

### 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, May 5, 2011  
10:00 a.m. – 2:00 p.m.  
Office of Public Defense Services  
1175 Court Street, NE  
Salem, Oregon 97302

### AGENDA

1. **Action Item:** Approval of the Minutes of PDSC's March 9, 2011 Meeting (*Attachment 1*) Barnes Ellis
2. Commission Discussion of Service Delivery Plan for Lincoln County (*Attachment 2*) Barnes Ellis Commissioners
3. PDSC Budget Presentation Report (*Handout*) Barnes Ellis OPDS Staff
4. **Action Item:** PDSC Review and Approval of Request for Proposals (*Attachments 3 & 4*) Barnes Ellis OPDS Staff
5. OPDS Monthly Report  
- Legislative Discussions on Death Penalty/ Drug Cases  
- Post Conviction Relief update  
- Appellate Division Report OPDS Staff
6. Executive Director Recruitment Plan Barnes Ellis

### Notes

**Please note:** Lunch 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 Kepford at (503) 378-3349.**

**Next meeting:** The next meeting of the Commission is scheduled for June 16, 2011 from 9 am to 12:30pm at the Seventh Mountain Resort in Bend, Oregon.

# Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION  
OFFICIAL MINUTES

Thursday, March 10, 2011  
9:00 a.m. – 2:00 p.m.  
Room 302  
Lincoln County Circuit Court  
Newport, Oregon

MEMBERS PRESENT: Barnes Ellis  
John Potter  
Peter Ozanne  
Janet Stevens (by phone)  
Honorable Elizabeth Welch

STAFF PRESENT: Ingrid Swenson  
Kathryn Aylward  
Peter Gartlan  
Paul Levy  
Caroline Meyer  
Billy Strehlow  
Shelley Winn  
Amy Jackson

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The meeting was called to order at 9:05 a.m.

**Agenda Item No. 4 Update on Lane County Service Delivery**

Chair Ellis invited Brad Cascagnette and Greg Hazarabedian to comment on the Lane County Service Delivery Plan update. Brad Cascagnette said the most difficult part of organizing a new consortium had been to get attorneys to buy into the new system. But over time they have seen the benefits of having a more reliable and consistent income, which has allowed them to focus on criminal defense. There are currently fourteen individual attorneys in the group some of whom handle full time public defense caseloads, others of whom have half or quarter time caseloads. The consortium has co-sponsored several CLE events with the public defender's office and is now having monthly attorney meetings at which case law developments and defense strategies are discussed. Members are also communicating with each other by email. The consortium's board of directors includes three outside members (two criminal attorneys and an accountant) and two consortium members. It meets quarterly. Brad Cascagnette, as the administrator, has been able to address all of the quality issues that have arisen to date without involving the board. Caseload

fluctuations make it difficult to project how many attorneys are needed. 70% of the caseload goes to the public defender and 30 percent to the consortium. Greg Hazarabedian said that Lane County's case numbers had been increasing for a two-year period but had dropped in 2011. Brad Cascagnette said that some of the decrease might be related to the fact that the county is now being required to convene grand juries in felony cases again. Greg Hazarabedian said that much of the credit for the improved public defense system in Lane County should go to Brad Cascagnette for his leadership. Chair Ellis also noted the contributions made by Ross Shepard.

**Agenda Item No. 1**

**Approval of the Minutes of PDSC's October 22, 2010 Meeting; October 23, 2010 PDSC Retreat**

**MOTION:** John Potter moved to approve the meeting minutes (and the transcript as amended); Hon. Elizabeth Welch seconded the motion; without objection, the motion carried: **VOTE: 4-0**

**MOTION:** John Potter moved to approve the retreat minutes; Hon. Elizabeth Welch seconded the motion; without objection, the motion carried: **VOTE 4-0.**

**Agenda Item No. 3**

**Presentations on Public Defense Delivery in Lincoln County**

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

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

Jeff Pridgeon said he is one of the partners in a five-person firm, four of whom handle public defense cases. One of the associates in his firm has a year of criminal law experience and the other has two. The other law firm member of the consortium is Ouderkirk and Hollen which has four attorneys. Guy Greco said that most of the public defense cases are handled by two experienced associates in the Ouderkirk and Hollen firm, even though the partners have more experience than the associates. He said that consortium members don't compete with each other for public defense cases. They have agreed among themselves how the cases are to be distributed. Some lawyers prefer to handle juvenile matters and others prefer to focus on criminal cases. Members devote varying percentages of their time to public defense. Mr. Greco devotes approximately 10% of his time to consortium management. Jeff Pridgeon said that three of the independent attorney members of the consortium were associates in one of the firms before establishing their own offices. Other associates and one of the firm

partners left the area seeking a drier climate or a more prosperous community in which to practice.

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

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

Jeff Pridgeon said that none of the current public defense providers came to the county for the purpose of handling public defense cases. People came to the firms and then went out on their own. Chair Ellis said that public defender offices are working well in other counties and the training and supervision offered by these offices is one of their strengths. Jeff Pridgeon said that no one had considered starting a public defender office in Lincoln County and if one were started there would be a loss of the senior people. He would not be interested in working in such an office. His impression is that there is a high level of turnover in public defender offices. In Lincoln County the same lawyers have represented members of multiple generations of the same families over the years. The lawyers know the county and are part of the community. Chair Ellis inquired whether training was an issue first raised by the Commission. Mr. Pridgeon said that it was. Guy Greco said that lawyers are expected to fulfill their own training obligations. Jeff Pridgeon said that attorneys do receive CLE training but the questions may be more about training on local practice issues. This is an area of weakness.

[Commissioner Stevens joined the meeting by telephone.]

Chair Ellis said that the Ouderkirk, Hollen firm appears to have senior partners that do very few public defense cases and associates who spend 90-95% of their

time on these cases. He said that that model is very different from some of the other firms with whom PDSC contracts such as the Jack Morris firm and the Jim Arneson firm. The senior partners in those firms are very engaged in public defense and in their local criminal justice systems.

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

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

Guy Greco said that the system is not broken, why does it need to be fixed? Chair Ellis read a passage from the initial report about senior partners not handling Measure 11 cases and two senior attorneys who appear apathetic and fail to file motions or take cases to trial. Chair Ellis asked Guy Greco whether the consortium's decision to continue using a single rate model internally despite a contract that values cases by seriousness level didn't make Measure 11 cases less attractive. Guy Greco said that the lawyers don't think in terms of case weight but only in terms of volume and assume that the heavier cases will average out. He, for example, would rather do Measure 11 cases than juvenile cases even though they take more time. Each firm receives a fixed amount per month regardless of the case mix. He does not see any cherry picking occurring.

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

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

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

With respect to the use of non-routine expense funds Guy Greco said that he regrets that he may get only seven to nine hundred dollars for handling a murder case but the expert witness he uses may be paid six or seven thousand dollars.

[Commissioner Stevens disconnected.]

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

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

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

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

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

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

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

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

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

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

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

Commissioner Ozanne agreed with the structure/model distinction. Commissioner Welch said she agreed with the comments too but believes people should be told what is wrong with their system and asked whether Commissioners agreed on what is wrong. Commissioner Ozanne said they had been told what was wrong. Chair Ellis said OPDS is contracting with an amorphous group without bylaws and in which there is no one to do the fundamental things PDSC requires such as recruitment, training, supervision, mentoring and discipline. There is not only no structure but no model. There are no bad actors. This is just how they have always done things. There is a big vacuum to fill. The climate is right for a public defender with the right director. The judges might be willing to support it if it didn't displace the individual

practitioners. Commissioner Ozanne said that the community seemed more open to change than when he came to Lincoln County as the OPDS director. Ingrid Swenson said that the five independent lawyers are all reported to be doing good work without any organization. They need a sufficient caseload to sustain them. A public defender office, to be functional would need to take a large part of the caseload. It might be more difficult to start a public defender office in Lincoln County where the bench is less dissatisfied with the current system than it was in Marion County. It would be difficult to create a public defender office without local support. Commissioner Ozanne noted the involvement of the chief justice in creating the office in Marion County. Ingrid Swenson said some of the judges had suggested contracting directly with the lawyers who do the work or with a consortium, like that in Lane County, that is comprised of individual attorneys all of whom do public defense cases. Chair Ellis said he thought a public defender office could work in Lincoln County. Commissioner Ozanne said the office could start as a very small office and expand as needed to replace attorneys who might be retiring. Commissioner Ozanne suggested that a topic for a future PDSC retreat could be whether the site visit process and the structural reviews conducted by the commission would be combined.

[tape ends abruptly.]

**Agenda Item No. 6                    Executive Director’s Annual Report**

Ingrid Swenson summarized the contents of her annual report to the Commission. This year the report includes a section on the activities of the Commission. It covers the achievements of the two OPDS divisions and the activities of management staff including the executive director. She said that the principal challenge for the next year would be to obtain an adequate budget from the Legislature to allow the agency to achieve its mission.

**Agenda Item No. 5                    Preliminary Discussion of PDSC Policy and Procedure regarding Contracts for Personal Services**

Paul Levy said that at the next PDSC meeting the Commission would be presented with the agency's request for proposals for contracts beginning in January of 2012. The Commission will also be asked to approve an acknowledgement that the RFP represents the agency's policies and procedures for contracting for public defense services. The RFP has always included the agency's contracting criteria. Commissioner Ozanne said he wanted to make certain that it would not be said that the RFP represents all of the agency's policies and procedures since it is only a part and Commissioners want to expand their role in the review of proposals. Paul Levy said that the full Commission process had not be included in the RFP. Ingrid Swenson said it was included in the strategic plan. Commissioner Ozanne asked whether it wouldn't be good to inform contractors of the role of the Commission in contract approve. Ingrid Swenson said the RFP could include reference to the commission procedure. Commissioner Ozanne said Commissioners could review the draft at the next meeting. Chair Ellis said he assumed PDSC's policies and procedures had been compared to DAS's procedure. Paul Levy said he had reviewed the Public Contracting Code and the Attorney General's Model Code but the PDSC's RFP is not controlled by DAS.

**Agenda Item No. 7                    OPDS Monthly Report**

Kathryn Aylward reported that in the agency's 2009-11 budget PDSC had returned \$110 thousand from the Appellate Division Account and had requested and received an additional \$905 thousand for the Public Defense Services Account. The agency's current service level budget for 2011-13 is approximately \$242 million. The amount allocated in the Governor's budget is \$210 million, which is \$32 million short. The Governor's budget maintained the same general fund level for all agencies as a starting point. Since PDSC's budget included \$12.4 million in other funds from the court fee and surcharge bill that is no longer available as other funds, this amount was simply not included in the Governor's budget. That \$12.4 million and \$20 million in mandated caseload costs means that we are \$32 million short. PDSC's budget hearings are scheduled for March 30 and April 4.

Kathryn Aylward also described some legislative concepts that could reduce public defense costs. One proposal would reduce the crime seriousness level of some drug possession charges involving user quantities. Another would make procedural changes to the death penalty statutes. In death penalty cases it is hard to estimate potential savings from changes that are being considered, in part because there have been very few cases that have gone through all the stages of state court review. The ones that have already been through that process are probably a lot less expensive than the ones that are still in the system.

Ingrid Swenson said that there had been meetings that included legislative staff, district attorneys, defense lawyers and OPDS to discuss the differences between Washington and Oregon in the prosecution of death penalty cases. There was no consensus but a legislative proposal will go forward that has substantive and procedural law changes that could lower public defense costs.

Paul Levy described the responses to OPDS's annual statewide survey of judges and other justice system representatives. He said it is not a scientifically validated measure of quality but allows OPDS to track changes over time. The results indicate that services are getting better especially in juvenile and death penalty advocacy. He and the OPDS analysts will be following up on the 200 plus specific comments that were provided. Paul Levy reported that OPDS was sponsoring a diversity program on April 14 that would include presenters from the DHS program last year.

Chair Ellis asked about OPDS's response to the finding in the Oregon Criminal Justice Commission's report on Measure 11 that defendants with retained attorneys have better outcomes than those with court appointed counsel. Kathryn Aylward said that OPDS analysts were reviewing the data and that OPDS would ask the Criminal Justice Commission to look more closely at some issues such as how many of the person who were eligible for court appointed counsel nevertheless managed to get together the resources to retain counsel. People who have money and jobs may have better outcomes. OPDS's Contractor Advisory Group will also be reviewing the report and discussing it in light of a law review article addressing similar findings in another state.

Kathryn Aylward said that OPDS was working with Metropolitan Public Defender and several other contractors to provide immigration law information to public defense lawyers obligated to make such information available to clients under the Padilla case. Ingrid Swenson reported that neither the courts nor the Department of Human Services appear to have data on the number of juvenile cases that remain in the court system pending resolution of related domestic relations issues. Commissioner Welch recommended that OPDS

request that the data be kept in future cases rather than trying to gather anecdotal information from the past.

Peter Gartlan said that the Appellate Division had completed its annual evaluations. Although it is time consuming it is beneficial for both the individual attorneys and for management. Commissioner Ozanne asked whether it would be more realistic to perform them every two years. Peter Gartlan said that it had been so successful that he would be reluctant to change it. He reported on the three legislative proposals submitted by the division this session. A bill providing that the filing date for legal documents submitted by persons who are involuntarily confined will be the date the document is given to the institution for mailing, not the date of receipt, is unopposed. The Division's bill to revise the "forfeiture by wrongdoing" rule relating to the right to cross examine a witness whose absence is a result of the conduct of the defendant, would have affected civil as well as criminal cases and was objected to by the Department of Justice. It is hoped that a middle ground can be agreed upon. A bill addressing the Partain case, which lifted the ceiling on the length of the sentence that could be imposed on remand after a successful appeal by the defendant, has been directed to an interim workgroup.

Commissioner Ozanne said that he wanted to commend Lane Borg of the Metropolitan Public Defender Office for the work he is doing on the Local Public Safety Coordinating Council in Multnomah County.

#### **Agenda Item No. 8**

#### **Executive Director Recruitment Plan**

Commissioners discussed with OPDS staff the process that had been used to recruit and select the current executive director and decided against using an outside resource to assist in the recruitment of a new director. Kathryn Aylward was directed to prepare a job description and notice similar to that used in 2006 and a schedule to be circulated to PDSC members. A subcommittee can then be identified to participate in the interviews. Commissioner Welch said she had recently participated in a very elaborate hiring process and one of the most challenging parts was the development of written questions to be used in the interviews. Chair Ellis said that he did not recall using a standard set of questions and that the interviews were quite free ranging.

**Meeting was adjourned at 2:20**

PUBLIC DEFENSE SERVICES COMMISSION  
UNOFFICIAL EDITED TRANSCRIPT

Thursday, March 10, 2011  
9:00 a.m. – 2:00 p.m.  
Room 302  
Lincoln County Circuit Court  
Newport, Oregon

MEMBERS PRESENT: Barnes Ellis  
John Potter  
Peter Ozanne  
Janet Stevens (by phone)  
Honorable Elizabeth Welch

STAFF PRESENT: Ingrid Swenson  
Kathryn Aylward  
Peter Gartlan  
Paul Levy  
Caroline Meyer  
Billy Strehlow  
Shelley Winn  
Amy Jackson

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The meeting was called to order at 9:05 a.m.

