, and other crimes outside the Criminal Code; the Uniform Trial Court Rules; and Oregon State Bar, Criminal Law (current version); and
- B. Satisfies at least one of the following:
 - a. Has been certified under the Oregon Supreme Court Rules on Law Student Appearances to represent clients on behalf of a public defender office, a district attorney office, or a private attorney office in criminal cases; has undertaken such representation for at least six months; and can present a letter from the ~~person's~~ student's immediate supervisor certifying the ~~person's~~ student's knowledge of applicable criminal procedure and sentencing alternatives;
 - b. Has observed five complete trials of criminal cases that were tried ~~and submitted~~ to a jury;
 - c. Has served as counsel or co-counsel in at least two criminal cases that ~~were have been~~ tried ~~and submitted~~ to a jury;
 - d. Has served as co-counsel in at least five criminal cases. Such service shall have included attendance at ~~the majority of~~ court appearances and client interviews in each case;
 - e. Has served as a judicial clerk for at least six months in a court that regularly conducts criminal trials;

- f. Will be working under the ~~direct~~ supervision of an attorney who does have the requisite qualifications or experience.

2. Lesser Felony Cases and Felony Probation Violation Proceedings in Trial Courts

Lesser felony cases include all **felony** drug cases and all Class C felonies other than sexual offenses.

An attorney is qualified for appointment to lesser felony cases and felony probation violation proceedings if he or she:

- A. Meets the qualifications specified in Standard IV, section 1;
- B. Has met the qualifications in Standard IV, section 1 for at least nine months;
- C. Has served as counsel or as co-counsel ~~and has handled a significant portion of the trial~~ in two criminal cases that ~~were have been tried~~ **submitted** to a jury;
- D. In at least one felony trial **tried submitted** to a jury, has served as co-counsel with an attorney who has previously tried felony cases and is otherwise qualified to try felony cases under these standards; and
- E. On request, can present an additional showing of expertise and competence in the area of criminal trial practice by submitting at least three letters of reference from other criminal trial lawyers or judges the attorney has appeared before on criminal cases. The letters must explain why the attorney has the requisite experience and competence to handle felony cases involving potential incarceration of up to five years.

3. Major Felony Cases in Trial Courts

Major felony cases include all A and B felonies other than drug cases, all **felony** sex offenses ~~felonies~~, and all homicides other than murder and capital murder cases.

An attorney is qualified for appointment to major felony cases if he or she:

- A. Meets the qualifications specified in Standard IV, section 2;
- B. Has met the qualifications in Standard IV, section 2 for at least nine months and has had at least nine months ~~of lesser felony trial~~ experience **representing clients in lesser felony cases** ~~in a public defender or a district attorney office or in private practice~~; and
- C. On request, can present evidence of additional expertise and competence in the area of criminal trial practice by submitting at least five letters of reference from other criminal trial lawyers or judges that the attorney has appeared before on criminal cases. The letters must explain why the attorney has the requisite experience and competence to handle felony cases involving potential incarceration of **25** years ~~or~~ **more**.

4. Murder Cases in Trial Courts

- A. *Lead Counsel.* An attorney is qualified for appointment as lead counsel in murder cases, not including capital murder, if he or she:
- a. Meets the qualifications specified in Standard IV, section 3;
 - b. Has met the qualifications in Standard IV, section 3 for at least three years;
 - c. Has demonstrated to persons with direct knowledge of his or her practice a high level of learning, scholarship, training, experience, and ability to provide competent and ~~adequate~~ ~~vigorous~~ representation to defendants charged with a crime for which the most serious penalties can be imposed, including handling cases involving co-defendants, a significant number of witnesses, and cases involving suppression issues, psychiatric issues and scientific evidence;
 - d. Has acted as lead counsel or co-counsel in ~~at least five~~ ~~a significant number of~~ major felonies tried to a jury, which include at least one homicide case that was tried to a jury ~~and went to a final verdict~~; and
 - e. On request, can demonstrate the above by:
 - (1) A written statement explaining why the attorney believes that he or she has the qualifications required to handle a murder case; and
 - (2) ~~Written statements~~ ~~Certification~~ from those with direct knowledge of the attorney's practice ~~declaring, indicating~~ that they believe that the attorney should be allowed to defend murder cases and explaining why the attorney has the qualities required. ~~Written statements~~ ~~Certification~~ must include at least five letters from persons in at least two of the following three groups:
 - i. Judges before whom the attorney has appeared;
 - ii. Defense attorneys who are recognized and respected by the local bar as experienced criminal trial lawyers and who have knowledge of the attorney's practice; and
 - iii. District attorneys or deputies against whom or with whom the attorney has tried cases.
- B. *Co-counsel.* Co-counsel in murder cases must meet the qualifications in Standard IV, section 4.A, subparagraphs a, b, c, and e or must possess significant equivalent experience under Standard III, section 2.B.

5. Capital Murder Cases in Trial Courts

- A. *Lead Counsel.* An attorney is qualified for appointment as lead counsel in capital murder cases if he or she:
- a. Has reviewed and is familiar with the current version of the ABA Guidelines for

the Appointment and Performance of Defense Counsel in Death Penalty Cases, and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases;

- b. Meets the qualifications specified in Standard IV, section 4.A;
- c. Has represented clients in tried major felony cases for at least five years;
- d. Has acted as lead counsel or co-counsel in at least five significant number of major felonies cases tried to a jury, which include at least one murder homicide case that was tried to a jury and went to a final verdict. ~~Lead counsel in capital cases must have acted as counsel or co-counsel in at least one murder case that was tried to a jury and went to a final verdict;~~
- e. Has completed or, prior to trial will have completed, comprehensive training in the defense of capital cases. Such training should include, but not be limited to, training in the following areas:
 - (1) relevant state, federal, and international law;
 - (2) pleading and motion practice;
 - (3) pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
 - (4) jury selection;
 - (5) trial preparation and presentation, including the use of experts;
 - (6) ethical considerations particular to capital defense representation;
 - (7) preservation of the record and of issues for appellate and other post-conviction review;
 - (8) counsel's relationship with the client and his or her family;
 - (9) post-conviction litigation in state and federal courts;
 - (10) the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science.
- f. Has attended and successfully completed within the last two years at least 18 hours of specialized training on current issues in capital cases through an established training program awarding CLE credits;
- g. Has demonstrated to persons with direct knowledge of his or her practice:
 - (1) a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases;
 - (2) substantial knowledge and understanding of the relevant state, federal

and international law, both procedural and substantive, governing capital cases;

- (3) skill in the management and conduct of complex negotiations and litigation;
- (4) skill in legal research, analysis, and the drafting of litigation documents;
- (5) skill in oral advocacy;
- (6) skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
- (7) skill in the investigation, preparation and presentation of evidence bearing upon mental status;
- (8) skill in the investigation, preparation, and presentation of mitigating evidence;
- (9) skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements; and

h. On request, can demonstrate all of the above by:

- (1) A written statement by the attorney explaining why the attorney believes that he or she has the qualifications required to handle a capital murder case; and
- (2) **Written statements Certification** from those with direct knowledge of the attorney's practice, **declaring indicating** that they believe that the attorney should be allowed to defend capital murder cases and explaining why the attorney has the qualities required. **Written statements Certification** must include at least five letters from persons in at least two of the following three groups:
 - i. Judges before whom the attorney has appeared;
 - ii. Defense attorneys who are recognized and respected by the local bar as experienced criminal trial lawyers and who have knowledge of the attorney's practice; or
 - iii. District attorneys or deputies against whom or with whom the attorney has tried cases.

B. *Co-counsel.* Co-counsel in capital murder cases must meet the qualifications in Standard IV, section 5.A, subparagraphs a, b, c, e, f, g and h or must possess significant equivalent experience under Standard III, section 2.B.

C. ~~*Alternate Procedures for*~~ **Establishing Equivalent Skill And Experience In Capital Murder Cases.** ~~*Meeting Minimum Qualifications.*~~ The Office of Public Defense Services may determine that an attorney with extensive criminal trial experience or

extensive civil litigation experience meets the minimum qualifications for appointment as lead or co-counsel, if the attorney clearly demonstrates that the attorney can and will provide competent representation ~~in capital cases to the capially charged financially eligible defendant.~~ For qualification under this paragraph, attorneys:

- a. ~~may~~ **must** be prescreened by a panel of experienced capital murder attorneys to ~~determine whether the attorney~~ **ensure that they** will provide competent representation; and
 - b. must have either:
 - (1) specialized training in the defense of persons accused of capital crimes, or
 - (2) the availability of ongoing consultation support from other capital murder qualified attorney(s).
- D. *Caseload.* An attorney shall not handle more than two capital cases at the same time without prior authorization from the Office of Public Defense Services.

6. Civil Commitment Proceedings Under ORS Chapters 426 and 427 in Trial Courts

An attorney is qualified for appointment in civil commitment proceedings under ORS Chapters 426 and 427 if he or she:

- A. Meets the qualifications specified in Standard IV, section 2;
- B. Has handled at least three civil, juvenile or criminal cases in which a psychiatric or psychological expert was consulted by the attorney and the use of psychiatric or psychological evidence was discussed with the client;
- C. Has knowledge of available alternatives to institutional commitment;
- D. Has knowledge of the statutes, case law, standards, and procedures relating to the involuntary commitment of the mentally ill and mentally retarded; and,
- E. Satisfies one of the following:
 - a. has served as co-counsel in two civil commitment cases that have been submitted to a judge for determination; or
 - b. has observed five civil commitment hearings that have been submitted to a judge for determination.

7. Juvenile Cases in Trial Courts, Including Delinquency, Waiver Proceedings, Neglect, Abuse, Other Dependency Cases, Status Offenses and Termination of Parental Rights

An attorney is qualified for appointment to juvenile cases, under ORS Chapter 419, if he or she:

- A. For all cases, has knowledge of juvenile justice statutes, case law, standards, and

procedures; is generally familiar with services available to children and parents in the juvenile system; and has reviewed and is familiar with the following materials:

- a. Oregon Revised Statutes, Chapters 419A, 419B, and 419C, Oregon Juvenile Code.
 - b. Oregon Revised Statutes, Chapter 417, Interstate Compact on Juveniles and the Community Juvenile Services Act.
 - c. Oregon Revised Statutes, Chapter 418, Child Welfare Services.
 - d. Oregon Revised Statutes, Chapter 420, Youth Correction Facilities; Youth Care Centers; and Chapter 420A, Oregon Youth Authority; Youth Correction Facilities, and applicable administrative rules.
 - e. Oregon State Bar, Juvenile Law, (current version).
 - f. Pub. L. 105-89, Adoption and Safe Families Act of 1997.
 - g. Pub. L. 95-608, Indian Child Welfare Act of 1978, 25 USC §§1901-1963 (1982) and Refugee Child Act, ORS 418.925-418.945.
 - h. Pub. L. 105-17 Individuals with Disabilities Education Act.
 - i. Pub. L. 93-112, Title V §504, Rehabilitation Act of 1973, as amended, 20 USC §794 (1982).
- B. For juvenile delinquency cases, meets the qualifications for the equivalent adult crimes specified in Standard IV, sections 1-4; and satisfies at least one of the following:
- a. has served as counsel or co-counsel in at least two juvenile delinquency cases adjudicated after a contested hearing before a judicial officer which involved alleged conduct at an offense level at least as serious as the level of qualification certified; or
 - b. has observed at least five juvenile delinquency cases adjudicated after a contested hearing before a judicial officer which involved alleged conduct at an offense level at least as serious as the level of qualification certified.
- C. For status offense cases, meets the qualifications specified in Standard IV, section 1;
- D. For dependency cases, meets the qualifications specified in Standard IV, section 2; or has had equivalent experience, civil or criminal, involving complicated child-custody issues; and satisfies at least one of the following:
- a. has served as counsel or co-counsel in at least two dependency cases adjudicated before a judge or
 - b. has observed at least five dependency cases adjudicated before a judge;
- E. For waiver proceedings, meets the qualifications specified in Standard IV, section 3.

Where the underlying offense is equivalent to adult murder or capital murder, the attorney must meet the qualifications specified in Standard IV, sections 4 and 5, respectively. In addition, the attorney satisfies one of the following:

- a. has served as counsel or co-counsel in at least two delinquency cases adjudicated before a judge which involved alleged conduct at or above the major felony level; or
 - b. has observed or reviewed transcripts in at least two contested waiver hearings which involve alleged conduct at or above the major felony level;
- F. For termination of parental rights cases, meets the qualifications specified in Standard IV, section 3, or has had equivalent experience, civil or criminal, involving complicated child-custody issues. In addition, the attorney satisfies at least one of the following:
- a. has served as counsel or co-counsel in at least two termination of parental rights cases submitted to a judge for determination; or
 - b. has observed, or reviewed the transcripts of, at least two termination of parental rights cases submitted to a judge for determination.

For purposes of this section, a court trial in a delinquency case is equivalent to a jury trial under Standard IV, sections 1-3.

8. Appeals Other Than in Murder and Capital Murder Cases

An attorney is qualified for appointment in appeals other than in murder and capital murder cases if he or she:

- A. Has reviewed and is familiar with:
 - a. ORS 138.005 - 138.504 in the case of appeals of criminal cases;
 - b. Oregon State Bar, Criminal Law (current edition) in the case of appeals of criminal cases;
 - c. ORS 419A.200 - 419A.211 and ORS Chapter 19 in the case of appeals of juvenile cases;
 - d. Oregon State Bar, Juvenile Law, (current edition), in the case of appeals of juvenile cases;
 - e. The Oregon Rules of Appellate Procedure;
 - f. Oregon State Bar, Appeal and Review (current edition); and
- B. Meets at least one of the following criteria:
 - a. Has experience as appellate counsel, either in practice or under the Oregon

~~Supreme Court's State Bar's~~ Law Student Appearance ~~Program Rule~~
commensurate with the seriousness of the underlying case;

- b. Has served as co-counsel in at least two appellate cases which were briefed on the merits and argued to the court under the supervision of an attorney eligible for appointment to appellate cases under this standard;
- c. Has observed oral argument and reviewed the appellate record in at least five appellate cases, at least one of which was an appeal from conviction of a major felony or murder;
- d. Has significant experience in motion practice and arguments in state circuit court or federal district court;
- e. Will be working under the ~~direct~~ supervision of an attorney who does have the requisite qualifications or experience.

9. Appeals in Murder and Capital Murder Cases

An attorney is qualified for appointment in appeals in murder and capital murder cases if he or she:

- A. Meets the qualifications specified in Standard IV, section 8;
- B. For appointment as lead counsel, is an experienced and active trial or appellate lawyer with at least three years' experience in criminal defense;
- C. Has demonstrated the ~~necessary~~ proficiency and commitment ~~necessary for high that exemplify the quality of representation inappropriate to:~~
 - a. Capital murder cases if the appeal is in a capital case; or
 - b. Other murder cases, if the appeal is in a noncapital murder case;
- D. Has demonstrated proficiency in appellate advocacy in felony defense;
- E. For lead counsel in capital murder appeals, within two years prior to the appointment has attended and completed a legal training or educational program on defending capital cases. A substantial portion of the program must have been directly relevant to appeals in capital cases; and
- F. For co-counsel in capital murder appeals and for lead or co-counsel in other murder cases, has attended and completed a legal training or education program on appellate advocacy in criminal cases within two years prior to the appointment.
- G. *Alternate Procedures for ~~Meeting Minimum Qualifications~~ ~~Establishing Equivalent Skill And Experience in Capital Appeals.~~* The Office of Public Defense Services may determine that an attorney with extensive criminal trial or appellate experience, or both, or extensive civil litigation or appellate experience, or both, meets the minimum qualifications for appointment as lead or co-counsel in appeals of capital cases, if the attorney clearly demonstrates that the attorney can and will provide competent representation ~~in capital appeals to the capitally charged financially eligible~~

defendant. For qualification under this paragraph, attorneys:

- a. **may** must be prescreened by a panel of experienced capital murder attorneys to **determine whether the attorney** ensure that they will provide competent representation; and
- b. must have either:
 - (1) specialized training in the defense of persons accused of capital crimes, or
 - (2) the availability of ongoing consultation support from other capital murder qualified attorney(s).

10. Post-Conviction Proceedings Other Than in Murder and Capital Murder Cases

An attorney is qualified for appointment in post-conviction proceedings in cases other than murder and capital murder cases if he or she:

- A. - Meets the qualifications for appointment to an original proceeding involving the highest charge in the post-conviction proceeding;
- B. **Has reviewed and is familiar with:**
 - a. **The Oregon Post-Conviction Hearing Act, ORS 138.510-138.686, and**
 - b. **The Oregon State Bar's performance standards for counsel representing petitioners in post-conviction relief proceedings, and the authorities cited therein.**
- C. **Has served as co-counsel or observed proceedings and reviewed the record in at least two post-conviction relief proceedings in which a trial court entered a judgment on the petition.**

11. Post-Conviction Proceedings in Murder and Capital Murder Cases

An attorney is qualified for appointment in post-conviction proceedings in murder and capital murder cases if he or she:

- A. Meets the qualifications specified in Standard IV, section 4;
- B. **Has reviewed and is familiar with:**
 - c. **The Oregon Post-Conviction Hearing Act, ORS 138.510-138.686, and**
 - d. **The Oregon State Bar's performance standards for counsel representing petitioners in post-conviction relief proceedings, and the authorities cited therein.**
- CB. For appointment as lead counsel, has prior experience as post-conviction counsel in at least three major felony cases; and

D.C. For capital murder cases, meets the qualifications specified in Standard IV, section 59 for co-counsel in capital cases in the trial court appeals. If more than one attorney is appointed, only one of the attorneys must meet the qualifications specified in Standard IV, section 59.