**Agenda Item No. 4 Update on Lane County Service Delivery**

- 0:04 Chair Ellis I am going to call the meeting to order. I am going to change the sequence a little bit to facilitate some folks who are here from Lane County. With everybody's concurrence we will take Item 4 up first, which is a report on the Lane County service delivery review. Brad Cascagnette is here, or was. Brad, if you want to come up. Greg, I don't know if you want to participate in this concurrently? Come on up. Balance it out. Just to set the scene, it was a year ago that we started the new structure in Lane County, with the new consortium replacing what had been kind of the appointment list system that we had used. We are very interested in how you feel it is going. You have seen the report, which is frankly very encouraging. I think it sounds like things are off to a good start. Why don't you share with us how the year has gone?
- 1:24 B. Cascagnette I think it has gone pretty well overall. I think, as you know, the most difficult part for us was getting attorneys to buy into this system. It was difficult to form a group, and for the first several months I think they were very apprehensive about it.
- 1:42 Chair Ellis They, meaning the people in the group, or those not in the group, or both?
- 1:48 B. Cascagnette I would say both, but more so a large percentage of those in the group. We had existed under this old system for however many years, and they were adverse to change, I think is the simplest way to put it. But as it went on I think they found it is a better system. It provides them with a more reliable and consistent income. It allows them to focus more on criminal defense, which was one of the goals of our doing this - to pare it down and try to get people who specialize largely in criminal defense.

2:25 Chair Ellis How many are in the group?

2:25 B. Cascagnette Including myself there are a total of 14 attorneys.

2:30 Chair Ellis That is a big operation.

2:30 B. Cascagnette It is. It is larger than what our original intent was.

2:38 Chair Ellis I think the list had been like 28.

2:39 B. Cascagnette If fluctuated and I think it was as high as 35 at some point in time. So it has substantially fewer attorneys than it had originally.

2:50 Chair Ellis For your members what percent of their practice is public defense?

2:55 B. Cascagnette We have different levels. We have what we call full-time in our consortium group, half-time, and quarter-time. That doesn't mean that they are full-time public defense, but it means that they get the equivalent of our full-time caseload. I would say with a few members it is probably close to 100%. For most members I would guess it is around 50%.

3:27 Chair Ellis Your members are each individual lawyers. You don't have law firm members in the consortium?

3:31 B. Cascagnette Individual lawyers, yes.

3:36 Chair Ellis What are you doing on mentoring and training and that sort of thing?

3:42 B. Cascagnette Well, in conjunction with the public defender's office we have had two or three CLEs. The first Tuesday of every month we have a round table. Anyone in the consortium can come to this and share case ideas and bounce questions off one another. That happens every month on Tuesday. That was slow to get going. People weren't participating and part of that was my fault because it wasn't the first Tuesday of every month. It was whenever I sent out a notice. Now it is more reliable. People weren't coming originally and, again, I think it was part of buying into this system. We made it the same date and that wasn't working. Then we bought pizza and now more of them seem to be coming. It is actually good because I think one of the biggest problems of the old panel is we had all these sole practitioners. I work in an office with eight different attorneys. They are not all criminal defense attorneys but I can bounce ideas off of them. The sole practitioners in our group didn't have that opportunity. Now with this once a month Tuesday thing it has actually helped quite a lot. The group, as a whole, is communicating more with each other and bouncing ideas off each other more than ever occurred under the panel. I know that I get emails that are sent out to the group, of questions and other things that people bounce off one another and that never happened before.

5:22 Chair Ellis Describe your board.

5:25 B. Cascagnette There are two members of the consortium that are on the board and there are three independent members who are on the board: Don Diment is an experienced attorney in town, Dan Koenig is also an experienced attorney and then an accountant and the two consortium members of the board.

5:49 Chair Ellis Does that work well?

5:59 B. Cascagnette It has so far, yes.

5:50 Chair Ellis Who appoints? Is it self-perpetuating, or do you use outside appointment?

5:55 B. Cascagnette It is currently self-appointing and I understand from reading that thing that maybe we are not fulfilling exactly what we are expected to do. Maybe you can fill me in on what exactly the Commission is looking for there.

6:11 Chair Ellis The one you should talk to is right behind you - Paul. But you are very close to qualifying under our new standards. We definitely do want outside participation on a board.

6:26 B. Cascagnette Our goal originally was to set it up so that there would always be a minority of members in the consortium. So we purposely set it up with three outside members and we always wanted to keep it that way.

6:45 Chair Ellis That is quite consistent with our policy. How often does the board meet?

6:48 B. Cascagnette The board meets once a quarter.

6:50 Chair Ellis You may say you haven't had this issue so you don't know the answer, but have you had quality issues that either you as the administrator or the board has had to deal with?

7:07 B. Cascagnette None that the board has currently dealt with. There have been some issues with regard to missing court appearances that I have had to deal with. I have never done this before. This is management type stuff that I was kind of thrown into.

7:26 Chair Ellis You thought you were going to be a lawyer.

7:26 B. Cascagnette So much for that. Originally I just talked to these individuals and then if it happened again I thought, "What do I do now?" What we have done is institute a penalty where you get taken out of the rotation and it affects each attorney's pocketbook if something like that happens. It seems to have cleared itself up.

7:53 Chair Ellis You have only been going a year so it may be that the 14 have been the same during that time. Have you yet had the experience of admitting a new consortia member or an exit?

8:05 B. Cascagnette We have not. We are still trying to figure out the fluctuations of the caseload. For a good portion of last year it was very consistent. Then towards the end of last year there were a lot of cases we were being appointed to, and I was thinking, "It is time to start adding new members." Now in the last couple of months we are down to half of our contract quota. Our caseload fluctuates so much it is very difficult to determine when it is time to add someone. If we dilute it too much then we don't have the budget for each of these attorneys to run their office. It is difficult for me because I am trying to balance, "When are these attorneys too busy? What is too much?" with, "When are these attorneys not going to be able to make a living?"

8:50 Chair Ellis The split in caseload between Lane PD and you is about 80/20?

8:54 G. Harazabedian More like 70/30.

8:59 Chair Ellis Has that stayed about constant?

9:00 G. Harazabedian It has. What hasn't stayed constant is, in 2011 the case count seems to be down locally. Brad and I have talked about that. It is down for us the same way. As the Chair knows most of the state has had low public defense numbers for a while.

9:18 Chair Ellis I was told Lane County was the one place where the crime rate was not reported as down.

9:25 G. Harazabedian Yeah, the case counts in terms of contracts in Lane County has historically been higher than the rest of the state the last year or two. Since 2011, it seems to have

taken quite a large percentage dip based on previous performance. That is something that we have seen as well as Brad's group. I don't think the ratio changes. It is just less cases overall.

- 9:49 Chair Ellis Is my memory right that Harcleroad is no longer DA and you have had a change. How has that gone?
- 9:57 B. Cascagnette Alex Gardner has been the DA for several years, four, five, maybe, so it is going pretty well. I don't know if this is true or not but the lower case counts may be a reflection of the fact that Lane County is now requiring grand juries on every felony case. I think, as you know, that wasn't happening for a while. Greg and I got together and we made a change to go back to requiring grand juries. Now district attorneys may be a little busier dealing with that. There may be fewer case filings at the moment.
- 10:42 Chair Ellis How are you getting along with OPDS and Salem, all those bureaucrats that are here?
- 10:50 B. Cascagnette They are great to work with. As far as I know we are getting along just fine.
- 10:54 Chair Ellis Any other questions that people have?
- 10:58 P. Ozanne Certainly encouraging.
- 11:04 Chair Ellis Anything that we can do to make it better?
- 11:07 B. Cascagnette I don't think so. We are still in the learning curve and we are trying to make it better internally. We hope that we can continue to do that. I think overall the system is better than what we had in Lane County.
- 11:19 Chair Ellis Certainly the comments from the judges and others suggest that. Greg, any input you want to share with us?
- 11:25 G. Harazabedian I agree with what has been said. All I would add is that much more of the credit for how well this is working belongs at Brad's doorstep than Brad will ever admit. Some of the people who were seeking leadership of this group, who the Commission was wise enough not to go with, I don't think would have run it as well as Brad who came to this leadership position somewhat reluctantly.
- 11:56 B. Cascagnette Somewhat?
- 11:57 G. Harazabedian I think there may be a lesson there.
- 11:58 P. Ozanne I think I have always found that reluctant leaders seem to be the best ones.
- 12:05 G. Harazabedian And Brad is very slow to take credit for the way that he has administered this group, for its success, but I will do that for him.
- 12:14 Chair Ellis Alright. We all are conscious of the contribution that Ross Shepard made too.
- 12:20 G. Harazabedian Absolutely.
- 12:20 Chair Ellis Thanks, Brad. You are welcome to stay around or head back over.
- 12:26 Hon. Elizabeth Welch I have one little informational question. Is the list gone?
- 12:34 B. Cascagnette Yes.
- 12:34 Hon. Elizabeth

Welch It is not just sort of in residue?

12:40 B. Cascagnette As far as I understand it if the public defender or our consortia cannot take a case, OPDS is contacted directly and I don't know how it is determined what attorney is appointed.

12:52 Hon. Elizabeth Welch Thank you.

12:52 Chair Ellis Thank you.

**Agenda Item No. 1 Approval of the Minutes of PDSC's October 22, 2010 Meeting; October 23, 2010 PDSC Retreat**

13:02 Chair Ellis So Item No. 1 is approval of the minutes from the October 22 meeting. I found a few typos but they are not substantive. Jeff Ellis' name is misspelled in the middle paragraph of page three. I believe in the third line of the middle paragraph on page four the word "resent" probably should be "reset." Then in the third line on the top of page six "if" should be "is." Other than that I thought the minutes were fine. Is there a motion to approve?

**MOTION:** John Potter moved to approve the minutes; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE: 4-0**

14:07 Chair Ellis And then, similarly, the October 23 retreat. Any additions or corrections to the summary of that? It is just a list of bullet points that people made. Is there a motion to approve the October 23, 2010 minutes of the retreat?

**MOTION:** John Potter moved to approve the retreat minutes; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

15:07 Chair Ellis Anything anybody wants to add or correct on the transcript of the December 9 meeting? That doesn't require an approval. I have to say that I continue to be impressed with both the quality of the transcripts and the quality of the minutes. I think it is really excellent.

**Agenda Item No. 3 Presentations on Public Defense Delivery in Lincoln County**

15:34 Chair Ellis Alright. We are now to the main business of the day, which is Lincoln County. We are very happy to be here. Let me just comment a little about our process and then we would be very interested in meeting and discussing issues here in Lincoln County with our guests. This Commission was formed a little over 10 years ago, so it goes back awhile. There has been some change in the mix. Commissioner Welch came on about six years ago?

16:14 Hon. Elizabeth Welch No. It more like three, I think, two and a half.

16:17 Chair Ellis When you are having fun time flies. We were charged by the legislature with trying to develop a system that has the combination of quality and efficiency. Of course that is the tension that lots of public service faces. One of the things that we have done for the last eight years is to go to communities around the state, meet with the providers and the other system participants in each of the communities, and see if we have the right structure in place. That is not to say that places where we have made a change somebody did something wrong, it is that we inherited a system that grew without any planning. It started back with the *Gideon* case and then you had all of a sudden a requirement in every criminal case where there was risk of incarceration of public defense availability for indigent defendants. That was just sort of thrust upon not just Oregon but all states. There has been a long history. In 1980 the responsibility for that shifted from county provision to state provision. When that

happened the state really didn't have a structure to do much more than provide funding. It evolved with a group in the State Court Administrator's office - wonderful people who did the very best they could but without any real authority, real planning opportunity. When the legislature agreed that this Commission would come in after a year long study - and many of us were involved in that - we did have the authority and the responsibility to try to bring some planning to the process. We didn't want to let it be just, "Whoever throws a proposal over the wall, send them money." We wanted to find a way to structure, in each of the areas around the state, a public defense system that does meet those two criteria of quality and efficiency. There are several places in the state that we have made substantial changes in the structure that was in place. One you just heard about - Lane County, which had inherited an old, individual appointment system that seemed to please a lot of the lawyers in Lane County, but it really didn't please the judges and it didn't please us in terms of the quality and the efficiency - the two things that we focus on. You heard what we have just been through. Significant improvement has occurred in Lane County. In Marion County we had something somewhat similar to what we have in this county, which was a single provider consortium model. That can work. We have been very consistent in all of our work that we do not take a one-size-fits-all approach. But in Marion County we got some awful reports. They heard them so I am not saying anything that the providers in that consortium didn't hear themselves. But it was not well administered. It was too large. The quality was not there. The efficiency was terrible. We got repeated reports of lawyers not being present. When the lawyer doesn't come everybody else who does come can't function. It was just simply not an acceptable circumstance. With quite a lot of effort, including some people from the community who took a leadership role, we have structured Marion County and have created a public defender there that is now carrying a significant part of the load. MCAD, which was the consortium, instead of fighting that change realized it was not working. "We are not doing the job nearly as well as we should." They have made huge strides in improvements. They have a very good administrator. They have taken on a much stronger leadership role. They scaled down their membership. They have moved from an hourly system to a unit payment system. They are undertaking CLE training and quality supervision. So what has happened in Marion County, and I have said this to them and I will say it wherever, we have had a win, win. We had a significant structural change that has lead to significant improvement by the players in a system that was really not working when this process started. It took a couple of years. The hearings in Marion County were in, like 2005, if I recall. I don't think we completed the process of change until about 2008. I could be off in my dates, and correct me if I am wrong, but I think that is about right. It doesn't happen overnight, but it did happen. For a while you felt like maybe the community was treating the new defender like an outsider. I think that has changed. I think the community now recognizes this is a far better system for provision of defense services than we had before. That is an example. I think we have gone to 14 communities. We have been all around the state trying to do this. We are not here to impose a system, but we are here to really work with the community and jointly develop the best system for that particular community. The models vary. We have places like Hood River or Douglas County where law firms play the dominant role as providers. Those two areas have very strong law firms, very focused on this work, so we have been happy with that. Obviously you have the very largest counties. Multnomah has a mix of a very large public defender, plus a consortium, plus specialty in the juvenile area. In Washington County you have the same defender from Multnomah in both counties. Clackamas County is a single consortium provider model similar to how this county has been to this point. We have shown a willingness to work with a range of models. Where we are really not willing to do is just sort of sit back if we find evidence that either the quality is not there or the efficiency is not there. Our job is to try to find a way to help the community bring together the resources to improve it. That is where we are. I think everybody here should have received the draft report that staff put together. It was Ingrid, John, and I forget who else was involved.