D.D. *Alternate Procedures for Meeting Minimum Qualifications Establishing Equivalent Skill And Experience in Post-Conviction Cases.* The Office of Public Defense Services may determine that an attorney with extensive criminal trial, appellate, or post-conviction experience or extensive civil litigation or appellate experience, or both, meets the minimum qualifications for appointment as lead or co-counsel for post-conviction relief proceedings in murder and capital murder cases, if the attorney clearly demonstrates that the attorney can and will provide competent representation in capital murder cases to the financially eligible petitioner. For qualification under this paragraph, attorneys:

- a. may must be prescreened by a panel of experienced capital murder attorneys to determine whether the attorney ensure that they will provide competent representation; and
- b. must have either:
 - (1) specialized training in the defense of persons accused of capital crimes, or
 - (2) the availability of ongoing consultation support from other capital murder qualified attorney(s).

12. Habeas Corpus Proceedings

An attorney is qualified for appointment in habeas corpus proceedings if he or she meets the qualifications specified in Standard IV, section 2.

STANDARD V: QUALIFICATION CERTIFICATE AND APPOINTMENT OF COUNSEL

1. Certificate and Supplemental Questionnaire

In order to receive an appointment to represent a financially eligible person at state expense, an attorney must submit a certificate of qualification together with a completed supplemental questionnaire, unless covered under Standard III, section 2.C, and be approved by the Office of Public Defense Services for appointment to the case type for which the appointment will be made . The certificate and supplemental questionnaire must be in the form set out in Exhibit A to these standards. An attorney who submitted a certificate prior to March 1, 2007 is not required to submit a new certificate unless the attorney seeks to accept appointment to cases not covered by a previous certificate, or unless submitting a new contract for execution.

2. Submission Requirements

A. *Contract Attorneys (Non-public defender).* Contract attorneys must submit their

certificates of qualification and completed supplemental questionnaires to the Office of Public Defense Services (OPDS) prior to the execution of the contract and thereafter as necessary to ensure that OPDS has current information for each attorney who performs services under the contract.

B. *Assigned Counsel (for all Noncontract Appointments)*. Certificates of qualification and completed supplemental questionnaires may be submitted to OPDS at any time. OPDS will periodically require re-submission of certificates of qualification and completed supplemental questionnaires as needed to document that an attorney continues to meet ongoing training requirements and other standards.

~~C. Public Defense Organizations. Contract seeking to qualify attorneys pursuant to the Public Defense Organizations provision of seeking to qualify attorneys pursuant to Standard III, section 2.C, shall submit prior to execution of its contract with OPDS and update as necessary:~~

- ~~a. A description of the organization's management, supervision, evaluation and training procedures, along with an explanation of how these procedures will ensure adequate and competent representation by the organization's attorneys;~~
- ~~b. Certificates of Attorney Qualification, with supplemental questionnaire, from the organization's supervisory attorneys;~~
- ~~c. A Certificate of Attorney Qualification for each attorney qualifying pursuant to Standard III, section 2.C, signed by an authorized representative of the organization that states the type of cases for which the attorney is eligible to receive appointment; and~~
- ~~d. A supplemental questionnaire for each attorney qualifying pursuant to Standard III, section 2.C, completed and signed by each attorney.~~

3. **Supporting Documentation**

A. An attorney must submit supporting documentation in addition to the certificate and questionnaire:

A: **a.** At the request of OPDS; or

B: **b.** When the attorney seeks to qualify for appointments based on equivalent skill and experience.

B. Contract providers seeking to qualify attorneys pursuant to the Public Defense Organization provision of Standard III, section 2.C, shall submit prior to execution of its contract with OPDS and update as necessary:

a. A description of the organization's management, supervision, evaluation and training procedures, along with an explanation of how these procedures will ensure adequate and competent representation by the organization's attorneys;

b. Certificates of Attorney Qualification, with supplemental questionnaire, from the organization's supervisory attorneys;

c. A Certificate of Attorney Qualification for each attorney qualifying pursuant to Standard III, section 2.C, signed by an authorized representative of the organization that states the type of cases for which the attorney is eligible to receive appointment; and

d. A supplemental questionnaire for each attorney qualifying pursuant to Standard III, section 2.C, completed and signed by each attorney.

4. Approval for Appointment

- A. *Review of Submitted Certificates.* OPDS will review the qualification certificates and may request supporting documentation as needed. Not all attorneys who meet the minimum qualifications for a case type will be approved for appointment to cases of that type. OPDS's goal is to select attorneys who:
- a. are more than minimally qualified,
 - b. have specialized skills needed in a particular community,
 - c. are available to cover cases in the appropriate geographic area,
 - d. are able to meet specific needs of the court such as availability at specific times,
 - e. are both effective and efficient, and/or
 - f. have other qualities that which would benefit the court, the clients or OPDS.

At the completion of the review, OPDS shall notify the attorney of the case types for which the attorney has been approved for appointment and the reason for its decision not to approve the attorney for appointment in any case type for which certification was submitted.

- B. *Request for Reconsideration.* An attorney who is not approved for appointment in case types for which the attorney has certified qualification may request reconsideration by submitting to OPDS, within 21 calendar days of the notice of approval/disapproval for appointment in particular case types, additional information, including supporting documents, if any, which the attorney believes demonstrates indicate that the attorney meets the criteria for selection set forth in Paragraph 4.A.
- C. *Review of Request for Reconsideration.* Within 21 calendar days of OPDS's receipt of a request for reconsideration the executive director of OPDS, or a person designated by the executive director, shall review the request and issue a final determination. OPDS shall notify the attorney of its final determination.
- D. *Extension of Time for Good Cause.* The time for requesting reconsideration and for issuing a final determination may be extended for good cause.
- E. *Provision of Lists to the Courts.* OPDS will prepare an applicable list of attorneys approved for appointment for each county. The list will be sorted by case type and, within each case type, alphabetically by attorney name.

F. *Updating Lists.* OPDS will update lists as necessary.

5. **Suspension From Appointment**

- A. *Suspension from Future Appointments.* If OPDS obtains information that calls into question an attorney's ability to provide adequate assistance of counsel, OPDS shall notify the attorney of the information and shall perform such investigation as is necessary to determine whether the attorney is able to provide adequate assistance of counsel. After completing its investigation and reviewing any information provided by the attorney OPDS shall have authority to suspend the attorney from future appointments for any or all case types until OPDS is satisfied that the attorney is able to provide adequate assistance of counsel. When OPDS suspends an attorney from future appointments OPDS shall notify the attorney and the court of the suspension and the reason(s) for the suspension.
- B. *Suspension from Current Appointments.* The court, after reviewing the reason(s) for the suspension, shall consider whether the attorney should be relieved as counsel in any pending court-appointed cases. The court shall consider with respect to each open case: the reason for the suspension, the needs of the client, and the ability of the attorney to provide adequate assistance of counsel under all of the circumstances. The court shall comply with the Paragraph 1.7 of OPDS's Public Defense Payment Policies and Procedures relating to substitution of counsel.
- C. *Request for Reconsideration.* An attorney who is suspended from future appointments may request reconsideration by submitting to OPDS, within 21 calendar days of the notice of suspension, additional information, including supporting documents, if any, which the attorney believes establish the attorney's ability to provide adequate assistance of counsel.
- D. *Review of Request for Reconsideration.* Within 21 calendar days of OPDS's receipt of a request for reconsideration, the executive director of OPDS, or a person designated by the executive director, shall review the request and issue a final determination. In reviewing the request the executive director or the executive director's designee may select and empanel a group of public defense attorneys to advise the executive director about the attorney's ability to provide adequate assistance of counsel and whether the attorney should be suspended from future appointment for any or all case types. OPDS shall notify the attorney and the court of its final determination and the reasons for its final determination.
- E. *Extension of Time for Good Cause.* The time for requesting reconsideration and for issuing a final determination may be extended for good cause.

PUBLIC DEFENSE CERTIFICATE OF ATTORNEY QUALIFICATION

Name: _____

Bar Number: _____

Address: _____

Vendor or Tax ID#: _____

Email: _____

Foreign language fluency in: _____

Phone Number: _____

Years of Experience: _____

Fax Number: _____

Practice of Law _____ Criminal _____

Cell/Pager: _____

Juvenile _____ Appellate _____

For appointments in the following county(ies): _____

TRIAL LEVEL

APPELLATE LEVEL

- Capital Murder
- Lead Counsel
- Co-counsel
- Murder
- Lead Counsel
- Co-counsel
- Major Felony
- Lesser Felony
- Misdemeanor

- Capital Murder
- Lead Counsel
- Co-counsel
- Murder
- Lead Counsel
- Co-counsel
- Major Felony
- Lesser Felony
- Misdemeanor

- Juvenile Delinquency
- Major Felony
- Lesser Felony
- Misdemeanor
- Juvenile Dependency
- Juvenile Termination

- Juvenile Delinquency
- Major Felony
- Lesser Felony
- Misdemeanor
- Juvenile Dependency
- Juvenile Termination

- Civil Commitment
- Contempt
- Habeas Corpus

- Civil Commitment
- Contempt
- Habeas Corpus

- Post-Conviction Relief
- Capital Murder
- Murder
- Other Criminal

- Post-Conviction Relief
- Capital Murder
- Murder
- Other Criminal

Please check only one box below:

I certify that I have reviewed the Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense (Rev. 2-8-07) and that I meet the requirements of those standards and wish to be listed as willing to accept appointment to the case types checked above.

or

I certify that the above-named attorney will be working at a public defense organization as described in Standard III.2.C, which has provided the information required under Standard V.2.C.

Signature _____

Date _____

SUPPLEMENTAL QUESTIONNAIRE TO CERTIFICATE OF ATTORNEY QUALIFICATION

If this questionnaire does not address important aspects of your experience, please feel free to attach additional information. If more space is needed to answer any of the questions below, please do so on additional pages.

1. Name (please print):
2. Date admitted to Oregon State Bar:
3. Oregon State Bar number:
4. Number of years and location(s) of legal practice in Oregon:

5. Number of years and location(s) of legal practice outside Oregon:

6. What percentage of your present practice involves handling criminal cases? juvenile cases? (or other cases as appropriate, such as civil commitment, habeas corpus, post-conviction relief)

7. What percentage of your present practice involves handling public defense cases?

8. Briefly describe the nature and extent of your work experience in the area(s) of law which you have certified and any related areas of law.

9. Before which courts and judges have you regularly appeared in case proceedings which you have certified?

16. Has the Oregon Supreme Court, Oregon State Bar or any other bar association ever found you in violation of a Disciplinary Rule or Rule of Professional Conduct? If yes, please describe the violation and provide the date of decision.

17. Has a former client ever successfully obtained post-conviction relief based on your representation? If yes, please describe and cite to opinion, if there is one.

I certify that the above information is true and complete.

SIGNATURE

DATE

Attachment 4

Agenda Item 5 – Drug Courts

The following are excerpts from standards and treatises on the role of defense attorneys in drug courts and the interests of defendants that should be protected.

Group 1 – From “Ten Tenets of Fair and Effective Problem Solving Courts” (American Council of Chief Defenders, National Legal Aid and Defender Association) and National Drug Court Institute (NDCI) publications.

1. Qualified representatives of the defense bar should meaningfully participate in the design, implementation and operation of the court including the determination of eligibility and the selection of service providers. (The defense should ensure that those accepted into the court reflect a cross section of the whole population of those who are similarly situated. Racial or gender disparities should be identified and challenged.

2. PD as participant in planning and operation of drug court: The public defender has an institutional role in drug court – to ensure that court is designed and operated to serve interests of clients, ensure their rights are fully protected and advance and promote recovery. The PD shall cooperate with others to promote recovery through a coordinated response. The PD should strive to ensure that a defender is involved in planning for the court; if court is designed or operated without PD participation, the PD should strive to be included in future planning and operation. Before supporting a drug court the PD should attempt to ensure that all major policy issues of importance to the defense are resolved. The PD should strive to resolve issues in a way that is beneficial to participants. With respect to each issue the PD will have to gauge whether something less than the optimum still provides a better alternative than traditional local practices. Some of the Issues to consider:
 - a. Pre-adjudication v post-adjudication and legal benefits of successful completion. The ideal program is a pre-adjudication, diversionary drug court that results in dismissal with no stipulated facts or evidence, no waiver of jury trial, no guilty plea. It may be necessary to agree to waive a speedy trial and a preliminary hearing.
 - b. With voluntary and involuntary terminations, the PD should strive to see that no negative consequences result. “A drug court should not punish a participant’s failed attempt at completion.”
 - c. Eligibility – PD should promote broad eligibility without sacrificing likely success of participants
 - d. PD should support early intervention but without sacrificing the client’s legal rights and with adequate time to consult.

- e. The PD should support voluntary participation by the defendant and voluntary continuation.
 - f. The PD should strive to protect the client against use of statements made in drug court as evidence outside of the drug court setting. Defense counsel should create a record to ensure that all promises of benefits are legally enforceable, e.g. through a signed agreement with the prosecutor. The defendant should not be required to waive the right to have a hearing before another judge if defendant terminated from program. The PD should protect the client's confidential information. (Note: Federal law prohibits the disclosure (or re-disclosure) of "the identity, diagnosis, prognosis or treatment of any patient" by "any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research, which is conducted, regulated or directly or indirectly assisted by any department or agency of the United States." 42 USC Sec 290dd-2 (2002). (Because of breadth of the language, this prohibition applies to virtually every drug court program.) Attorneys are included in the prohibition against disclosure. Any person who violates the section is subject to a fine. Defense attorneys should be involved in the design of "waiver" documents and in the client's execution of any waiver document.
 - g. The PD should advocate that costs and fees not be unduly burdensome.
 - h. The PD should promote effective evaluation and monitoring of the court's performance measured by agreed-upon criteria, including e.g. completion rates, failure rates and recidivism rates.
 - i. The PD should continue to strive to make the court better and guard against prosecutorial dumping of otherwise weak evidentiary cases into drug court.
 - j. The defense should advocate that credit be given on any ultimate prison sentence for days spent in jail as a drug court sanction. [From National Drug Court Institute monograph (NDCI)]
3. There should be resource parity between the prosecution and defense with respect to access to grant funds and other resources for training and staff.
 4. The accused should have the right to review with counsel before deciding whether to participate in the court the program requirements and possible outcomes, and counsel should be given a reasonable amount of time to investigate before advising the client how to proceed.

5. The accused should be able to withdraw from the court within a reasonable time without prejudice to his or her trial rights.
6. The defendant should be protected against self incrimination.
7. No policy or procedure of the court should compromise counsel's ethical responsibility to zealously advocate for the client, to obtain complete discovery, to challenge evidence used against the client in the drug court or the findings made by the court, or to recommend alternative treatments or sanctions.
8. Constitutional rights of defendants must be protected. Examples of concerns include implications for First Amendment freedom of religion of mandatory participation in AA/NA 12 step programs that require commitment to the existence of a supreme being; due process right to notice, hearing and fair procedure in termination/revocation proceedings; due process right to fundamental fairness in procedure for testing of drug court participants for drug use; due process right to impartial judicial officer in termination proceeding. [From "Ethical Considerations for Judges and Attorneys in Drug Court Cases," National Drug Court Institute (NDCI), May 2001.]
9. Defense attorneys' ethical obligation of competence includes a duty to explore disposition without trial, a duty to become familiar with all sentencing alternatives, a duty to obtain a thorough understanding of the drug court model and court practices and to participate in interdisciplinary training regarding substance abuse and treatment and locally available treatment options. (NDCI)

Group 2: Missouri Guidelines - for adult drug treatment courts (summary)

12.2 - Public defender has dual roles: attorney for the client, participant in the planning and operation of the court.

12.3 – primary role is as attorney for the client, maintaining the traditional defense attorney function of protecting the client's legal interests while adding promotion of client's physical and mental well being and client's interest in recovery. Although the defense strategies used in drug court may be nontraditional, the PD is not a guardian *ad litem* but is the attorney for the client. The attorney's ethical duties remain the same. The public defender should not participate in proceedings regarding defendants who are not PD clients and should not advise those defendants.

At the Initial consultation the attorney should meet the client in a private setting before the client has to decide if he or she is going to participate. At that meeting the attorney should:

1. review the eligibility documents and complete the client interview form
2. give the client a copy of the discovery and review discovery and the charges with the client
3. discuss the drug court program – its nature, purpose, rules regarding eligibility, fees, the nature of a therapeutic courtroom, staffings, and adversarial as opposed to non-adversarial processes
4. review the drug court contract and related documents
5. discuss the consequences of complying with or failing to comply with drug court rules, including any system of graduated sanctions, rewards, the nature of proceedings to impose sanctions or terminate
6. explain the legal consequences of successful completion or voluntary or involuntary termination
7. explain the requirement that the client waive preliminary hearing, speedy trial, jury trial, or stipulate to facts or evidence or plead guilty prior to entering drug court and any other rights the client will give up.
8. explain the role of the public defender in court and in staffings and that counsel may request the client's permission to agree to or not oppose imposition of certain sanctions and possible disclosures of attorney-client communications in the course of representation.
9. explain the nature and extent of any investigation or other trial preparation to be done
10. discuss whether pretrial motions may be litigated
11. review the client's alternatives to drug court, the likelihood of success, the advantages and disadvantages; offer advice on whether the client should enter drug court (based on client's legal interests and interest in recovery)
12. if sufficient legal protections exist, encourage the client to be open and truthful to judge and staff re substance use
13. secure an informed and voluntary decision from client as to whether he or she wishes to enter drug court, explaining that entry includes acceptance of role of public defender as explained
14. explain it is client's decision to enter and to remain.

In addition, it is the duty of counsel to:

1. consult with client as necessary
2. maintain a complete file
3. review the discovery. If no opportunity before client enters, the public defender should reserve the client's right to withdraw after entry and not lose any rights
4. investigate as necessary to allow the client make an informed decision and to preserve exculpatory evidence in the event of termination

5. Be prepared for all drug court proceedings; present all beneficial information that is permitted; advocate on behalf of client when it is appropriate and reasonable to do so
6. Avoid conflicts but be aware that representation of one drug court clients is usually not directly adverse to the interests of others.