25:13 Chair Ellis                    There we go. They came over and met with a range of people from the community to try to give us a starting point. Then what we like to do is, and this is not a cross-examination because we are all here with the same fundamental interest. We really like to hear from people in the community - their thoughts on how things are going, how things could be improved, and what the structural issues may be. Then it often takes us two, three, or four meetings. The other meetings probably won't be here. We like to kind of work through what we have learned and see if it leads us to a view that some change may be appropriate. Then we carry on that dialogue. That is our process. With that introduction who would like to lead off here? Is Judge Littlehales here yet?

26:27 I. Swenson                    I don't see him yet.

26:37 P. Ozanne                    Here he is.

26:37 Chair Ellis                    Judge, you just missed your introduction. Thank you for coming. Why don't we start off – did you get a chance to see the draft report that our staff did?

[Judge Littlehales noted that he had been ill for a period of time after first reading the report, and requested an opportunity to review the draft again before testifying.]

28:23 I. Swenson                    Guy Greco is here, Mr. Chair.

28:24 Chair Ellis                    Guy, do you want to come on up and we can start with you. Walk us through who participates in the consortium and your own role, how long you have been with it and that sort of thing.

29:05 G. Greco                    I have been doing indigent defense in Lincoln County since 1977, making \$30 an hour when I was on the list in the county and we submitted our hours so I have been involved in every permutation of the system since that time. I can go back to when IDSD and SCA administered the contract.

29:35 Chair Ellis                    Has it always been a sort of single consortium provider?

29:38 G. Greco                    No, no, no, that is just where I was going - to just give you the history. We all started out being on the list and working by the hour. Then IDSD came up with the concept of contracts. Instead of doing it by the hour, we were getting paid a certain amount of money per case and it was a fixed amount per case. It wasn't weighted by the type of case that it was. What we did was we actually broke into two groups. There were actually two contracts that were issued. I can't remember the name of the other one. We had a Lincoln Defense Consortium and, I think, there was the Lincoln Defenders. Basically one of them had maybe 60% and the other one had 40% of the total caseload. We would routinely submit RFPs independently and individually and then negotiate the amount of fees per unit. It wasn't until the PDSC rolled around with OPDS that it became a single entity, and quite frankly it was strongly recommended and suggested that we do that. It wasn't something that was really voluntary. At the time there were more law firms. Now it is kind of half law firms and half sole practitioners.

31:10 Chair Ellis                    Two law firms...

31:08 G. Greco                    There are two law firms and five sole practitioners.

31:14 Chair Ellis                    And the law firms, one of those is yours?

31:16 J. Pridgeon                    Yes, sir.

31:16 Chair Ellis                    Let me just kind of get the landscape. How large is your firm?

31:20 J. Pridgeon I have five members of my firm and four of us practice indigent defense.

31:26 Chair Ellis Okay. And the other law firm is which one?

31:27 J. Pridgeon Ouderkirk and Hollen. They have four people.

31:35 G. Greco They have four people in the office and we display them as four providers but primarily the indigent defense is performed by two associates. The two partners combined maybe account for 10% of their load. They are the most experienced ones. One of the things we talked about with Ingrid, as far as Measure 11 is concerned, of the more experienced lawyers we have only three, him included, that really only do Measure 11 work. We did compete. When PDSC came around they moved us into a single unit. Essentially then – it has worked smoothly from our end, we submit an RFP every biennium as the group and then negotiate that way. There then was no longer the competition among practitioners internally as to how much of the work they would do. In fact, we just negotiated it amongst ourselves as to how many cases per year everybody would do. As my administrative tasks have increased, which they have, I have backed off and done fewer actual cases.

32:48 Chair Ellis You had four lawyers in the two firms. How many individuals participate?

33:02 G. Greco Five.

33:02 Chair Ellis Okay.

33:05 G. Greco People have tended to gravitate to certain areas. For example, probably six or seven years ago I stopped doing juvenile appointments and basically concentrate solely on criminal. Mr. Pridgeon has preferred to do juvenile and so he is almost exclusively doing juvenile work. We don't have any problem internally with that. I think that adds to efficiency because he knows dependency and I don't. I can focus more on the criminal work and the judges don't mind that. The way we are structured in court - Fridays, for example, are juvenile days. I was finding myself not being able to try cases on Fridays because I was just doing juvenile work. Now I am freed up on Fridays and I can do other things.

33:51 P. Ozanne Guy, what is the percentage of your time now with administrative tasks? You said it had increased over time.

33:59 G. Greco You mean the percentage of my 70 hour work week? I don't know. It varies. At the end of the month there is probably at least a half a day tabulating the statistics. Then there is balancing the books and paying people. I don't know maybe five to 10% of my overall time. It is all over the place. There are certain things that you do monthly and there are certain things that you do all the time that you don't really even think about.

34:28 Chair Ellis Of the five individual participants in the consortium, what percent of their practice is criminal and of that what percent is public defender criminal?

34:43 G. Greco Mr. Scholl, what percentage of your practice is criminal and what percentage is indigent?

34:52 R. Scholl They are both criminal so it is 100% criminal but 95% indigent and probably 5% retained.

35:01 Chair Ellis That is you. Is that roughly true for the others?

35:06 G. Greco No. I can go through it. I am just estimating without real hard data. Ms. Benfield - 90% of her practice is probably indigent and 95% criminal. Mr. Reynoldson is in the back. He is another sole practitioner. What percentage of your practice is indigent and what percentage is criminal?

35:25 A. Reynoldson Criminal as a whole is probably about 85%. Indigent is 75%.

35:33 Chair Ellis Seventy-five of the 85?

35:36 A. Reynoldson No. Of the whole, of my entire practice, 75% is probably indigent. It varies, depends. In some months with terminations and those kinds of things it consumes much more. But I would say of my cash flow probably 75% of it comes from indigent defense.

35:55 G. Greco I would say our other sole practitioner is probably the same. I am probably different. I have the smallest percentage of actual appointed cases of any of the sole practitioners. I would say that indigent defense is about 45 to 50% of my income and practice.

36:12 Chair Ellis Including the administrative?

36:12 G. Greco Yeah. Maybe 55% if you include that. Probably 25 to 30% of my practice is civil. The remainder is retained criminal. I do a lot of civil work.

36:27 Chair Ellis Then within your law firm can you answer the same question?

36:34 J. Pridgeon I have two associates who primarily do indigent defense at this point. One is doing probably 95% indigent defense. The other is probably 85%. Then I have a partner who probably does 50 or 60% of his time on indigent defense. I think I probably do about 60% of my time on indigent defense, but it is not nearly that large a fraction of my income. I have a civil practice that obviously makes more for me than doing juvenile work. I do juvenile work because it needs to be done.

37:12 Chair Ellis Are you able to describe the same thing with the other law firm?

37:21 J. Pridgeon Well, our impression is that the Ouderkirk and Hollen firm has two associates that do almost all indigent defense, and two partners who do 10% indigent defense.

37:33 G. Greco They do 10% of their office's caseload. I think it is probably a very small percentage of their overall work. I know Jeff Ouderkirk does some retained criminal, but I think they mostly practice civil.

37:47 Chair Ellis The associates in your office, what is their experience level?

37:51 J. Pridgeon I have one with one year of criminal defense experience and one with two years of criminal defense experience. That lawyer has a prior experience as an immigration lawyer.

38:08 Chair Ellis The Ouderkirk firm, the two associates there, what is their experience?

38:11 J. Pridgeon More experience than that - one with appellate work and one with prior indigent defense practice in Eastern Oregon.

38:25 G. Greco I don't know. Mr. Biedermann worked for the Appellate Division. He did that for five or 10 years, I don't know.

38:29 Chair Ellis So has there been a fair amount of turnover at the associate level?

38:36 J. Pridgeon There is always turnover at the associate level in any law practice that I am aware of.

38:43 Chair Ellis Give me a little sense of that. Has the pattern been the younger lawyers come and work two or three years and then move into something else?

38:56 J. Pridgeon Well, Mr. Reynoldson started in my firm and now is a sole practitioner here. Mr. Scholl started in my firm and is now a sole practitioner here.

39:04 Chair Ellis Are they among...

39:03 G. Greco Yes, and Mr. Taylor started in the Ouderkirk firm and now he is a sole practitioner.

39:10 J. Pridgeon And Ms. Benfield too.

39:16 G. Greco Yeah. A lot of them stay.

39:20 J. Pridgeon It has been a feeder system but then we also lose people to other – one of my former partners is with the Attorney General’s Office. People have gone to other places in the state. I think it’s the normal lawyer turnover.

39:39 G. Greco There is a sort of “rain attrition” in this community. There are certain people who want to go to drier places.

39:44 J. Pridgeon And per capita income is very low here as you might be aware and the cost of living is higher. It is a little tough to make a living. Sticking here depends on how much you like to look at the ocean.

40:01 G. Greco I come from the New York metro area and I have been in heaven for 35 years.

40:06 J. Pridgeon And I am from flat land Ohio.

40:08 Chair Ellis So within your law firm, how do you do the supervision, training, I mean you have these young associates coming in. They are being given a significant responsibility handling these criminal cases. How do you do that?

40:25 J. Pridgeon To this point, and this is the criticism that came out of the interviews in the draft report, it has been very informal. It is tag along with the senior lawyer to court. I have an open door policy at my office. My door is open seven hours out of eight every day. They can wander in anytime they have questions. We don’t have a formalized training thing other than CLEs, OCDLA conferences, and those kinds of things.

40:56 Chair Ellis And do they go to those?

40:58 J. Pridgeon Oh yeah. Because of that being identified as a possible weakness in our group, Mr. Greco and I are going to start an ongoing training process, if you will. We are going to meet the first Tuesday of every other month and come up with what are the issues, what needs work, who needs help, that kind of thing.

41:27 G. Greco If I could follow up on it because he wasn’t here for the earlier testimony. It is kind of like the other gentlemen talking about having pizza and we are identifying a restaurant that has a conference room in town. We will set an agenda, like Measure 11, and we will meet and talk about Measure 11, or the repo statute or how you report your cases to me. So anything and everything that we can do and if I could also follow up on that, we were in the process of doing it when Ingrid was here several weeks ago. I am not able to sit down and watch trials and evaluate lawyers. There is just not enough time in the day to do that. The people that are probably most capable of evaluating the performance of our lawyers are our judges. I have finally been able to work with them. Everything they like to do is mostly anecdotal, but I did submit a survey to them about a month ago and I have just gotten it back. I plagiarized from Marion County. Surprisingly, I think there are only maybe two lawyers that have red flags that I see as far as the judges evaluating their performance. I am going to meet with the judges. We are going to have more anecdotal conversations with them. I am then going to individually meet with the lawyers that I say would be at the level of concern. The surveys will have helped me

identify where they are weak. I will take the time to mentor them specifically in the areas of weakness. Nobody is really being criticized for not showing up for court. That has not been an issue as far as I can see from any of the judges. They are concerned that there is no motion practice coming out of this lawyer.

- 43:21 Chair Ellis            There was one comment, and I don't need to get into names. That is not the level at which we approaching it. I would have to say that I was not happy to see a comment that one of the lawyers was viewed as providing a far better level of service for retained clients than for indigent clients.
- 43:42 G. Greco              And I will talk to that person.
- 43:44 Chair Ellis            That is just unacceptable to us.
- 43:49 J. Pridgeon          We agree. You are not getting an argument on that point.
- 43:55 Chair Ellis            So, structurally, you have no board.
- 43:54 G. Greco              We have a board. The board consists of a minimum of one member per office. Each sole practitioner gets to be on the board, then one lawyer from each of the firms. However, when we have board meetings it is not unusual – I believe that in the two firms both partners will come. The associate lawyers are really the only ones who wouldn't participate. We have those meetings roughly every six months. They have primarily, so far, been designed to control the flow of funds to each firm because we have to make sure that we have sufficient funds to repay OPDS in the event we go under contract. Ever since we have been converted to the weighted system we get paid more than we earn. We paid back \$136,000 last biennium and we had it. We didn't have to go reaching into our pockets, so we have to monitor that constantly and we make sure we have the money in reserve. As the Lane County people said, our caseload fluctuates wildly, wildly. We have had a gap of \$55,000 worth of difference in two different months.
- 45:16 Chair Ellis            I assume your population fluctuates wildly. Summer is probably double here what it is in winter.
- 45:21 G. Greco              Our big months are August and September. In the summer we have an extra 100,000 people here.
- 45:33 J. Pridgeon          They are not residents just people in the county.
- 45:39 G. Greco              Who are boozing it up and getting into trouble.
- 45:39 Chair Ellis            I don't think criminal issues are limited to residents. Are you familiar with the policy that we have adopted that takes effect ...
- 45:50 G. Greco              January 2012.
- 45:51 Chair Ellis            Correct.
- 45:52 G. Greco              Yeah.
- 45:52 Chair Ellis            What is your plan?
- 45:57 G. Greco              I don't know. We have talked about having non-lawyer members of the board. I am not sure we see the utility of that. I was interested when I heard the Lane County gentleman indicate that Koenig and Diment were on their board. So they were not indigent providers but they were at least lawyers who understood ...
- 46:24 Chair Ellis            That is perfectly acceptable.

- 46:24 G. Greco I have a few. There are a few criminal practitioners in the county who don't do indigent defense. I think they could make a contribution and maybe an accountant to help me count the dollars. Again, the issues we deal with are making sure we don't overpay ourselves.
- 46:59 Chair Ellis You have no bylaws. You are operating on an oral understanding.
- 46:56 G. Greco Pretty much. You have to understand that essentially what has happened – the way we are providing services isn't a whole lot different than it has been since about 1990. We kind of do it the same way we did it starting in 1990 with IDSD. A lot of it is generated by what the courts want. The court wants to have a lawyer at every arraignment. The court wants a lawyer to show up for every shelter hearing. We work with the courts because they morph into different kinds of status hearings. In criminal cases - it is probably in the report - we have to report every three or six weeks. At one point they had all the lawyers in all three courtrooms at the same time. I had to go into the presiding judge and say, "That isn't going to work. We can't manage that." What we have tried to do is basically to provide the services that the courts want us to provide in terms of where we have to be and when. That has pretty much always been the same.
- 47:53 P. Ozanne Guy, what is the total value, roughly, of our annual contract? How much money comes to you per year?
- 48:02 G. Greco Annually we were at \$1,169,000. I just got Shelley's reconciliation for the year two days ago, yesterday. That \$1,169,000 is what we were paid. We had a \$28,000 shortfall through December. We have \$55,000 in the bank. The courts have driven how we provide indigent defense. I guess we could have bylaws. Because we are a mixture of firms and sole practitioners, I think it is the firms' obligation that their associates are mentored and their associates attend CLEs. We are all competitors. It is kind of difficult for me to put my foot down and say, "I am going to do A, B, and C to you."
- 48:58 Chair Ellis Have you had new entrants into the consortium in the last five years?
- 49:08 G. Greco The way it works is like a feeder system, as Jeff Pridgeon said. There will be turnover in a firm and 50% of the time if someone leaves a firm they are able to stay in the county. For example Mr. Taylor, who is now on his own, was an associate and then he became a new, separate member when he was no longer an associate. The reason that happened was only because the person that preceded him in sole practice went to the Attorney General's Office. There was an office waiting for him to go to.
- 49:40 J. Pridgeon There isn't anybody practicing indigent defense in this county that came to this county to open up a shop to practice indigent defense. I came to the district attorney's office. Guy came to the firm. These people that we have mentioned have come through the firms and then have gone out and become sole practitioners. It is with everybody's blessing that they do that. They are all people who have proved they are competent.
- 50:07 Chair Ellis Around the state there are, I think, 14 public defender offices. Just to describe that, I think they are all non-profits who contract for a caseload. They have full-time employees working in the indigent defense area. That model has worked very well in terms of training and supervision. I think it really is a strength of that model. Have you all given any thought to structuring a true defender's office here?
- 50:56 G. Greco No.
- 50:59 J. Pridgeon No.
- 50:59 Chair Ellis I thought that would be the answer.