It is also the duty of counsel to obtain adequate training in the following areas:

1. cultural competence – “culture” refers to a set of customs, beliefs, ideals, linguistic practices, and institutional practices deployed within and, in many instances, peculiar to a given community. In drug court, some of the cultures are professional ones (police, judge, prosecutor), institutional culture as it affects treatment options for the client; lifestyle culture includes demographic markers, family circumstances.
2. treatment issues: the nature of addiction, the spectrum of treatment options (including self-help options), alternatives to drug court, success rates of various programs, treatment of coexisting disorders, net widening, links between domestic violence and substance abuse, use of drug court clients as informants
3. reliability limits of individual drug tests (e.g. potential false positive readings, the standard error of measurement, exceeding minimum testable quantity, poor lab procedures
4. protection of due process rights
5. confidentiality protections for drug records, medical records, etc.

Attachment 5

**OPDS's Revised Draft Report to the Public Defense Services
Commission
on Service Delivery in Post Conviction Relief Cases**

(April 16, 2009)

Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. From 2004 through 2008, the Commission completed investigations of the local public defense systems in Baker, Benton, Clatsop, Coos, Curry, Grant, Harney, Jackson, Josephine, Lane, Lincoln, Linn, Malheur, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into service delivery in post conviction relief cases and a summary of the testimony received at the PDSC's public meeting in Salem on Thursday, February 14, 2008. The final version of this report will contain PDSC's service delivery plan for post conviction relief cases.

PDSC's Service Delivery Planning Process

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

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

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

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

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

Background and Context to the Service Delivery Planning Process

The 2001 legislation establishing PDSC was based upon an approach to public defense management widely supported by the state's judges and

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

PDSC is committed to undertaking strategies and initiatives to ensure the competency of those attorneys. In the Commission's view, however, ensuring the minimum competency of public defense attorneys is not enough. As stated in its mission statement, PDSC is also dedicated to ensuring the delivery of quality public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

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

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

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

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

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

The Commission is also concerned about the “graying” of the public defense bar in Oregon and the potential shortage of new attorneys to replace retiring attorneys in the years ahead. More and more lawyers are spending their entire careers in public defense law practice and many are now approaching retirement. In most areas of the state, no formal process or strategy is in place to ensure that new attorneys will be available to replace retiring attorneys. The Commission has also found that the impact of such shortages is greatest in less populous areas of the state, where fewer lawyers reside and practice, but where the demands for public safety and functional justice systems with the requisite supply of criminal defense and juvenile attorneys are as pressing as in urban areas of the state. As a result, PDSC is exploring ways to attract and train younger lawyers in public defense practice across the state.

“Structure” versus “Performance” in the Delivery of Public Defense Services

Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles for PDSC and OPDS in the Commission’s service delivery planning process. That process is aimed primarily at reviewing and improving the “structure” for delivering public defense services in Oregon by selecting the most effective kinds and combinations of organizations to provide those services. Experienced public defense managers and practitioners, as well as research into “best practices,” recognize that careful attention to the structure of service delivery systems contributes significantly to the ultimate quality and effectiveness of public defense services.¹ A public

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

agency like PDSC, whose volunteer members are chosen for their variety and depth of experience and judgment, is best able to address systemic, overarching policy issues such as the appropriate structure for public defense delivery systems in Oregon.

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

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

Organizations Currently Operating within the Structure of Oregon's Public Defense Delivery Systems

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

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

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

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

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

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

PDSC and have organized themselves in the following ways:

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

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

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

Due to the frequency of cases in which public defender offices have conflicts of interest due primarily to cases involving multiple

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

defendants or former clients, no county can operate with a public defender office alone.³ As a result, PDSC expects public defender offices to share their management and law practice expertise and appropriate internal resources, like training and office management systems, with other contractors in their counties.

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

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

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

³ Id.

conduct a search for individual attorneys to handle such cases and, frequently, to pay both the original attorney with the conflict and the subsequent attorney for duplicative work on the same case.

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

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

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

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

The foregoing observations are not meant to suggest that law firms cannot provide quality, cost-efficient public defense services under contract with PDSC. Those observations simply suggest that PDSC may have less influence on the organization and structure of

this type of contractor and, therefore, on the quality and cost-efficiency of its services in comparison with public defender offices or well-organized consortia.

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

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

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

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

OPDS's Preliminary Investigation into Delivery of Services in Post Conviction Relief Cases

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

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

On February 14, 2008 from 9:00 a.m. to 1:00 p.m., PDSC held a public meeting in Salem at the Labor and Industries Building. The purpose of that meeting was to (a) consider the results of OPDS's investigation into post conviction relief as reported in the preliminary draft report, (b) receive testimony and comments from interested officials and other individuals regarding the quality of the service delivery, and (c) identify and analyze the issues that should be addressed in the Commission's Service Delivery Plan for Post Conviction Relief Cases.

The initial draft of this report was intended to offer guidance to PDSC's guests at its February 14, 2008 meeting, as well as to the Commission's contractors, public officials, justice professionals and other citizens who might be interested in this planning process, about the kind of information and comments that would assist the Commission in improving public defense delivery in post conviction relief cases. This revised draft report is intended to provide a framework to guide the Commission's discussions about the condition of service delivery in this area of practice and the range of policy options available to the Commission – from concluding that no changes are needed to significantly restructuring the delivery system. In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in the justice system is the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan

A. Description of Post Conviction Relief

What is post conviction relief?

Post conviction relief (PCR) is the principal means by which a convicted person may challenge the lawfulness of a criminal conviction or the proceedings which resulted in the conviction. It is often the only avenue for seeking redress for fundamental miscarriages of justice that may not appear on the record. Consequently, it is an important component of Oregon's public defense system even though it represents only a small portion of the public defense caseload.⁴

PCR is a remedy reserved for situations in which other remedies are not available. A petition for post conviction relief may not be filed when a motion for new trial, a motion in arrest of judgment or direct appellate review remain available.⁵ A criminal judgment must be final before a petition for post conviction relief may be filed. All formerly available common law post-conviction remedies except habeas corpus were abolished upon enactment of Oregon's post conviction relief act. ORS 138.540.

What are the grounds for relief?

ORS 138.530 requires the court to grant post conviction relief if one or more of the following grounds is established by the petitioner:

- A substantial denial of the petitioner's federal or state constitutional rights in the trial or appellate court proceedings that rendered the conviction void
- Lack of jurisdiction by the court to impose the judgment
- A sentence in excess of that authorized by law or an unconstitutional sentence
- The unconstitutionality of the statute under which the petitioner was convicted

The most frequent circumstance in which relief is sought is upon the petitioner's claim of ineffective assistance of counsel. Among the other circumstances in which relief has been granted are cases alleging faulty guilty pleas, governmental misconduct, denial of adequate defense resources, and the mental incompetence of the defendant.

What forms of relief are available in PCR?

⁴ There were 672 post conviction cases in Oregon in FYE 2006 out of a total of 179,058 trial-level non-death penalty public defense cases.

⁵ A petitioner is not required to pursue an appeal before filing a petition for post-conviction relief but when an appeal has been taken, no ground for relief may be asserted in the PCR petition unless it was not and could not reasonably have been asserted in the appellate proceeding (except where the appellant was indigent and was denied counsel and the ground for relief was not actually decided by the appellate court). ORS 138.550.

The post conviction court is authorized to provide a variety of forms of relief including release from custody or supervision, a new trial, modification of the sentence, or “other proper and just relief.” ORS 138.520.

What is the appropriate venue for PCR proceedings?

ORS 138.560 provides that proceedings must be commenced in the circuit court of the county in which the petitioner is imprisoned. If the court finds that the hearing can be more expeditiously conducted in the county of conviction, the court may order the case transferred to that county. SB 45 (2003) amended the venue statute to provide that the court may deny a motion for change of venue when a petitioner in a PCR proceeding is transferred to a state institution in another county.

How are proceedings initiated?

PCR is a civil proceeding in which the petitioner carries the burden of proof by a preponderance of the evidence. The proceeding that must be initiated by the convicted person, except that in some death penalty cases they may also be initiated by a person with a significant relationship to the convicted person. The petitioner may request appointment of counsel by filing an affidavit stating inability to pay. Once appointed, counsel may move to amend the petition as filed by the petitioner within 15 days following appointment or as otherwise allowed by the court. ORS 138.590.

What is the deadline for initiating proceedings?

There is a two-year statute of limitations for post conviction relief actions that begins to run when the conviction has become final for purposes of appeal. ORS 138.510. The time frame for relief under 28 USC 2241(d)(1) of the federal Antiterrorism and Effective Death Penalty Act, however, is only one year and while the statute is tolled once the petition for post-conviction relief is filed, if an Oregon petitioner does not file the state petition until after the federal statute has run, the petitioner (except under rare circumstances) is barred from relief under the federal act.

What are some of the other pitfalls to be avoided in state proceedings which may limit or defeat federal claims? (These will be described in more detail in the oral presentation.)

- Exhaustion of state remedies (Requires a petition for review in the Oregon Supreme Court if the Court of Appeals upheld the denial of the PCR request)
- Procedural default rule and the doctrine of independent and adequate state grounds

- Presentation of facts and proper statement of federal claim

How are PCR hearings conducted?

ORS 138.620(1) requires that the petitioner be present at any hearing on the petition (other than a hearing on a defense demurrer or other legal issue) but the court may order that such appearance be by telephone or other communication device and this is the most common means of appearance. ORS 138.622 permits the court to approve the appearance of any of the parties, counsel for the parties or witnesses by telephone or other communication device approved by the court. The statute prohibits this alternative form of appearance for petitioner or petitioner's counsel, however, unless the facilities used enable the petitioner to consult privately with counsel during the proceedings. Evidence at the hearing may be in the form of affidavits, depositions, oral testimony or other competent evidence. ORS 138.620(2).

What is the appropriate role of the client in PCR proceedings?

In state post conviction cases the client is ultimately responsible for raising all appropriate issues, *McClure v. Maass*, 110 Or App 119 (1991), *rev. denied*, 313 Or. 74 (1992). ("A petitioner's failure to bring counsel's refusal to raise an issue to the trial court's attention in the first post-conviction proceeding bars subsequent post-conviction litigation on that issue.")

How should an attorney prepare for a post conviction proceeding?

The following outline is derived from materials prepared by Wendy Willis, a former Assistant Federal Defender, as part of her presentation in March 2002 at an Oregon Criminal Defense Lawyers Association seminar on post conviction relief. This outline is provided only as a very basic summary of the components of representation in PCR cases. As noted below, an Oregon State Bar work group has been formed to create performance standards for attorneys practicing in this area and that group is expected to prepare a detailed outline and discussion of recommended practices in PCR cases.

- Preparation by counsel:
 - Meeting with client
 - Review of written materials (including transcript; court file, state's file, trial and appellate attorneys' files, bar files on attorneys, jail records (including medical records)
 - Investigation (trial team, client, client's family, witnesses, law enforcement personnel, jurors, DNA evidence, appellate counsel)
 - Consultation with appropriate experts (forensic experts, mental status experts, legal experts, statisticians or social scientists)
- Discovery – Oregon Rules of Civil Procedure govern in PCR cases

- Pleading – framing the issues, preserving claims, exhaustion and default
- Preparation of client for deposition and hearing
- Post conviction hearing: evidence and methods of proof
- Findings of fact and conclusions of law
- Appeal and petition for review - role of appellate attorney

B. Quality Concerns

Concern about the overall quality of representation in post conviction relief cases is not a new issue for PDSC. Since the early days of the Commission the problem has been discussed and a number of possible solutions offered. There are, of course, some attorneys who provide the highest quality of representation in these cases and who have won relief for their clients from a variety of sentences. Unfortunately, however, the quality of performance is very uneven and it is therefore appropriate for the Commission to consider what steps can be taken to improve quality statewide.

Indigent Defense Task Force III Report

In May 2000 the Oregon State Bar's Indigent Defense Task Force III Report expressed significant concerns were about the quality of representation being provided in post conviction relief cases. The Task Force noted that its members were especially concerned about inadequacies in representation in post conviction cases since post conviction relief is supposed to provide a forum for monitoring the adequacy of representation in other types of cases. It found that PCR cases were handled almost exclusively in a relatively few judicial districts where state prisons are located and that small firm contractors in these areas handle a disproportionate amount of the work and that, as a result relatively few judges and practitioners have firsthand experience with these cases. Judges in these areas and the state Indigent Defense Services Division reported significant difficulty finding competent attorneys willing to accept the cases at the rates offered. Funding for these cases was considered grossly inadequate. The Task Force reported on its interview of Steven Wax, the Federal Defender for the District of Oregon. Mr. Wax's perspective is a uniquely broad one since his office represents persons convicted in state courts who seek relief in federal habeas corpus. He noted that post conviction cases are even more under-funded than trial level representation since trial level cases are often negotiated by way of plea so that providers assume that a certain percentage of cases will be resolved without trial. But this assumption does not apply to post conviction cases, virtually all of which go to trial since there is no procedural mechanism for negotiated resolutions. Every post conviction case, therefore, requires thorough investigation, preparation, and litigation. The Federal Defender's Office had found, however, that few post conviction cases in state court were investigated. That office has investigated cases five or ten years later, discovered new evidence and, in some cases, successfully obtained a new trial for the client. Mr. Wax noted that the problem is exacerbated by attorneys' reliance on the

McClure v. Maass, supra, standard, which allows post conviction practitioners to shift the burden to their clients to identify errors that occurred at trial. Of course few indigent clients have the legal sophistication, technical knowledge or investigative resources to adequately identify the manner in which their trial level representation may have been legally inadequate. He also noted that issues not raised in the state court proceedings were becoming increasingly difficult to raise during later federal review. Constitutional violations not alleged by the state post conviction attorney often are deemed waived by federal courts. It was recommended to the task force that increased funding, additional investigative resources, additional education and greater oversight be provided in post conviction relief cases.

C. Possible Solutions

In a status report on April 19, 2002 the Task Force reported that no remedy other than the creation of a statewide entity would be able to provide competent and economical representation in post conviction cases. It noted the advantages of a single specialized office where lawyers could develop the expertise to handle PCR cases in an efficient manner, like the Oregon Department of Justice has done in the defense of these cases.

The PDSC created its own workgroup in June of 2002, chaired by the Vice-Chair of the Commission, Shaun McCrea, to explore solutions to the problem. Among the proposals explored were the drafting of performance standards, and the consolidation of representation at both the appellate level and the trial level. No formal request was apparently made to the bar to create a work group on performance standards until 2005. At that time a bar group was already working on updating performance standards in juvenile and criminal cases and the bar suggested that the post conviction relief project be postponed until the completion of the earlier project. In March of 2007 a formal request was made to the bar to create a task force to develop performance standards for post conviction relief practitioners. The proposal was approved and task force members were appointed.⁶ That task force has now completed its work and proposed a set of performance standards that have now been approved by the Oregon State Bar and are available on its website⁷. A summary of the testimony of Dennis Balske, the chair of the group, describing the role of the new standards at the March 12, 2009 PDSC meeting is set forth below.

Consolidation of representation has also been pursued. Post-conviction relief appeals (in other than death penalty cases) are now being directed almost exclusively to the Oregon Appellate Consortium, a group of highly experienced

⁶ Task Force members are: Dennis Balske, Tony Bornstein, Noel Grefenson, Lynn Larsen, Harrison Latto, Paul Levy, Ingrid MacFarlane, Mark Olive, Rita Radostitz, Matt Rubenstein, Marc Sussman, Hon. Youlee You.

⁷ <http://www.osbar.org/docs/resources/ConvictionReliefProceedings/CSPCRP3.pdf>.

appellate attorneys. PDSC has proposed in several legislative sessions a budget policy package that would create four full time-equivalent positions at OPDS that would be devoted to PCR trial level representation.⁸ These packages have not been approved. As an alternative, OPDS has attempted to identify a group of well-qualified private providers to concentrate on PCR representation at the trial level. Currently two Salem practitioners are devoting a significant amount of their professional time to these cases.⁹

Other efforts at improving representation have come from the Oregon Criminal Defense Lawyers Association which continues to sponsor a post-conviction relief seminar every two years¹⁰, and from the Federal Defender's office which offers advice and assistance to attorneys working on these cases and provides speakers and program materials for OCDLA's seminars. The Bar's Criminal Law CLE volume includes a chapter summarizing the post conviction relief statutes and caselaw co-authored by Chief Justice Paul J. De Muniz, Federal Defender Steven Wax, Assistant Attorney General Lynn Larsen, and PCR attorney Douglas Park and Andy Simrin.

Unfortunately, despite the efforts that have been made, OPDS continues to receive reports about quality concerns from a variety of sources including the Federal Defender, PCR trial judges, Department of Justice attorneys, Appellate Consortium attorneys, the Client Assistance Office at the bar, clients, and at least one correctional officer.

OPDS is also advised that some of the judges who hear post conviction cases on a regular basis exacerbate the problem by discouraging or attempting to prevent full review of the issues raised in these proceedings. It is hoped that improved representation might result in effective challenges to these practices.

Although neither the federal nor the state constitution require appointment of counsel at public expense in post conviction cases, in the past when the legislature has considered the elimination of the right to representation, the Department of Justice, among others, has advised against such action.¹¹

⁸ In the 2007 session, PDSC's Policy Package No. 102 sought an increased allocation for the Legal Services Division of \$835,293 to add three Deputy Public Defender 1 positions and one Senior Deputy Public Defender 2 position. A reduction in the allocation to the Public Defense Services Account of \$531,840 would have meant a net impact of \$303,453 to fund the package.

⁹ In addition, the Marion County Association of Defenders continues to represent a significant number of clients in PCR cases.