51:06 J. Pridgeon It is not necessary and I think we would have a fallout of some of the senior people.

51:13 Chair Ellis Walk me through what you are saying there.

51:13 J. Pridgeon Well, I am certainly not in a position at this stage in my career to just do indigent defense. I have a family to support and ...

51:25 Chair Ellis And you have a blended practice. I understand that.

51:24 J. Pridgeon I have a blended practice and I pretty much – we don't like to use the word "specialize" but I pretty much specialize in juvenile law. The way this group is constructed allows me to do that. Am I going to be an employee of a public defender's office?

51:43 Chair Ellis You might even be the manager.

51:45 J. Pridgeon As a full-time employee or not, I am not interested in that. I like doing what I am doing because I am representing the most vulnerable people and I like doing it.

51:57 Chair Ellis I understand that answer relating to your personal situation. From the standpoint of provision of service in the county, what is your thought about a defender office, if we could get to that, that would probably include some of the people that are here?

52:17 J. Pridgeon My impression of public defender offices is that they have greater turnover than we have. We have people that have been in this community for a long time. I have got people where I am representing the third or fourth generation of the same family in this county, whether it is with criminal problems or other kinds of problems. We know the community. We are all part of the community. It works for a small community like this in a much more intimate way than a public defender office, where I think you are going to get more turnover as people move through. That is just an impression.

52:53 Chair Ellis I do get the impression from each of you that until our staff came through and started asking these questions that training wasn't high on your agenda. Am I right?

53:08 J. Pridgeon I will admit to that, yes.

53:14 G. Greco I can't speak to that because I probably get 20 hours a year of criminal CLEs. I try to get them for free so I moderate them. Everybody knows that I am reading these things all the time when I am sitting in court. Again, you made of us aware that the training dynamic is supposed to come from the consortium on down. I expect that the lawyers that work indigent defense are responsible enough to fulfill their obligations to meet their educational requirements. I am pretty sure that the sole practitioners are like me. They attend CLEs. At the one we did in Newport there was a sprinkling of our members. We have a lot of OCDLA CLEs in Newport, quite a few. Those educational opportunities are available. I wouldn't want to say that we don't think of it. I think it is an obligation that every practitioner should do that.

54:14 J. Pridgeon I think we do that. I think the criticism was more about dealing with local issues: Do you sit down and talk about district attorney policies and how they affect indigent defense globally, practice in the courtroom, the application of the administrative rules for the sentencing guidelines as one judge is seeing it? I took that to – when I actually looked into that, people are doing what they are required to do by the bar. It is really kind of the nuts and bolts of how you are practicing here, and is everybody getting the same treatment from the district attorney's office and the judge and are we aware of it? I think that is the area where we have been weakest in any formalized kind of sense. In an informal sense as you have gathered, we all know each other pretty well. We have been on the same side or butting heads with each other for a long time. So you pick up the phone and you call somebody. It is pretty one-on-one in terms of working with each other.

55:27 Chair Ellis So the Ouderkirk firm is not here today I gather.

55:34 G. Greco They are not.

55:36 Chair Ellis I don't want to be unfair. As I read the report, it sounded to me like the two partners there do very little of this work, that the firms take their allotment of cases and the young associates are the ones performing the work. Is that accurate?

55:56 G. Greco That is pretty much it.

55:59 J. Pridgeon Not real young at this point.

55:59 G. Greco They are not real young. The aging of the bar. Got that from you. They were aware of the issue. I circulated the draft report to everyone. I know Mr. Hollen planned to be here. I had invited them to address the issue and I don't know why he isn't here.

56:27 Chair Ellis Let me just say as I think I indicated in my introduction, we have worked with law firms as contract providers in various places. Janet, is that you?

56:59 J. Stevens [By telephone] It is I.

57:01 Chair Ellis Alright. You are in the middle of a large public hearing here in Lincoln County. Welcome.

57:09 J. Stevens Oh, great.

57:10 Chair Ellis We were talking about one of the law firm members of the Lincoln Defense Consortia. As I understand the report the two partners themselves do very little. I think you maybe indicated 10% of their time. The associates, who may not be young but they are associates, 90 to 95% of their time is on indigent work. I guess my question is – I want to compare that with law firm providers that we deal with elsewhere in the state. One of those is the Morris law firm up in Hood River and Wasco County. Jack Morris is the partner. I am not sure whether anybody else is a partner with Jack, but it is clearly a law firm. He does a great job. Jack is all over it. He is a very focused provider himself. We had the same kind of circumstance in Roseburg in Douglas County, where Jim Arneson is the lead. He is a very admired guy in that community. He does a great job. It is he who participates when there are discussions about the criminal justice system, etc. So this is a different model than we have seen before. How would you describe it? Are you comfortable with the partners in a law firm participating in your consortium but really passing the work on to their employees?

59:00 G. Greco I don't know what the percentages are of Morris and Arneson. I am implying from what you are saying that they probably – are they doing almost exclusively indigent defense?

59:08 Chair Ellis That is my understanding.

58:09 G. Greco That would also be the Ramsdorff firm in Bend. I think historically in Lincoln County there were never any firms that were 100% dedicated to indigent defense. We grew up as practitioners having that as part of our overall practice but not all of it.

59:26 J. Pridgeon Part of that was at the request of the predecessor to Mr. Ozanne, because ...

59:40 Chair Ellis Are you talking about Ann Christian?

59:40 J. Pridgeon I think so. I think it was about that time. It became clear that we needed to have a large enough pool of people doing this so that we could meet the conflict situation

when a group of people got arrested for the same thing and we had to have enough lawyers to cover all the co-defendants. We were kind of encouraged to spread it out to a size that could accommodate those kinds of cases.

- 1:00:04 Chair Ellis      Actually the firm participants complicate the conflict issue. The two law firms are subject to the unit rule.
- 1:00:18 J. Pridgeon      Of course. You have the two firms and then you have the solo practitioners and that is large enough.
- 1:00:20 Chair Ellis      Unless I am missing something that is not quite catching the issue that I am asking about.
- 1:00:30 G. Greco      Let me get to that. I can, at least to a certain extent, paraphrase what Mr. Hollen said to me. He indicated that they are providing the overhead and the office and all the staffing. The amount of money they receive is close to what they are paying for two full-time (inaudible). In other words, although the partners are not doing a lot of the work, if they have two people that are working 100% of the time on indigent defense they are getting almost two FTE worth of compensation. That is only factor to consider. The downside to me is that when I hear the judge saying that they would like some better Measure 11 defense, I am just concerned why can't these practitioners – we have got two experienced practitioners who would be available to provide that work and they are not doing it. The other concern is that perhaps the associates are maybe doing more in terms of caseload than one FTE. So they may have too many cases and that is affecting their performance.
- 1:01:46 P. Ozanne      The downside for me is that the two FTEs aren't receiving that plus the overhead. There may be something else going to the firm. We don't know about the firm because we don't have any business piercing the firm veil, if you will.
- 1:02:15 G. Greco      Exactly. We don't know how much profit is over the overhead expense. When I tabulate my numbers it was an eye opener for me to see how few credits they were actually taking. I want to go ahead and paraphrase Mr. Hollen again. That is he say, "Well, if my associates told me they were working too much and were overloaded then Mr. Ouderkirk and I would take the overflow. They are not telling us that." I just want to make sure I get that out there that that is what he has told me.
- 1:02:54 Chair Ellis      I don't want to sound like I came here with an agenda because I didn't. I already know you're kind of resistant to thinking of a public defender here. But as I read the report and I saw this description, I will tell you the question in my mind is wouldn't Lincoln County be better served if you had a PD office with a real manager managing those associates, who would then become public defender employee lawyers, than if you kept the model we are looking at? It does seem to me that the partners become kind of a pass through. They are not really engaged in defense work.
- 1:03:47 J. Pridgeon      Not in my firm.
- 1:03:54 Chair Ellis      No. I am trying to be accurate. So am I wrong? Am I missing something?
- 1:04:03 R. Scholl      I have been here 20 years. You have five or six sole practitioners with a lot of experience. Those practitioners would not be part of a public defender's office. They just wouldn't do it.
- 1:04:21 Chair Ellis      They don't have to be. Most of the communities that have a PD also have a consortium. You can't do it with just a PD because of the conflict issues. PDs are subject to the unit rule, but as an organizational structure designed to provide services, PDs have been pretty good.

- 1:04:47 R. Scholl I don't mean to say that a PD office would not be appropriate. I guess the point that I wanted to make was that the five practitioners who are sole practitioners are all experienced. We train ourselves with CLEs and primarily OCDLA. I would suspect that we are all members of OCDLA. That should be mandatory. We exchange ideas with people in the state. It is really a statewide system in terms of legal analysis of cases, etc.
- 1:05:20 Chair Ellis This is good.
- 1:05:26 R. Scholl OCDLA is our trainer for the most part. Then through that you link into the MPD trainer and all the resources there. That is how we get our education here in Lincoln County. There is always the exchange of information. For example if I don't have a pleading that I need I can email Guy and he will tell me if he has one or a case that he had one. For us to be well trained we use OCDLA. It is the best resource there is.
- 1:05:59 Chair Ellis You are not the problem that I am talking about. You are essentially a full-time, focused criminal defense lawyer and you are doing your thing and we are proud of you. I am focused on this model of a law firm participant with two partners who are spending really very little of their time on it. The work is being done by associates and I am asking if that is a very good model.
- 1:06:33 R. Scholl Right. The epilogue to my little story here is that the four people we are talking about, the people who work for those law firms who provide a lot of indigent defense, if they are getting the mentoring from those law firms - and I don't know if they are or not, I am assuming Jeff is doing that - they also have the statewide resources that we could use. The only thing that I see is missing, if it is missing, would be the mentoring of those fairly new associates working for those law firms to make sure that they are taking advantage of all those statewide resources and all that type of thing. That is all I have to say.
- 1:07:07 G. Greco One final point. I can see the concern you might have with that one entity, but I didn't get an impression from the report, nor have I gotten one from any of the district attorneys, judges, or any of the participants that we are broken. We are providing excellent service as a general rule. If we are not broken why do you want to fix it?
- 1:07:32 Chair Ellis Let me read a passage that prompts this. I don't know the names of who is being referred to here but this is at the bottom of page 9. It says, "Three of the senior public defense lawyers who could provide excellent representation in all case types, including Measure 11 cases, never appear in criminal court. Two of the experienced lawyers who do appear seem apathetic and one of them provides obviously better representation to retained clients than to public defense clients. Neither of these latter two attorneys files motions or takes cases to trial." I am not here to go after any particular individual. I look at that and say is this a system that is really providing quality representation? I have to say that those sentences, if true, indicate no. Let me go to one other subject here.
- 1:08:33 J. Pridgeon One of those three is me. I don't do criminal cases. You can't even do good juvenile work in this county because all of your kids live someplace else because we don't have any resources here and you have to try and keep up with them all across the state. I don't do criminal cases because I have my hands full.
- 1:08:59 Chair Ellis Okay.
- 1:08:59 J. Pridgeon That is for me. As to the other two I can't speak to that.
- 1:09:05 I. Swenson Mr. Chair, can I interrupt? Judge Littlehales has a hearing at 10:30. Can you hear from him and then return to this discussion. What is your preference?

- 1:09:15 Chair Ellis      Okay. I tell you what. Let me ask one other question and then we will bring Judge Littlehales up. I don't mind making this a community deal. It doesn't have to be one on one. I did want to ask this question and it appears at page 11 of the report. I think it is an area in which you are going to be the responding person. It says, "However it appears that while agreeing to a contract that valued cases appropriately" – this is the contract between the consortium and OPDS - "the consortium decided to continue the single rate model internally. Since under their internal model attorneys receive no more compensation for handling Measure 11 cases than they do for handling misdemeanors, it may not be surprising that some lawyers prefer not to handle the more serious cases and assign them instead to associates in their firms."
- 1:10:16 G. Greco      I don't agree with that. I don't think that that is accurate or true. It is accurate in the sense of how we compensate ourselves internally. But I would differ with the suggestion that the Measure 11 cases are then pushed on to the less competent lawyers or associates because of that. We think in terms of volume and not in terms of weighting the cases, okay. Bottom line is that our overall compensation will depend on that mix. In other words, we are holding money back because we don't know what the compensation is going to be because the cases come to us randomly. But we assume that overall, since we all agree to do a certain percentage of the volume ...
- 1:11:10 Chair Ellis      That includes the heavy cases.
- 1:11:14 G. Greco      Yeah. They are going to average out. But some people are willing to make sacrifices. He does juvenile cases. I don't begrudge him that. I don't know how difficult it is anymore because it has changed. We generate a lot of review credits. There is a lot of revenue that comes in from review hearings. Interestingly enough the variation of that has to do with how often Judge Sanders is here. When she is gone for two weeks that goes down because there are no review hearings and when she is here it goes up. I don't do any juvenile. Frankly, juvenile was much more time effective for me. You can do a juvenile case in less time than you can do a Measure 11. I don't care. I would rather have more Measure 11 cases and continue to do that. In other words, I don't get a random assignment because I don't do juvenile. Most of the practitioners, Mr. Scholl, Reynoldson, Taylor, they get the whole mix. We had decided, and this was just a conscious decision of our board, that we would just rely on the randomness of it and we basically pay each firm a fixed amount each month. The mindset should be you are receiving \$8,000 a month to provide the best defense service you can. You are on a salary.
- 1:12:31 Chair Ellis      You don't think there is cherry picking going on?
- 1:12:36 G. Greco      I responded specifically to that paragraph by email to Ingrid. A DUII can take way more time than a Measure 11 case. Especially now if you get a third offense you are going to trial because that person is going to lose their license for life. Half of the Measure 11 filings settle out of Measure 11. You get a plea offer that takes your client out of Measure 11 you are done. So I don't necessarily think the weighting system is necessarily commensurate with the amount of time involved.
- 1:13:12 Chair Ellis      I am going to agree with that on any individual case. I think we feel that over time and with a reasonable population of cases...
- 1:13:23 G. Greco      I don't see any cherry picking at all. We have described the way the delivery system is working. The Ouderkirk firm has got two full-time indigent lawyers. There is no cherry picking because they take what they get.
- 1:13:37 Chair Ellis      Let's stop for a minute. Judge Littlehales I want to respect your time. You guys can stay here if you want.
- 1:13:47 J. Littlehales      I had it in my notebook. I have to apologize. I really wasn't sure what this hearing was all about. I did read and responded on the 25<sup>th</sup> to Ingrid. As far as reading the

draft and any comments that I had, I didn't have much of a comment other than there was an error in there.