¹⁰ OCDLA included a review of the new performance standards for post conviction relief cases in a March 2009 CLE in Salem.

¹¹ In 2003, for example, the Department of Justice testified in opposition to HB 2092 which would have eliminated the right to counsel in post conviction cases. The bill was referred out of the House Judiciary Committee without recommendation and was sent by prior referral to the Ways and Means Committee where it remained upon adjournment. In March of 2003 appointment of counsel in all PCR cases was suspended as part of the Oregon Judicial Department's Indigent Defense Budget Reduction Plan and was not resumed until July 1, 2003.

Testimony provided by invited guests and others at the Commission's February 14, 2007 meeting highlighted additional concerns and included additional recommendations for improvements. In addition to the measures previously recommended for consideration - enhanced compensation, a continued effort to centralize services either at OPDS or through contract providers, and additional training opportunities for attorneys - presenters at the February 14 meeting identified changes to statutes, rules and practices that might impact quality.

Summary of Testimony at February 14, 2008 Meeting

At its meeting on February 14, 2008, the Commission heard testimony from attorneys Noel Grefenson and Marc Sussman, both of whom represent petitioners in trial level PCR cases.

Mr. Grefenson said that he had been asked by PDSC in 2006 to enter into a contract to handle PCR trial level cases, that he agreed to such a contract, that he currently receives approximately five appointments per month and has about 30 active cases in his office at any one time.

After accepting this assignment he met with the paralegals at the prisons and offered to assist them in getting the materials they needed to do their work. They agreed to let him know if his clients were expressing dissatisfaction with his representation. He has received only one bar complaint since 2006.

Upon receiving an appointment in one of these cases, his office sends the former attorney a release of information from the client and begins gathering records that are then scanned and organized. He receives cases from all parts of the state. Investigating cases that arise in other parts of the state can be difficult. Petitioners have a right, and if they will later be seeking relief in federal court, an obligation, to ensure that all viable claims are raised. Prison inmates often lack the skill to do that. ORCP 17 requires lawyers to certify only meritorious claims, but the case law holds petitioners responsible for not raising any other issues that they might claim as a basis for relief. For lawyers this creates a dilemma. In order to maintain a good relationship with his clients an attorney may not be able to filter out the groundless claims from the meritorious ones. Some cases are resolved quickly when the inmate realizes that if he is successful in overturning his plea agreement the result will not be a dismissal of the case but a return to court to face all of the charges again, including those that were dismissed. Other cases are huge cases with thousands of pages of transcript. If an attorney gets bogged down with too many cases, the attorney may just file claims without setting forth the evidence to support them.

Mr. Grefenson receives \$2,100 per case and post conviction work is approximately 50 to 75% of his practice. He does not have an investigator on staff but hires them as needed. He does not use an investigator in many cases. His staff does contact some witnesses directly. He obtains documents from the District Attorney's office and from trial counsel. He gets medical and crime lab reports when they are involved. He does not use the Oregon Rules of Civil Procedure to request production of documents. He does not often take depositions of witnesses and uses affidavits instead. Although there is a hearing in every case, most of the time he does not call live witnesses.

In Marion County, PCR cases are assigned to all of the judges except those at the annex and to one of the criminal judges. The case remains with the original judge throughout the proceeding. A status conference is scheduled in each case. Counsel notify the court when the case is ready to proceed to trial and the court schedules a hearing date. The average case is resolved within approximately eight months. The judges seem to treat these cases no differently from other cases. The petitioners are unlike the plaintiffs in other cases since they sometimes contact the court directly and express concerns about the actions taken by the court.

In the division of the Attorney General's office that handles post conviction cases the attorneys are easy to deal with.

It has not been difficult to get approval from OPDS for funds for investigation or for experts but Mr. Grefenson requests them only when he needs them.

Mr. Grefenson believes the quality of representation statewide is average and could be improved. One change he would make would be to standardize some of the procedures since different courts have different approaches. One court gives the attorney 30 days to file an amended petition, others allow 90 or 120 days. A complex case designation would allow the attorneys to separate out the cases that need more attention.

A central PCR office would be a positive development. Among other things it could install a video system to permit more contact with clients.

Mr. Sussman said he had come to this work from a slightly different direction. He has practiced law for more than 30 years and started doing post conviction cases about 13 or 14 years ago. Those cases are now about 25% of his practice, not including the capital post conviction cases he does under his death penalty contract. If an attorney puts a lot of effort into a case, word can get around and other inmates start calling you. Post conviction has become a significant part of his practice. He gets fewer calls from prisoners in Marion County than from eastern Oregon prisoners.

Having been both a public defender and a private practitioner, he knows that attorney caseloads have a lot to do with the kind of representation people get . In his retained work he can select the cases he wants to handle and sometimes declines to take a case that doesn't have merit. In some areas he is comfortable recommending that prisoners accept appointed counsel but there is a huge disparity in the range of quality of representation that people get in these cases. The approach to representation outlined by Wendy Willis in the Commission's materials for the commission meeting describes his own approach to preparation of these cases.

The interplay between the state post conviction and the federal habeas timelines is very important to his practice. Most PCR cases revolve around the issue of ineffective assistance of counsel. In order to obtain relief you have to show that counsel made a serious error or admission and that the client was prejudiced. It is not enough to show that trial counsel didn't call a witness, you have to show what the witness would have said and that it would have affected the outcome of the case. The attorney has to look at PCR cases from two perspectives – that of the trial lawyer in reviewing what was done and not done, and that of the appellate lawyer in reviewing the record and applying legal standards to the issues. He uses an investigator in almost every case because that has been one of the most fruitful areas of post conviction practice. He investigates and consults with experts and calls those experts and witnesses at trial. In eastern Oregon there is pressure to present cases on paper. Marion County judges will accommodate live witnesses. It has been a good idea to use retired judges to handle cases in eastern Oregon because they have time to review all the materials but typically those judges are in Salem in a hearing room at the Department of Justice and the petitioner and his lawyer are in a prison on the other side of the state. It is hard to get a witness to a hearing room to testify in most cases. He relies on affidavits for tactical reasons in some cases and on depositions, which may be held anywhere in the state.

If PDSC moves in the direction of setting up a statewide office to handle post conviction and it is adequately staffed and has appropriate resources it could provide more uniformly competent representation.

Mr. Sussman said that one thing that has to be considered with PCR cases is that the cost will be driven by fact that the case is tried in the county in which the petitioner is imprisoned even though the underlying offense may have occurred on the other side of the state. The system might be more efficient if venue lay in the county in which the conviction occurred.

Judge James Hargreaves testified that he is a senior judge from Lane County who had never tried a post conviction case until he assumed senior status five years ago. He has now tried hundreds of post conviction cases filed by prisoners in the three prisons in Umatilla and Malheur Counties. When he began trying these cases he was appalled at the poor quality of the legal work. He had been a judge for 20 years and had never seen such poor practice. There is a culture in both counties that accepts poor practice. Umatilla County, in particular, still has a very big problem. He filed a bar complaint against one of the attorneys.

The legal community in both counties is so small that it is difficult to find attorneys to take the cases. Even the firms that do good work in other cases don't do much better than anyone else in these cases. The standard procedure in both counties was for a prisoner to file a petition which included a laundry list of complaints about what his trial lawyer had not done. After counsel was appointed an amended petition would be filed by the lawyer that generally recited the same list, including misspellings. Lawyers disregarded ORCP 17 which requires them to certify the merit of the claims. Prisoners are concerned that if they don't submit the laundry list they cannot get their cases into federal court.

Periodically a new claim will be filed by one inmate and then all of the other petitions from that prison will include the same claim. Lawyers are concerned about angering their clients by not complying with their demands regarding the claims to be filed. Angry clients threaten attorneys, threaten their families, file bar complaints and sue their attorneys. The culture that has developed is a "go along, get along" approach. Occasionally an attorney puts some real effort into a case.

Ninety percent of the cases probably lack merit; 10 percent require a serious look and only three to five percent have merit, although it is true that you can't know which cases have merit if they never get developed because so few are investigated. Most cases in Malheur and Umatilla Counties are tried via television. The judge (who is usually a senior judge, not one of the judges from the court where the matter is pending) is located in a hearing room in Salem with the Assistant AG. The petitioner and his counsel are usually in one of the prisons. All of the exhibits are provided to the judge before the hearing. Only occasionally is live testimony presented at the hearing except for brief testimony by the petitioner. It is a paper trial and that is the only way these cases can get done.

Beginning March 14, 2008 new rules will be going into effect in Malheur and Umatilla counties. Judge Hargreaves worked with both sides to develop rules that comply with the PCR statutes. The rules are set forth in a document he wrote entitled "The Pleading Edge." Among other things

the rules will required that the petitioner make a prima facie case before he will be allowed to go forward. There will be a 120-day period within which the amended petition must be filed. He hopes the new process will weed out meritless cases at the pleading stage. The judge made presentations on the new rules to the legal assistants at all three eastern Oregon prisons. The main issue the prisoners wanted to discuss was the poor quality of representation they receive from court-appointed counsel. The legal assistants were recommending that prisoners represent themselves. Judge Hargreaves urged them to get counsel to assist them in complying with the new rules.