1:14:20 Chair Ellis Thank you for joining us. We are very interested in hearing from where you sit what your observations are as to – we are not talking about individuals. We are talking about the system as a whole - the provision of service to indigents accused of crimes. Do you feel like the quality is good? Do you feel like there are ways we could improve this system? What is your sense?

1:14:50 J. Littlehales I think that overall they are doing an adequate job. I have been doing this since 1969, so I am not a newbie in this. I have watched the different systems that we have had on indigent defense long before you set up the statewide system. The new lawyers come in and in the past they were getting a lot more mentoring. Our big concern, and even with some of the ones that are doing Measure 11, is that you have people who aren't that familiar with the Evidence Code. I am talking about the three, Hollen, Ouderkirk and Jeff Pridgeon, experienced lawyers, but they are not that experienced because they are not doing Measure 11 kinds of cases, particularly when you get into child sexual molestation cases. You have a lot of Evidence Code issues and you look out there and say, "Well wait a minute. Have you explored that?" They don't come into court. It is their newbie guys and gals that come in. Overall they are doing a good job. I would like to see more mentoring in looking at the case when it initially comes into the office. It isn't just indigent defense but it is also the district attorney's office too - that you evaluate your case based on the resources that you have. We are seeing a lot of cases go to trial that should never go to trial. On your DUIs you are kind of locked in because you can't negotiate them unless you have a second charge. The DA's office will usually throw in a couple of complimentary recklessly endangering things. They can throw those out and let the person plead to the DUI. I have had a number of cases in the last three or four years where we have gone to trial and it hasn't been in the best interest of their clients. By the time I hear the whole case, I am hearing a lot more than I would have heard if I had gone in for a plea and sentence. In a plea and sentence you get a real watered down version. You get the PC report, oftentimes, as the only factual basis you have. You go to trial and you find out this old guy was stalking these young cheerleader girls...

1:17:15 Chair Ellis You sound like the piece in the paper this morning about Judge Ken Walker. The molestation case and the defendant makes an impassioned argument why he shouldn't be sentenced. Judge Walker, according to the paper, says, "Well, I wasn't sure what I was going to do before I came in but you didn't help yourself."

1:17:38 J. Littlehales Exactly.

1:17:38 G. Greco If I can interject here for just one minute on that. One of things, and this is a compliment, I think, to our bench, is I have no sense, and never had any sense, that an individual is getting a more serious sentence if they go to trial. Our judges are really good about that. I have done 25,000 cases and I have not seen – I mean obviously if you get convicted of more counts than the plea bargain that is another story - I have not seen anybody getting punished for going to trial. That is something that I think we have to counsel our clients about. If you want to see the horses run that is your business. It is your right to go to trial. I am not going to stop you. The only time you tell them they are looking at a worse outcome is if they are rejecting a plea bargain that is going to expose them to less time than they could get. I just want to interject that.

1:18:24 J. Littlehales I appreciate that. There is a factual basis for the plea as you well know, and then there is an exposure to what really happened. When you have the victims there testifying that this person was doing certain things and it scared them, as opposed to a lot of stuff we see where there is disorderly conduct and people with a mental illness. They are just being nuisances. One gal we have sits over on the JC Market bench stark naked yelling and screaming at the people coming in - a big nuisance and

a problem in our community but not a real danger to the public. After I have seen some of these trials I become quite aware. I don't punish them for going to trial, but they just gave me more information than I would have had before.

- 1:19:17 Chair Ellis      An issue we have talked about this morning is one of the law firms that participates in the consortium has two partners who spend approximately 10% of their time on this work. They have two associates who spend 95 to 100% of their time on this work. That is a different law firm model than we have seen elsewhere in the state where some law firms provide wonderful defense service but the partners are the real leaders on it. Yes they will have associates but the partners are actively involved supervising, mentoring, and so on. Do you have any reaction to whether this model of limited time partners and full-time associates is working?
- 1:20:14 J. Littlehales      I don't think it is the best scenario. I think if we are dealing with Greco, Mr. Greco, he is up to speed on all this. I am not sure that the others would be up to speed on most of the criminal law issues. As far as their mentoring you have to know what the law is and you have to be in doing these kinds of cases.
- 1:20:32 Chair Ellis      I don't practice criminal but I have great respect for those who do. I know perfectly well it is as difficult, complicated, and specialized a field as any field I can think of.
- 1:20:45 J. Littlehales      Sure it is. You have to keep up. You have to read your advance sheets. You have to make sure – you know the Supreme Court came out with a 403 ruling today - make sure you have read that one before you go into your next hearing. Those things are changing constantly, particularly in the area of the extended search in the stop on a DUI and the “May I search your car?” kind of stuff. That is a constantly changing process that requires you to read those advance sheets and keep up with what the Court of Appeals and Supreme Court are saying, just as you do in probate or family law. Family law has changed so much. I don't like doing [juvenile cases] anymore, although I take a number of Judge Sanders' conflicts, just because – I don't know when it started, [addressing Commissioner Welch] you probably know better than anybody - about 10 years ago the feds got involved and put in some pretty specific requirements on active efforts, reasonable efforts, and all this kind of stuff.
- 1:21:49 P. Ozanne      Judge, your comments seem to be borne out by your statistics about trial rates. The felony trial rate in Lincoln County is below the statewide average and the misdemeanor is above. If I understood your point, you are observing cases that really aren't worthy of trial or taking your time. It might be happenstance of course, but do you think it could be due to the unavailability of senior people to assess the cases on either the DA's side or the defense?
- 1:22:22 J. Littlehales      I think on both those two. An experienced lawyer will have client control. Sometimes you have the mentally ill that you have no control over. On those you either go with fitness to proceed or you just let them go in there and do their thing. But in many of the cases we have you have to evaluate the case from both sides. You say, “We have had this offer from the state and we make a counter offer and the best deal for you is to take this.” Now if they say “no” it is a decision whether you go on in spite of that or whether you resign. I don't think you want to push resigning all the time because that just makes another attorney have to go through the same process. I don't think there is enough pressure by the defense attorneys as well as the prosecutors to really evaluate those cases. We have a lot of cases statewide and we can't try every single one of them. We don't have the resources. We don't have the jail space.
- 1:23:33 Chair Ellis      Do you have much of an issue here with substitution requests where the client expresses dissatisfaction with the lawyer and you are in the position of having to decide, “Do we allow a substitution?” For us this can be a very inefficient, costly thing. We will have paid the lawyer and then you have to pay the new lawyer. Is that an issue that has surfaced here?

1:24:02 J. Littlehales I don't think it is so much of an issue. You can name the individuals because we see these people repetitively. They can't get along with any lawyer. They want to be in control and they want to tell the lawyer what to do. Again, a lot of that is mental illness. As far as firing the lawyer I have had them say, "I am going to fire my lawyer." I say, "Well, fine. You go hire your own. I am not going to appoint another one. You have competent counsel." If their concern is over a substantive issue I talk to them. The lawyer is usually there. The lawyer says they aren't agreeing on that. "I don't think we can do this." He may want to tell a different story than he told the lawyer the first time.

1:24:47 Chair Ellis But you aren't seeing it as a recurring ...

1:24:47 J. Littlehales I don't see it as a real repetitive thing. What do you see?

1:24:52 G. Greco What I see is it is Measure 11 driven. When you have a client in jail who is only going to be offered some substantial prison, they don't want to hear it and you are stupid. Quite frequently I will see Measure 11 cases cycle around to more than one lawyer. It is almost like they need a second legal opinion before they will walk off that plank. Again, there are the mentally unstable people but I don't see any particular lawyer in the consortium that has got a problem with it. In my experience it is like, well, I am not going to win this case. I have one right now that is going to get 140 months because the judge said he is going to give him 100. He wants to go to trial for five days. He hasn't fired me but usually at the last minute they will want to fire me.

1:25:48 Chair Ellis The other area we encounter that leads to a lot of inefficiency is late identification of conflicts. A lawyer gets started on a track and didn't realize that a former client is going to be an adverse witness.

1:26:07 J. Littlehales I have not seen that here. I think they do a pretty good job of screening out cases that they would have some kind of conflict with.

1:26:14 Chair Ellis Is that kind of left to the individual lawyer to read the file early and see if he or she has an issue?

1:26:22 J. Littlehales Absolutely. I think the lawyer has a responsibility to go through the police reports.

1:26:26 G. Greco We have a system internally in the consortium on how to handle that. If you get appointed to a case and you have a conflict you have a particular other law firm that you go to. We have a protocol written out of who the next person would be. We don't get the court involved and we have a standard form of substitution. We will say conflict of interest and boom. We take care of it all and the court doesn't have to worry about it.

1:26:51 (unknown) It would be rare to have a double payment. There are no double payments unless you have had the case for six months or so.

1:26:55 G. Greco There are no double payments on any substitutions. We don't have bylaws but we have a policy on how that will be portioned out.

1:27:10 Chair Ellis Good. Any suggestions you have how we can do our job better in respect to Lincoln County?

1:27:25 J. Littlehales If we could have more than just two or three who are capable of doing Measure 11 offenses and the more serious offenses. You have burglaries and others that are up there that can rack up some time if you get yourself up in the A category of the sentencing guidelines. There aren't enough when you have just the four young ones that come in to spread that around.

1:28:03 Chair Ellis The extraordinary expense issue, defense lawyers that need experts and the like....

1:28:10 G. Greco You are reading my mind. I was just thinking of that. Go ahead.

1:28:11 Chair Ellis I am interested from the provider point of view, do you feel that the process for reviewing and approving that is working?

1:28:27 G. Greco I think it works quite well. I think you have to talk to staff at OPDS about whether they feel there is any abuse of that. I can only monitor my own. I probably only apply for expenses in 10% of my cases. That is probably it. I will just give you the anecdote because I handled two murder cases last year. They were outside the contract and I got paid by the hour. In one of them – just the frustration you get. One of them I got paid \$700 for. The other one I got paid \$900 for. My expert, who helped me get my settlement, got \$6,000 to go and interview my client to establish an extreme emotional disturbance defense. I presented it to the DA and settled my case. I got paid my hourly rate and settled the case. But you are seeing this psychologist getting \$6,000 or \$7,000 dollars and you are making \$800 on a murder case. You wonder why I am doing this. I just wanted to share the anecdote so you could see some of the economic frustrations that we face. I don't see a problem with the extraordinary expenses. Staff would have to tell you if there is an issue.

1:29:45 Chair Ellis Was the Ouderkirk firm invited to be here?

1:29:46 G. Greco They are here. Come on up.

1:29:50 Chair Ellis Judge, I know you have got a 10:30.

1:29:56 J. Littlehales I do but they won't start without me. We can go a couple of minutes.

1:30:15 Chair Ellis Any other thoughts or suggestions you have? You know our job is to do the best we can, with the state resources for indigent defense, to structure a system within each of the communities that works. That is what we are here for. Any other thoughts you have?

1:30:39 J. Littlehales I think I need to be more aggressive. I think the judges are looking at that now, as far as communicating not only with Guy but the other members of consortium. I don't like the selection by the defense - what I would consider judge shopping. Our newest is out of the prosecutor's office, as is Judge Sanders. We get cases where the defense says, "My client can't get a fair trial." The person's name is Jose somebody that doesn't speak any English. He wouldn't have knowledge of that particular judge unless the attorney is saying that. Now if the attorney is saying you can't get a fair trial before a particular judge, then he really shouldn't be trying any cases before that particular judge. It is, just to me, of concern although it is getting better now. I think they are getting more comfortable with Judge Bachart. She is an outstanding lawyer, at least in my opinion. She deserved the job. She was our first female on the bench. She came out of Toledo. Has a family here in Newport. She is just a marvelous example – in fact she gave the commencement speech last year to Toledo High School. She was the first one in her family to graduate from college. I very much like our judges. I enjoy working with the bar, both the district attorneys and the defense bar, but for a while there we were getting a flurry of them. Some of it might have just been a nervousness about the fact that she came out of the DAs office. I think every judge in Lincoln County for the last 15 years has come out of the DA's office.

1:32:40 Chair Ellis At breakfast this morning we were talking about around the state there were a lot of judges who came out of the defense practice, PD offices and the like, and they tend to be the most severe on defendants. There is no certainty about that.

1:33:00 J. Littlehales I tend to believe that judges shouldn't be severe on anybody. They should follow the law. With sentencing guidelines we don't have a tremendous amount of discretion. I don't have any defendant that I have any animosity towards. Conduct yes. I do the

best I can to do my job, to be fair, impartial, and impose a sentence that is appropriate with what authority I have.

1:33:43 Chair Ellis      Anything you want to support, disagree with, or add to the report?

1:33:58 J. Littlehales      No. I thought it was pretty accurate as to what we have here. I read it a few minutes ago and nothing jumps out at me.

1:34:20 Chair Ellis      We would welcome any written thoughts to Ingrid.

1:34:28 J. Littlehales      I appreciate that. I appreciate you folks coming over. Our civil side is just as important to me as our criminal side. Although if I never get another one of those things that Judge Branford is doing down there - they have a complex litigation court now set up. We are going – he has been going since about the first or second week in January. That has a tremendous impact on our ability to dispose of the 90% criminal cases that we have.

1:35:00 Chair Ellis      Unless there are other questions...

1:35:02 G. Greco      Can I ask a question? I don't know if you were in the room when we were talking about this. Do you feel that a service delivery model based on a public defender office – in your view would that improve the quality and efficiency of indigent defense services in Lincoln County?

1:35:28 Chair Ellis      This would be a group of full-time defense lawyers functioning as a non-profit law firm in the community. You would have a manager and whatever number of others who are full-time defenders.

1:35:44 J. Littlehales      In Lincoln County we tend to be interrelated with everybody. You have many so many conflicts.

1:35:51 Chair Ellis      You couldn't do it as the only provider. That is a given.

1:35:58 J. Littlehales      You would have to have five to seven other lawyers that you would hope to be up to that experience level that could be doing the conflict cases. I don't think a public defender system in Lincoln County is going to be the best bet. I think a system such as what we have that is more closely monitored by myself as presiding judge and the other three judges and the contract head to make sure that we are getting the representation that these people are entitled to...

1:36:31 Chair Ellis      The model that we have found that works quite well in several counties - and Lane would be an example, Marion is now an example - is a combination where you have a PD office carrying a piece of the caseload and some other form, typically a consortium of individuals, separate lawyers...

1:36:56 J. Littlehales      But you are looking at counties – Lane County, Marion, Multnomah, Clackamas, Washington ...

1:37:02 P. Ozanne      Coos.

1:37:05 Chair Ellis      Deschutes.

1:37:05 J. Littlehales      Well Coos would be similar to ours. The others have a lot of extra lawyers in them that are experienced and you could have the conflict cases dealt with. I am not sure you could do that in Lincoln County.

1:37:16 Chair Ellis      Thank you very much.

1:37:18 J. Littlehales      Thank you.

1:37:26 Chair Ellis I would like to take a five minute break.

[break]

1:38:46 [Janet Stevens signs off.]

1:40:03 Chair Ellis We have Mr. Hollen of the Ouderkirk firm. Have you had a chance to see the report?

1:40:16 J. Hollen Yes. I apologize. From looking at the schedule I thought you had a fairly full schedule this morning. I had a 9:30 hearing that I went to.

1:40:21 Chair Ellis Well we took the occasion to do a lot of talking about your firm when you were not here.

1:40:30 J. Hollen That is good. I can come in unbiased.

1:40:33 Chair Ellis Any thoughts or comments you have on the report?

1:40:34 J. Hollen Lots of them. The one thing I am looking at is that there are only two firms, Pridgeon's firm and our firm. We have two associates. Alan Biedermann has been in the public defender's office doing appellate work before he came here. He has been doing – I didn't count the years but he must have 15 or more years under his belt in indigent defense.

1:41:04 Chair Ellis How long has he been with your firm?

1:41:11 J. Hollen I would say 15 years, I think, I really didn't count.

1:41:12 G. Greco Between eight and 10 would be my guess.

1:41:17 J. Hollen Seems like it has been a lot longer. When we first hired him he was doing civil work. That was when we were up the hill so that would be about 10 years ago. Then he began doing exclusively criminal work somewhere along the line. Our newest associate just became Measure 11 qualified. He has been with us for a couple of years. He seems to be doing fine. I have not heard any complaints about his performance. I am not sure who is being talked about. Other than that it would have to be the Pridgeon firm. The other thing that I noticed based on the statistics is that the more experienced attorneys aren't handling Measure 11 cases. I guess that points the finger directly at Jeff Ouderkirk and me. In the last contract and a half, the amount of work we have had to do on the indigent defense cases has dropped more and more and is down to almost nothing. That is based a lot on the volume of cases and the ability of our associates to handle them. That is really what that is based on. The other thing is whenever an associate leaves someone needs to fill the gap and then we would pick up more cases.

1:42:38 Chair Ellis So what percentage of your personal practice time is spent on criminal?

1:42:51 J. Hollen I would guess maybe 5%.

1:42:54 Chair Ellis And of that what percent is the indigent piece?

1:43:00 J. Hollen Probably half of that.

1:43:01 Chair Ellis Is the same true of your partner?

1:43:03 J. Hollen He actually has a little less.

1:43:07 P. Ozanne I am really disappointed about Jeff. He was in my first trial practice class and I expected him to continue on with all he learned in trial practice.

1:43:17 J. Hollen I will say that it is difficult at times to have your foot half in and half out. The indigent defense schedule pretty much consumes you. If you have an indigent defense case you are over here at the jail. You are back over here. Back at the jail. Your schedule is completely disrupted and always on short notice. It is difficult to run both a regular practice and an indigent defense practice. In the past we have had this situation and we have worked around it because there have been four or five of us. Whoever is going over to the courthouse can handle that appearance and can leave me free to take my office appointment with either an indigent defense client or a civil client. We have always tried to make it work for our schedules in terms of who is going to be over here. If our associates doing indigent work are able to handle it, then we will allow them to take as much as they can. That leaves us free to handle our other cases.

1:44:25 Chair Ellis Was there a time that you did a lot of criminal, or has that never been a big part of your practice?

1:44:32 J. Hollen When I began in 1976, I think they had just raised it to \$35 an hour. That was 95% or more of my practice. Over the years I have done criminal defense work. I would probably say in the last 10 years it has declined more and more as we have basically another office. We have two offices. One pretty much does exclusively indigent defense work. The other is an office more involved with civil.

1:45:11 Chair Ellis One in Lincoln City and one here?

1:45:13 J. Hollen No. One is right down here next to the jail. The other is right next to the post office less than a block away.

1:45:24 Chair Ellis So when you weren't here and we were talking about you, let me tell you the question that I put to several people. We do contract with law firms elsewhere in the state and some of them are among our very best providers, but in the ones I am thinking of the partners are essentially full-time on this. They are kind of the point persons in their communities for criminal defense. They are the ones who talk with the DAs and the judges about system and structure issues. They train, supervise, and mentor the younger lawyers in the office. It has been a very successful model. Your office is, to my knowledge and I may not have perfect knowledge here but I have been involved with this for quite some time now, is very different than what I have seen elsewhere. The partners are not playing that role at all. You said 5% and maybe 2% for your partner.

1:46:37 J. Hollen On the current contract that is correct.

1:46:39 Chair Ellis So tell me why we should think that is a good idea?

1:46:44 J. Hollen Okay. I am still involved. My one associate three or four years ago or something, had an indigent defense juvenile client complain about them. OPDS did an investigation and didn't like his performance. I supervised him for the next two years watching every case and following up. I still read, as Judge Littlehales indicated we should, pretty much every criminal case that comes off the list that looks like it has any significance. On search and seizure and the different types of search and seizure, I categorize them and put them in our computer base. We have a criminal law computer base which has the cases for warrantless stops and all these different categories of issues that might come up. We use those and my associates are aware of them and use them. I am still reading pretty much every criminal case of significance.

1:47:44 Chair Ellis But wouldn't we be better off dealing with a provider office where the senior people were heavily involved and not just marginally involved?

1:47:58 J. Hollen                    Certainly, yeah, you would be better off. If you could find an office that fit that model in this county I would say sure. Primarily you are really looking at indigent defense as the bulk of it. Maybe a half of one percent of the criminal cases in the county, maybe one percent or more, are retained. There is not an ability to have anybody with specific experience ...

1:48:36 Chair Ellis                    I would have thought with the amount of tourism you get here, both in Lincoln City and the Newport area, that there would be a fair number of high income tourist types.

1:48:55 G. Greco                        It varies. I would have to say 30% of my criminal practice is retained. I am pretty networked into the list, the pond, and everything. I am handling those people. I have clients in Massachusetts right now, Arizona, Washington, Nevada, and we are going to see the Seafood and Wine festival here pretty soon for all the DUIs. I am a little bit different.

1:49:22 J. Hollen                        Do we agree that you probably have more retained criminal cases in the county than anybody else?

1:49:26 G. Greco                        I do.

1:49:27 J. Hollen                        I don't even know who is a close second.

1:49:33 G. Greco                        The judges said I have the lowest percent of the indigent caseload. The judges tell me that I do more criminal cases than anybody.

1:49:40 P. Ozanne                        We have four or five senior people. A couple of these two are doing full-time indigent work.

1:49:50 Chair Ellis                        Why does it even make sense for you and your partner, and you obviously have a successful practice but it is in other areas, to even carry this indigent defense component that you have the two associates doing? Why does it even make sense for you?

1:50:04 J. Hollen                        Maybe Guy can give you the better percentages. I know that we are doing a very small amount now. I have been keeping up on criminal law. I have done some retained work and some appointed work. I have done it since 1976, and up until the last contract, contract and a half, we have done more. We have two associates that if we said, "Forget it, see you later," I guess they would have to go out and open their own offices. It is really no problem. It keeps the office busy and they are providing the service.

1:50:45 Chair Ellis                        But it doesn't sound like there is a whole lot of synergy going on here between the work they are doing and the practice you and your partner have.

1:50:57 J. Hollen                        They are different types. If we were to become a purely criminal law firm there would be 100%. As it is we handle all different kinds of law. That is pretty much since 1976 what we have done. We have handled indigent defense. We have handled personal injury. We have handled estates. We have handled a lot of things. I have to say from your perspective and looking at the statistics you might ask why are they involved? Because we always have been, since the '70s, but our involvement has been declining. We have an office that is right next to the jail. We have a system set up. Our secretary down there - you talk about conflicts - she checks for conflicts when the discovery comes in and brings it to the attorney's attention. The system is set up.

1:51:43 Chair Ellis                        And I have been told that that is working. This is not a county that has late discovery conflicts.

1:51:48 J. Hollen                        She spots them and brings them to the attorney's attention before the attorney even sees discovery.

1:51:53 Chair Ellis She is an administrator in your office?

1:51:53 J. Hollen She is an assistant, receptionist, the secretary.

1:52:02 Chair Ellis But she has the institutional memory and the skill set to check those conflicts?

1:52:08 J. Hollen She is familiar because she looks at all the names as they come in. She has been with us off and on for the last 30 years. We also have a database. She checks the database for names against the police reports when they come in if she doesn't know them.

1:52:29 Chair Ellis How would you describe the value added that you bring to what the two lawyers who are doing all this work do?

1:52:34 J. Hollen The question again?

1:52:42 Chair Ellis Where is the incremental value of having two partners who are not really practicing in the area but are only the contracting party?

1:52:52 J. Hollen I guess a place for these people to land. Without us being there they wouldn't be here. There is not enough money in indigent defense to attract a new practitioner to this area to set up their office. Our last associate, Dan Taylor, was lucky enough – he was with us and probably would still be except an indigent defense provider, Paul Reim, left and basically, between him and Marsha Buckley, gave him an equipped office with staff. That doesn't happen very often. Other than that I guess Kathy Benfield was an associate and then partnered with us. She is providing indigent defense. We have had other people come and go. It is difficult for us to even fill those slots when we are competing with the district attorney's office's benefits and better pay. We can't compete with the state.

1:53:45 Chair Ellis I am going to assume you are not in this for eleemosynary purposes.

1:53:50 J. Hollen No. We do make some money off of it. We do put our efforts into it. We have an investment there also. We have the building. We have the computer system. We have the staff. We have all of the equipment. We have the connection to the internet and to all of the things they are supposed to do. They are not required to deal with the payroll for the staff, the hiring and firing of the staff. They have basically a working system set up. All they need to do is practice law. They don't have to do anything administrative. That is 100% on us.

1:54:31 Chair Ellis Which is what would be true if we had a PD instead of what you are describing.

1:54:37 J. Hollen That has been a thought since 1976. What if they put in a PD office and wiped us all out? I guess I would say you would soon learn what a close knit community this is. What Judge Littlehales has described in terms of conflicts is exactly that. For example, even in juvenile someone comes in and their child is being taken away. You find out, oh yeah, the mother has been our client in half a dozen criminal cases and has actually had three or four of the lawyers in town here already. Who are you going to appoint to represent the child who doesn't have a conflict with the mother? You have the same thing with criminal cases because of so much repetitiveness.

1:55:23 Chair Ellis From your point of view, would it really matter to you that much if it got restructured with a PD office and the kind of staffing that you have in your private office now was staffing a PD office? Would it really matter?

1:55:44 J. Hollen Well, you were talking with Judge Littlehales a little bit about ages. At this point I wouldn't care if you took it all away.

1:55:51 Chair Ellis I already told you I knew your father.

- 1:55:51 J. Hollen           The pay is so low on this and the work is so demanding that I am surprised we can keep our associates. Maybe the benefit of the PD office would be being able to provide benefits commensurate with the district attorney's office.
- 1:56:14 Chair Ellis           As I have said before, I am not here with an agenda but I am here with questions. The other benefits are that you have institutionalized recruitment, training, supervision, mentoring, and participation in the criminal justice system as a voice on the defense side. I am not sure I am hearing those things happen very much in the model that you have.
- 1:56:45 J. Hollen           I will answer it in this way. We do have that set up and we do have the selection process. We want to get qualified associates and we did that with Dan Taylor. We have done that with our other associates. We have not had a problem in terms of selection, training, and mentoring with our associates. We do that. I have done criminal law since 1976. While I haven't tried cases actively in the last several years, I have tried many cases and have basically kept up on the law with these topics. I don't appear in Judge Littlehales court very often with these issues because my associates do. I do have communication with my associates. At this point, yes, Alan Biedermann, who has been with us this long and his experience in the appellate office probably has – he is the go to guy when we have a question about the law. We rely on him heavily, yeah, he has got that experience. There is nothing wrong with that. He is a very experienced in terms of what the law is. He is a very experienced attorney. Who am I supposed to be supervising and mentoring that needs it in my office? We have those two associates. Now with respect to the newest one I talk to him about his cases. We talk about where to go with them and what to do. There is that going on. I have not heard any suggestion that he is not handling the cases adequately. If you want to replace our office with a public defender office to try to do the same thing, you are going to walk into the conflict problem.
- 1:58:27 Chair Ellis           It wouldn't be any more of a conflict than your firm, which is a long-standing firm in the community, would have.
- 1:58:38 J. Hollen           Sure. If you had a PD office with two people in it like we have two people right now who are actively handling criminal defense. If you want to have a four person office then you are going to need to make it pay, you are going to need at least 50% of the contract to handle what we handle now which is 20%. I have looked at it before and thought why don't they? It doesn't pay off with the size of the community and with the conflicts.
- 1:59:09 Chair Ellis           We have had some communities of similar size that have had success.
- 1:59:15 J. Hollen           Yes, Coos Bay. I am not sure how they run it down there or why they have done it. I think they have a public defender's office down there and it seems to work. I don't know what their structure is. That would be something if you could do that here. That might work. It is a little different in terms of how the population is scattered around.
- 1:59:43 Chair Ellis           It doesn't have anything like the summer crowd that you get. It is different and it is much more stretched out geographically in a way that is very challenging.
- 1:59:58 J. Hollen           I guess I would say, why are we a target and why are we here, and I guess it is because we have done it for that many years and we have the system set up. If we were to go, what would be gained? We have two experienced people doing criminal work. If you were to jettison Ouderkirk and me at this point and deal directly with them what would you gain?
- 2:00:23 Chair Ellis           Take the middleman out.