Attorneys could be more effective in cases if they used some expert testimony instead of just relying on the transcript. OPDS needs to have a system of peer review. All these trials are recorded and copies of the CDs could be reviewed. The practice in Umatilla and Malheur is extremely poor. People should not get contracts without being reviewed.

Lynn Larsen has been with the Department of Justice (DOJ) for more than 18 years. In his experience, because of the number of these cases, the trials have always been paper trials. DOJ currently has 650 PCR cases in the office, which represents all of the felony PCR cases in the state. The trial division used to handle the death penalty PCR cases as well but these cases have now been transferred to the Appellate Division. There are six lawyers in the trial division. They received 40 new cases this month. They see spikes in case numbers when new Supreme Court opinions are issued. Statewide there are around 17,000 criminal prosecutions per year. There are 1100 appeals and 400 post conviction cases filed every year. Most of the cases used to be in Marion County but now about half are there and half in other counties, primarily Umatilla and Malheur. The trial division also handles all of the federal habeas cases as well.

The AG attorney deposes the petitioner in almost every case once counsel has been appointed and an amended petition filed. All of the depositions are done by phone. It is expensive for DOJ to take the depositions when the cost of a court reporter is approximately \$3.00 per page. Some cases are settled but DOJ tries to get agreement from the DA's office since they have gone to a lot of trouble and expense to prosecute the case. Even though they don't have the burden of proof the state deposes the petitioner so that the issues can be narrowed before trial. The state also submits the record of the case so that a reviewing court has an adequate record on which to proceed. Parties submit their trial memos at the same time so neither side knows what the other side will be saying. The better practice would be to require the petitioner to submit a memo and allow the state to respond (which Judge Hargreaves indicated will be the practice under the new pleading rules in eastern

Oregon.) The Department of Corrections and the courts have both set up video connections for the trial of these cases.

The practice in Umatilla County when he first started handling cases there was not very good. Trial memoranda were seldom filed. The petitioner would attend the hearing and the attorney would generally ask some of the same questions that had been asked in the state's deposition. In order to improve the quality of representation standardizing the process would be helpful. Status conferences like those held in Marion County could be used to set time frames for pleadings and the trial. A peer review process is something that the Commission or OPDS could do. But it really boils down to a question of time and money. The fewer cases an attorney has, the more time there is to work on each case. DOJ has objected to legislative proposals to removed funding for appointed counsel in PCR cases principally because it is easier to litigate a case with counsel. DOJ does not want innocent people in prison.

Erin Largesen is an AAG who handles PCR and habeas appeals. She has a background in civil practice and was surprised to see how poorly developed the record sometimes is in these cases. There is often only a trial file and no external evidence. She was also surprised by the lack of the use of civil discovery tools, the lack of attachments to the petition, the simultaneous filing of trial memos and the lack of issue selection. The lawyers appear to need more training in civil litigation. Standardization of practice and additional resources would also be helpful. The creation of a unit within OPDS would offer not only the peer review component but would add the benefit of having two attorneys looking over a case.

Chris Mullmann is with the Client Assistance Office of the Oregon State Bar. In the last two years the bar received 2,210 complaints. Seven hundred and eight of those or 32.85 percent came from inmates. A significant proportion involved PCR cases. The issues raised by inmates generally do not amount to ethical violations although they may constitute ineffective assistance of counsel. The bar generally informs complainants that the lawyer's conduct does not fall below the level of competent representation although it might be constitutionally defective. There was one PCR attorney in eastern Oregon who had 130 bar complaints. He knew what he had to do to meet the bar's ethical standards. The bar now refers complainants with complaints about the quality of representation provided by court appointed counsel to OPDS and also provides OPDS with a weekly report of new bar complaints. This year, out of 2800 complaints that the Client Assistance Office received, approximately 365 were sent to Disciplinary Counsel for further action. Most practitioners are sole practitioners and most complaints are about sole practitioners. His impression is that sole practitioners who share space with attorneys in a

similar practice seem to have fewer complaints than those who are entirely on their own and lack support staff.

Steven Wax is the Federal Defender for Oregon. He has handled or supervised more than 3,000 federal habeas cases all of which came from the state system. The culture in the prisons, among the defense bar and on the bench have all combined to create the problems that exist in the system today. There needs to be communication between the bar and OPDS and between OPDS and its contractors. The law which requires the petitioner to identify the issues needs to be changed. But regardless of whether the law is changed, OPDS needs to get qualified lawyers to do the work and then monitor their performance. The issues which need to be focused on in PCR representation are issue identification and issue development. The attorneys can't identify the issues unless they investigate and gather the necessary materials. Part of the problem is that these cases are treated like a continuation of the criminal case. They are civil cases where the petitioner is the plaintiff. OPDS should use lawyers who understand both criminal law and civil practice. Simultaneous pleadings also present a problem. The AG should not be taking depositions of the petitioners in these cases. Identification of the claims should come from the petitioner's attorney. If the AGs continue to take petitioner depositions, the petitioners' attorneys should be active participants.

Caseloads need to be appropriate. Federal defenders are assigned 25 new cases a year and have 50 to 60 cases in their caseload at any given time. Cases in the state system don't last as long so if they receive 25 new cases per year they might have 30 or 40 at a time. There also needs to be a sufficient number of investigators and paralegals. If OPDS establishes a PCR unit of 12 lawyers it would also need approximately 12 support staff.

Drew Chilton is a co-director of the Oregon Appellate Consortium and handles not-capital post conviction appeals. The Attorney General's office is highly professional and does good work. As an appellate attorney Mr. Chilton reviews the post conviction file and generally the most informative document he finds in that file is the AG's trial memo. There is a big difference in the quality of representation at the trial level in cases in Marion County as compared to those in the eastern Oregon counties. In Marion County attorneys like Noel Grefenson and Olcott Thompson do excellent work. Five years ago the representation he saw in Umatilla and Malheur Counties was an unmitigated disaster. Today it is merely a mitigated disaster. Some of the causes are the small size of the legal community in Malheur County, the desire by the court to expedite PCR cases, and the lack of meaningful investigation. Additional resources would improve the system but other things could help as well including

changing the venue statutes to have cases heard in the county in which the conviction occurred. The quality of representation is consistently better in cases tried in the county of conviction. Both the lawyers and the judges are more attentive. A properly operating PCR system provides a useful measure of the quality of performance of trial and appellate counsel.

OPDS staff and members of the commission discussed the difficulty of finding well-qualified attorneys to handle PCR cases. Commissioner Greenfield asked whether OPDS would receive proposals if it were to simply issue an RFP for these cases. Kathryn Aylward indicated that she did not believe OPDS would receive any proposals. It would also be difficult to recruit attorneys for a PCR unit at OPDS. Paul Levy described his experience with a PCR firm in Indiana. He noted that very few PCR attorneys, except in death penalty cases, seek approval for non-routine expenses for investigators and experts in PCR cases. He reported that the bar, at the request of OPDS, has established a workgroup to create performance standards for attorneys in PCR cases. The group has met and is scheduled for a second meeting in March. In addition to creating performance standards the group is interested in making recommendations for improvements. Ingrid Swenson said that although concerns with the quality of representation in PCR cases were well known to OPDS, the system problems identified at the hearing were not. She noted that OPDS had tried to address quality concerns but had few options.

Steve Gorham testified that Judge Hargreaves's rules will prevent petitioners from having their day in court and are meant to exclude litigants from the process. The Attorney General's office handles cases professionally unless they believe they are going to lose. A central PCR office is a good idea if you provided sufficient resources.

Summary of Testimony at March 12, 2009 PDSC Meeting

Dennis Balske, who served as the chair of the Post Conviction Relief Task Force that was created by the Oregon State Bar to prepare written performance standards for attorneys in post conviction relief cases, testified that the standards that the group developed are comprehensive and should serve as a road map for lawyers new to the field. They can also assist judges who may not understand the extent of the attorneys' obligations in these cases.

The task force recommended that PDSC create an office that specializes in PCR representation. Other approaches are unlikely to succeed.

Chair Ellis identified some of the obstacles to improving representation in this area of practice and agreed that a specialized office, as proposed by the Commission in its current and previous budget requests, would be the best option.

Kathryn Aylward was asked whether a contract office could provide the necessary services. She said that that effort had been made but that individual contract attorneys have not been willing to create such an office.

Mr. Balske said PDSC would not be able to attract the best quality lawyers to this work because the level of compensation provided is not sufficient.

Commissioner Potter inquired whether an attorney taking a high volume of those cases wouldn't be able to put more effort into the meritorious cases and, by averaging those cases with the non-meritorious cases, on average receive a reasonable rate of compensation.

Mr. Balske said that a lawyer can't determine whether a case is meritorious without putting in a significant amount of time and PDSC's current rate of \$2500 per case is not nearly sufficient to do that.

Service Delivery Plan for Post Conviction Relief Cases

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