- 2:00:23 J. Hollen Well, that is back to a good question. If it is a viable thing to do to come into this community and set up your own office and just do criminal defense work, why hasn't anyone else done it? It doesn't pay enough. If you could do anything talk to the legislature. They are pounding their chests creating Measure 11 so that all these people go to prison. Then you have to build prisons and now they are wanting to shut them down. That all sounds good when you are passing the law but think of the consequences. Recently we have a new edict that we have to go see our foster kids in situ. Now we have the attorneys pretty much pressured into going to the foster home, which is in Waldport or Lincoln City. My associate recently drove to Portland to visit his kids in a foster home. That is now being put upon the defense attorney. The suggestion is why don't you ask for mileage? Okay, well a day out of the office and I am going to get 10 cents a mile or something. Again, ask what you are imposing on the attorneys and to me it is – I hope I am not coming across too aggressive on this - it isn't...
- 2:01:34 Chair Ellis We are here to listen.
- 2:01:36 J. Hollen It isn't worth it to do all of that. The legislature, and actually you folks, keep putting more on more on us without raising the pay. I am not sure what they are getting in the valley, but we can't compete with the valley much less with the institutional people here in the county. It is a real problem. Why aren't they coming here and setting up an office? It is because it won't pay. If we shut ours down our associates would probably go to another county.
- 2:02:10 P. Ozanne They have figured out, as you say, in smaller communities that it does pay. Our problem - and I wrote this in the original report - as Barnes says, is how firms work. We are giving out a million and half according to Guy...
- 2:02:23 G. Greco One point one.
- 2:02:24 P. Ozanne ...over a million dollars and you are getting 20% of it. We respect you as a law firm but we can't see what is going on in your firm. We don't have any business doing that. If we have another structure we can figure out what people are getting paid, what the overhead is and where the money is going. With a firm it is difficult for us to be sure. You say you are getting a profit. I have no business asking what it is. That is why we are concerned about the firm model. As Barnes says it works.
- 2:02:54 J. Hollen I guess I am looking at it in terms of the benefits we have. One, Ouderkirk and I are not inexperienced attorneys. If one of our associates has a problem we are there. If one of them takes off and goes to another job we are there. We fill the gap. The reason we have not had to have much involvement in the last two years is maybe because the caseload has dropped. That is the only reason. If the caseload came back up we are there to fill the gap or hire another associate. If the associates were able to open their own office, then that is fine. We are not going to cry about that. We are just saying that in one sense we are providing a service. It is place where they can come and start work. They don't have to deal with all of that other stuff. How much we are making on it? I have never really penciled it out.
- 2:03:50 P. Ozanne And certainly over time you have been a great service and done a lot of things. As I say, with that huge amount of money we're not imposing anything on you. We get a big chunk of money and we are responsible for managing it. We are held accountable to the legislature. We are always looking at what is the best way to do this and how can we explain if we are doing it cost effectively? I don't want to suggest that the work you have done over time we don't appreciate. I know you personally do great work. I do have kind of a mystery, having practiced a lot of criminal law for a while, but after a couple of years I wouldn't do it. I guess you are reading the advance sheets. I don't read them all the time anymore. It is tough now for anybody to keep up on it unless they are doing it in my opinion. You are more motivated than I was or smarter than I am. That is the problem when the senior

people, as Barnes is saying, aren't engaged in the practice. It moves along. Common law and the courts change. As you say you are reading the advance sheets.

- 2:04:55 J. Hollen I would say if I was doing a greater volume of cases I would be even more hands on. There are some notice requirements that I would have to look up. They are being followed. I know that.
- 2:05:06 Chair Ellis Do you go to OCDLA meetings?
- 2:05:11 J. Hollen I have. I can't remember the last one I have gone to. We get all the materials for it. Generally, rather than having all of us go, we normally order the materials.
- 2:05:21 Hon. Elizabeth Welch Changing the focus here for a minute or longer. In both the report that the staff put together and in Judge Littlehales' comments, I think to me the most important issue here is the fact that Measure 11 cases are not being adequately addressed according to the presiding judge. There is a concern about that and I am not really raising that as a question to you. It seems to me that that is at least an issue. The question then becomes what can we do or what can the consortium do, not just this particular law firm, to respond to that? What is the problem?
- 2:06:15 G. Greco One thing I would like to point out. Mr. Pridgeon at the break commented on this to me. I am not sure that Judge Littlehales' numbers were accurate. We counted it and we have 13 lawyers in the consortium. Eleven of them are Measure 11 qualified and eight of them actually practice Measure 11. So it is not two or three there are eight people that are taking Measure 11 cases. Then we have the three people that you know about that are Measure 11 qualified.
- 2:06:41 J. Hollen Am I one of the eight?
- 2:06:42 G. Greco You are one of the eleven. You are not one of the eight.
- 2:06:47 J. Hollen I haven't done one recently but there is no reason that I couldn't handle one if I needed to. If it came up in our office I would. When we lost our last associate I think I took over a couple of Measure 11 cases that he had. I guess I will take issue with Judge Littlehales in this sense that Measure 11 cases are a problem. I don't know who he is talking about that hasn't handled them appropriately. No one from my office that I am aware of. No one has ever told me that my associates have had a problem. Our newest associate just became Measure 11 qualified. I will say that I don't know why you see it is a problem.
- 2:07:45 P. Ozanne We don't know either. It is a hypothesis at this point. The judge is saying there is a problem with case selection, which cases are being dealt and which cases are being tried. The numbers here would suggest that maybe that is true. There is a lower than average felony trial rate, and a higher than average misdemeanor rate. There might be a lot of reasons for that, but one could be that there is not the attention given to the Measure 11 cases in terms of evaluation and whether deals are being done at a higher rate than they should be in Measure 11 or other felony cases. That is just a hypothesis.
- 2:08:17 J. Hollen If I could address one thing that came up, in terms of when the Measure 11 cases come in and who they go to. In our office they pretty much go to whichever attorney doesn't already have a bunch of them. You don't want to have a single attorney with a bunch of Measure 11 cases coming up for trial in one month. We try to divide them that way.
- 2:08:41 Chair Ellis I take it that their compensation isn't going to be affected whether they get a lot of Measure 11 cases or not?
- 2:08:47 J. Hollen No. They are on salary. They get X dollars per month.

2:08:54 Chair Ellis Other questions for Mr. Hollen?

2:08:52 J. Hollen I will say on Measure 11 cases I have not seen a problem with those cases as opposed to any other type of cases. As far as cases going to trial, I will say that our office took a position several years ago when we had a different district attorney that it was less time consuming and more efficient to take a case to trial if you don't get an offer from the DA's office at the very start. Their office policy was they are not going to negotiate. "You plead to the highest charge and dismiss lesser ones and by the way, for the highest one you are going to end up with 120 months in prison." There was no evaluation of the cases on their side as to whether it was a weak case. You couldn't get an answer out of them for the life of you. So, yeah, the mentoring I gave to my associates when I saw how much time was being consumed with that and dealing it with myself from time to time to try to make the deal. If you can't you are wasting your breath over there. Set it for trial. We started doing that and cases got right up to the date of trial and just as we predicted they weren't ready. They had too many cases and they were overloaded because they wouldn't deal. The other thing that would happen is at the last minute the case would get dismissed. Instead of getting something they got nothing. Measure 11 cases were mixed right in with that group. If our statistics look a little skewed right now you might look at the past practice of the district attorney's office. They are the ones who can really throw the monkey wrench in here with their policies.

2:10:39 Chair Ellis We are about to talk to the DA.

2:10:40 J. Hollen If you don't have someone down there who can evaluate the case and make a decision based on looking at the facts of the case, you are going to have that kind of problem. We had that problem for many, many years. I will say the current practice in that office is much improved. You can talk to people. They make sense and there is no iron fist above telling them, "You can't negotiate that type of case."

2:11:14 Chair Ellis Thank you very much.

2:11:14 G. Greco For all of his remoteness, he is very much on top of exactly what is going on with the relationship between the defense bar and the district attorney's office. He is hitting it spot on.

2:11:34 P. Ozanne Thanks for your comments.

2:11:34 I. Swenson Mr. Bovett had to leave, sorry. He won't be able to join us.

2:11:40 A. Reynoldson If I could just have a moment. I am one of the five solo practitioners, Alan Reynoldson. I have been here since 1992. I started with Mr. Pridgeon and his former partner Pat Stimac. I was with them for five years. Then I managed to get a piece of the contract. They were in the middle of expanding it and adding another full-time position. I was fortunate enough to be able to catch that. I opened my own office in 1998. In 1999, I started on the contract. I do mostly indigent defense, not exclusively. I do probably maybe 75 to 80% indigent defense work.

2:12:19 Chair Ellis The balance is retained criminal?

2:12:19 A. Reynoldson The balance is retained criminal and I do some divorce work. The family law stuff I am starting to get away from just because it is becoming more and more difficult. This is a poor area. There isn't a lot money. There aren't a lot of rich divorce cases. You go to CLEs and you see half million dollar estates or two million dollar divorce estates. In this county you are dividing up the debts. Unfortunately, that is kind of how it is with the opportunities for criminal defense. I get maybe two or three retained criminal cases a month, mostly DUIs or misdemeanors, and they are handled the exact same way. If this area were to go to a public defender's office, I believe you would be squeezing out a number of us practitioners. For one thing - I

think it was mentioned earlier - you are in for a penny or in for a pound in this business. If you are doing only a third of your time instead of a full-time position, you are still going to be here most of the day Monday. You are going to be here most of the day Friday doing juvenile work. You are still going to have the issues that come up on a regular basis. You can't dabble in this. Either you do it or you don't.

- 2:13:29 Chair Ellis In one sense you are preaching to the choir. I think we have all been pretty consistent that we view criminal law as a specialty practice. It takes a lot of time to keep yourself current. It is not just what happens from the Supreme Court in Salem. The recent cases mean you have to be experts in immigration law and all the rest of it. It is not our vision that we want a lot of people doing it as 20% of their practice. We would rather have fewer people doing it as 100% of their practice.
- 2:14:10 A. Reynoldson Here is one thing. Talking with clients mostly with glass between you, they are going, "You are just a public pretender. You are a public defender. I can't afford a real lawyer." My response to those people is, "Pull the phonebook out." I am paying probably \$7,000 a year for phonebook advertising in our four phonebooks in our small county. This is a small place. If you make a practice of screwing your indigent defense clients, your reputation gets out. All of a sudden you aren't worth any money to be hired. There is a built in incentive if you have a combination practice to do a good job for the court appointed people, if for no other reason than it looks good for the retained people. There is a reason I am doing a good job for them. Besides what you think it should be and what it probably ought to be, for sure it is the ethical reasons, which are there. Sometimes the indigent people need to have more assurance because they don't trust anybody. I don't blame them. I wouldn't trust me either.
- 2:15:08 Chair Ellis So assume, and I will repeat I don't come here with an agenda, but I do come here with real questions about what we have now. If we went to a model where you had a PD office handling let's say 30% of the caseload, and you have people like yourself who are essentially full-time criminal defense lawyers in the consortium handling the balance, wouldn't that be a pretty strong mix?
- 2:15:39 A. Reynoldson I don't think there is enough to go around. I may be misinterpreting, and I don't want to put notions into anybody's head, but I think the main irritation is that the legislature and the board are irritated by the relatively easy case counts. The reviews, the pvs, all this stuff and of course there are no conflicts on those and you can channel those into a PD's office and there would be no conflict on those. The problem is this. Yes, I do do juvenile reviews. I do do pvs. However, that doesn't cover when I do a DUI trial. Or when I ...
- 2:16:23 Chair Ellis You're right. It does balance out.
- 2:16:23 A. Reynoldson It all comes out in the wash. What you would be doing in a PD's office is you would be channeling all of the work that makes it worth it to do this, and taking it away from the practitioner and you are giving those solo practitioners cases that are much more likely to go to trial. By the way, one thing not mentioned is this last thing they got passed last November with the DUIs, your third within a 10 year period now is a felony. You get up to 14 months in prison unless the DA's office wants to give you a break and wants to give you the 90 days, which is how it was billed to begin with. It is a 14-month sentence. You are going to have a lot more DUII cases going to trial, even though there always have been a lot of them going to trial because of the life time suspension on a third conviction, now that third conviction has the potential of sending you to prison. You are going to have more trials in those areas. If you start dividing up the practices between PD offices and private practitioners, I do believe you are increasing the workload. As it is now the costs are being shifted continually to the practitioners.

- 2:17:24 Chair Ellis I am going to take issue with you. I really don't think the history in counties where we have that mix of a PD and either individuals or a consortium that the PD is taking the high volume, low cost cases. I don't think that has been the case at all. I think, if anything, PD offices tend to take the heavier Measure 11 cases and the serious felonies.
- 2:17:55 A. Reynoldson Okay. I have never been in that situation. I am going to rely on your experience for that. My thinking is we are already withholding – what, 10% I think it is of our checks - to cover the overs and unders. With what I am bringing in, I have to provide for probably \$3,500 to \$3,800 a month in overhead, plus pay taxes and take what I can get out of it. If you start reducing that by very much, if I bill and collect two hours a day on a private practice case, I can pretty much replace my defense contract. But I don't want to do that. For one thing it keeps you in front of the courts. There are benefits to doing this for me as an attorney. I don't want to lose that. I am just saying that there comes a point in time where the balance is going to start going out of whack. If what you are really concerned about is the way we are monitoring ourselves, I do believe that our group can address that issue satisfactorily.
- 2:18:49 Chair Ellis You use the future tense. Up until now what self-monitoring has gone on?
- 2:18:59 A. Reynoldson We are all friends. I mean with the DA's office ...
- 2:19:01 Chair Ellis That sometimes makes monitoring harder not easier.
- 2:19:04 A. Reynoldson It does but it doesn't. It also makes it easier to call up somebody and say, "What do you think?" I have no problem doing that with people. I will call up Guy and any conflicts he has come to my office automatically. I call him frequently when I have a question. That is an open door policy or at least an open door arrangement between all of us. It is not formal. Sometimes being formal isn't really all that it takes.
- 2:19:35 G. Greco Once again, in order to monitor there has to be communication. From my point of view I have to know that there is an issue. When Judge Huckleberry was the presiding judge there was reluctance on the part of the judges to identify that. We couldn't monitor because we couldn't know. Within the last 24 months, and that is how long Judge Huckleberry has been gone, the judges have been more receptive to notifying me when there has been an issue that needed monitoring. You asked if there was any monitoring. It resulted in one lawyer basically being taken off the contract because we couldn't fix it. The other one I met personally with. I take the time to do that and address the issues. After that occurred the judges were telling me there had been marked improvement. There is monitoring. That has always existed since I have been here. Somebody has to let me know what needs to be monitored. Again, I can't be in every corner at all times.
- 2:20:42 Chair Ellis The way it is set up now you are just doing that out of your communication skills. You have no authority. You have no real ...
- 2:20:56 G. Greco I don't have the authority to remove a lawyer, but if the judges tell Ingrid a lawyer has to be removed that happens. I have ways of making it happen. I don't have the authority.
- 2:21:09 Chair Ellis When you go to this board with outside representation in January will that help you?
- 2:21:16 G. Greco I don't know.
- 2:21:21 Chair Ellis How are you coming on structuring Lincoln Defense Consortium with a board and outside participants?
- 2:21:28 G. Greco I have learned a few things here today. I am going to review the modifications. I think that if we bring in some criminal defense lawyers who are not part of the

consortium that is going to help. I have learned today some ideas on how we would approach it. This is a learning process. You are communicating with us and it is helpful.

2:21:57 Chair Ellis

That is why we are here.

2:21:56 G. Greco

I think it is doable. I didn't think of the idea until just this morning about having some people experienced in criminal law giving us the input. Again, I don't know how we are actually going to select a non-lawyer member. I like the idea of an accountant just because of the financial issues that could come up. Getting that kind of a board member isn't going to help us a lot on monitoring and mentoring and quality control, but we are working on that. I told you already we have a survey going.

2:22:30 Chair Ellis

One of the competing themes – and I respect everything you have said - you have a life to lead. You have got to make a living, etc. We are here with sort of a public service orientation. We are trying to blend the private practice issues with the public service issues. That is why it takes us towards this notion that we shouldn't just have a collection of people who happen to be there and call themselves a consortium and let it go at that. We really do want some sense of community responsibility, some cohesion, some supervision, and some process. You know you may not have it now but sometime somebody may have a substance abuse problem. Somebody is going to be trying to hang on too long. They get too old but they are hanging on too long. There are a range of things that will happen. If you have too buddy-buddy a circumstance everybody protects each other and we don't get the quality of service, and the clients don't get the quality of service that they should. You can see where we are coming from.

2:23:50 G. Greco

I come from a state where there was a State Public Defender's Office. When I was working in the criminal court there was just an agency that was the public defender.

2:24:11 Chair Ellis

There are states like that. Colorado does it that way. They are very proud of their system. They are all state employees but we haven't done that.

2:24:19 G. Greco

When I came to Oregon I was kind of shocked to see how it was done. The only point I am trying to make is you are just butting into a culture. The practice of indigent defense in Lincoln County is cultural. For 35 years lawyers who were in private practice performed the service. You heard Mr. Hollen say that we have been doing it for 35 years and providing the service. I am not opposed to what you are saying. Maybe the best answer would be that we had a statewide public defense office. That would alleviate a lot of concerns that lawyers have about salary and benefits. You could have one centralized system that is compensating the lawyers. I am not here to try to butt heads about what you are suggesting at all. It may be a very, very good thing. But you are dealing with a culture as I think Mr. Reynoldson and Mr. Hollen have expressed to you. Whether that culture has any value in a system of shrinking dollars, maybe not. You know \$35 an hour 35 years ago was still only \$35 an hour.

2:25:20 Chair Ellis

I think you are going to agree with this comment that none of us in this room want to say we should do it that way because that is how we have always done it. We ought to keep trying to make ourselves get it to a position where it is done better. Maybe what's been done is just right. To me it is not a powerful argument.

2:25:50 G. Greco

I am not making that argument.

2:25:50 P. Ozanne

We have also had a track record of struggling to respect the people who have done the work. We just don't throw people willy nilly out of work.

2:26:01 Chair Ellis

Any more comments?

- 2:26:04 A. Reynoldson I have probably said more than I should have. The five of us that are on our own have a different perspective on this whole process than the ones that are in firms. All of us have been trained by the firms. When I got here I spent two years downstairs in Judge Branford's court doing district court. There were only misdemeanors and sometimes that was a really good thing. When two of the DAs downstairs started with me the same week, for two years that is all we did - misdemeanors. Then they blended circuit and district court and it all changed. Training is an issue but it is something that we can overcome.
- 2:26:37 Chair Ellis Thanks for sharing with us. Judge Bachart is here. This is a friendly discussion. This is not a cross-examination and you are not up for Senate confirmation or anything like that. Did you get a chance to read the staff report?
- 2:27:03 J. Bachart Yes I did.
- 2:27:11 Chair Ellis Any thoughts or comments?
- 2:27:11 J. Bachart I shared with Ms. Swenson that it is extremely thorough, first of all. As far as the weaknesses and the qualification standards, I think this is certainly reflective of my comments. When I met with Mr. Potter and Ms. Swenson that was, again, it was consistent with what I felt could be improved in the model that we have.
- 2:27:42 Chair Ellis I don't know how long you have been able to be here this morning, but anything we have talked about that stimulates...
- 2:27:50 J. Bachart I have a court trial going on so I haven't heard any of the previous discussions here.
- 2:27:57 Chair Ellis Give me a little better sense of your role. Do the judges specialize here? Do you get a broad mix or are you focused on juvenile or criminal?
- 2:28:10 J. Bachart First of all I am new to the bench. I took the bench in June of 2008. I have been here in Lincoln County longer. I started in the district attorney's office in 1997. I was appointed in June of 2008. I took retiring Judge Huckleberry's position. As far as my caseload, it is a little bit of everything. It is easier to say what it isn't. I don't routinely handle juvenile dependency, juvenile delinquency, traffic, small claims, FED. I will handle them on occasion but that is not part of my normal caseload. Otherwise it is criminal and civil, probate. I handle the domestic violence specialty court. That has only been up and running about a year in February. I handle all the domestic violence cases.
- 2:29:10 Chair Ellis Kind of the big topic that we seem to keep coming back to this morning is whether it is a value added arrangement to have one of the law firm members of the consortium, two partners who spend very little time on this work, two associates who spend a great deal of time on this work, whether that model, which we have not seen elsewhere, is a good thing, a neutral thing, or might be improved. We have talked about the potential of converting that into a true public defender. You would have full-time practitioners rather than what we have here which is the partners at 5% or 2 1/2%. Any reaction that you have to the current situation and the potential for change?
- 2:30:08 J. Bachart I haven't worked with a public defender's office. I think when I spoke earlier and was asked for input on this report and saw as a weakness maybe in the current model, that it isn't as conducive to collaboration among the attorneys that do this. There are associates that are brought in and those are the ones I see. I see the associates that are actually doing the contract work in my courtroom everyday. The senior partners out of the two big firms, the contract, I simply don't have contact with.
- 2:30:58 Chair Ellis From your point of view how does that impact you?

2:30:59 J. Bachart The way it impacts me sometimes is the associates who are brought in and picking up a heavy misdemeanor or contract work, sometimes – a lot of times, and this is just with all new attorneys - there is a learning curve. There is a lack of experience. That could be benefited by mentoring, okay. If the senior persons in the firm aren't doing the work, I don't know where they go for that mentoring. Who would they ask if they had a question about a guidelines issue? Who would they ask if they had a question about something that came up at sentencing or trial strategy? I haven't seen in this county even a senior partner or somebody who would observe another attorney in trial. I have had what I think is their first trial and no one there. I think somebody to guide them through the process could be a benefit. I am not here to advocate a particular model. How would that benefit me? I think defendants would be better represented if they had somebody - if they didn't have the answer, they would know where to get it.

2:32:30 P. Ozanne Judge, we haven't raised this yet but you have a unique perspective because of your recent law practice here before this court, right?

2:32:32 J. Bachart Yes.

2:32:38 P. Ozanne You are a judge now looking at the system and learning it. What perspective do you have on the lack of a centralized docket as a practitioner and now as a judge? Do you have a different perspective now that you are on the judge side? It is increasingly less common to lack of a centralized docket.

2:32:53 J. Bachart It is. As a judge I like being able to control my docket.

2:32:57 P. Ozanne I thought that was probably the case.

2:32:57 J. Bachart I do because I like knowing the case and the history of the case. I have heard the motions and when I am making those decisions then I am the same judge who is hearing the case. I like being able to control trial status knowing what is going in my courtroom at a particular time. I have trial readiness hearings and I like that. With the domestic violence docket it has really significantly impacted my docket as a whole. I am not sure how that would work with a centralized docket.

2:33:37 P. Ozanne Taking you back to your recent practice experience there is a trade off. It is a little more challenging. On balance, now that you are a judge, are you comfortable with the costs and benefits?

2:33:40 J. Bachart I am. I think we have tried to incorporate - I mean I have trial status hearings three weeks before because I am sensitive to attorneys who have three trials set for the same week in different courtrooms and not knowing what is going to go. I have tried to give certainty to the attorneys that are doing work to let them know what trial is going to go, what is going to get moved and what else is on my docket so that you know if I have an in custody Measure 11, I could tell them at trial status, "Your trial is probably not going to go." I think we all do that - I can speak for what my practice is - to try to keep them informed about what is going and what is not. I try not to have to reschedule matters.

2:34:34 G. Greco A centralized docket would make our lives a whole lot easier. It is never going to happen in my lifetime but it would make us a lot more efficient.

2:34:48 Chair Ellis Other questions?

2:35:50 Hon. Elizabeth Welch I should have looked up the references to Measure 11. There were some concerns raised in this report and by the presiding judge about the quality of representation or the availability of lawyers qualified to represent Measure 11 defendants. Do you have any observations? As a former prosecutor I would think you would be very aware of all of that. What do you think about how it is working?

- 2:35:32 J. Bachart I don't know the qualification standards with the state office for Measure 11. I just know when the case is being arraigned the attorneys inform me which attorney in their firm this is going to be assigned to. I do have – as far as specific to Measure 11 offenses - I think we have quality representation in this county. I don't want to say that I have a specific concern that a single attorney who is appearing on the contract is not qualified to handle that. Again, I think they present complex issues especially with regards to sentencing. What I see is some of the inexperienced attorneys who I don't think sometimes aren't utilizing all the tools available to them in negotiations with the state and sentencing. That is just an observation. When you are looking at ways to improve what we have now that could be improved. The individual practitioners have experience in criminal law. Most of them have been doing this longer than I have, but the newer ones in the firms - the only way you know this stuff is by doing it every day. The law is constantly changing. If you have senior partners who only specialize in civil work, I don't know where they go to answer those questions. That is my point. That is the same for a Measure 11 case. I don't know where they go. Do they feel comfortable going to other attorneys on the contract? Everyone is busy here and you have to multitask to take on other cases to make a living here. I am sensitive to that. That is a concern I have about a public defender's office. I don't want to lose the good practitioners. To force them into something where they are not able to make a living and stay.
- 2:37:54 Hon. Elizabeth Welch I am changing the subject. I was surprised to hear from someone in the last few minutes that there is somewhat of a tradition of judicial restraint in complaining about lawyer's performances to their employer or to the state - that wasn't specifically mentioned but calling Ingrid or someone in her office. As a retired judge I think it is part of a judge's job to complain. I am just wondering if there is a culture of silence here in Lincoln County.
- 2:38:29 J. Bachart I wouldn't describe it as a culture of silence. Again, I am just speaking for myself. Being new as a judge the learning curve is like this. I am trying to do everything that I can to keep up. There has recently been a concern that I think rose to that level. When I met with Ms. Swenson and Mr. Potter, I was asked if I would feel comfortable going to Mr. Greco if I had such concerns and I did. I do not feel uncomfortable. If I felt that a defendant was not being adequately represented, I would, and I have, voiced that concern.
- 2:39:13 Hon. Elizabeth Welch I wasn't trying to put you on the spot. That was just an interesting thing, by the way, so don't misunderstand me.
- 2:39:24 G. Greco Judge, can I flip it? My comment was that two years ago there was this culture and two years ago is when she got on the bench. Let me ask you this. Do you feel that the judges were giving a lot of feedback to the performance of the deputy district attorneys back when you were a deputy district attorney?
- 2:39:40 J. Bachart Yes. Sometimes it had to be sought out and I did it on a regular basis.
- 2:39:49 G. Greco You were seeking it out. My comment before you got here was in order for me to deal with problems the judges have to communicate with me.
- 2:39:58 J. Bachart My experience as a DA was if judges had concerns about anything to do with my performance, it would be brought to my boss and my attention promptly.
- 2:40:10 P. Ozanne You could seek it out. Judges don't have to come to you. You can go to them.
- 2:40:16 J. Potter The culture of the community sounds like it allows people to approach the judge.
- 2:40:21 J. Bachart Yes. Absolutely.

2:40:28 J. Potter But it is not happening.

2:40:30 J. Bachart Mr. Greco has given us the evaluations. I have completed those. I thought that was great. I welcome those and tried to be as constructive in details as possible as far my impressions. I debrief with the juries after. Everyone knows that I do it. I would welcome attorneys to come contact me to share their insights. Again, it's all about making it better.

2:41:02 J. Potter Can you expand on that? Tell us about debriefing of the juries. That is one of the areas that I hear lawyers complain about. They never get to talk to juries. They don't know what they are thinking. You can't approach them in this state. Yet you are debriefing them. What is that process?

2:41:18 J. Bachart I go in and thank them for their service. I formally discharge them and say, "Now that you have been discharged do you have any questions about the process, about the trial itself, anything that was said or done?" I am specifically not there to comment on their verdict. I discourage that. I tell them that I would invite any feedback regarding the attorneys.

2:41:53 J. Potter Are the attorneys there?

2:41:53 J. Bachart No. I ask for feedback that they would like me to hear that I could share with the attorneys or the courts, anything that we could have done to make their service...

2:42:07 Chair Ellis Judge Kantor does that and then he goes one step further and says, "Would any of you want to meet the lawyers?" A few of them will do it and it is very informative.

2:42:21 J. Bachart I had a request from counsel in a civil case that I did. They wanted me to specifically ask that and I did. A few of the jurors came out – it was a week long trial - and spent some time with the attorneys and it was great.

2:42:36 Chair Ellis If you have a split verdict the dissenters always want to talk to the lawyers.

2:42:40 J. Bachart It was very helpful. I would welcome attorneys - I don't do it until after sentencing - to meet with me and I will share whatever the jury says.

2:42:47 Chair Ellis Have you been through an election cycle yet?

2:42:52 J. Bachart I was appointed in June and ran in November and it was uncontested.

2:42:56 Chair Ellis You are good to go. You have six years until the next one.

2:43:01 R. Scholl Have you ever had a juror tell you about a prosecutor or defense attorney being just terrible? Didn't like them?

2:43:06 J. Bachart Yes.

2:43:06 R. Scholl What did you do with the information?

2:43:08 J. Bachart Reported it to Mr. Greco.

2:43:16 A. Reynoldson(?) One thing is that the judges have historically been from the district attorneys office. One judge I noticed while on the bench wanted to still run the district attorney's office and wanted them to do things the way he wanted them to do it. The judges are more interested in how the DA's office ran than the defense because they had never operated on that side of the table. The judicial control historically in the county was always the DAs, "Here is how we want you to run your office."

2:43:48 J. Bachart I am sensitive to that. Again, I can only speak for myself. I think I am more critical of the state because that is my background. I try to balance that. What I am sensitive to is the defendant. If the defense attorney doesn't know the sentencing guidelines, they are not properly advising their clients on the sentencing ramifications. That is huge. When they screw up it means a lot more. When I have concerns about not knowing the sentencing guidelines, if the state screws up defendant can withdraw their plea and we can start over. That is not so on the other side of the table. I am going to hold them to a higher standard as far as their ability to handle Measure 11 cases and complex sentencing issues, yes.

2:44:41 A. Reynoldson I was just thinking historically. I don't recall the judges really interceding on the defense bar's side saying you need to do a better job. If it was critical of anybody it was generally of the state. That was my impression in the past.

2:45:03 Chair Ellis Any other comments?

2:45:02 J. Potter Judge Littlehales made some mention about mental problems of clients and that there were quite a few of those. Do you hear mental commitment hearings in your courtroom?

2:45:12 J. Bachart I do.

2:45:13 J. Potter What is the level of understanding by lawyers of their roles?

2:45:22 J. Bachart We spoke about this. I don't think we do them often enough. I do have concerns. I prepare all of the orders in the mental commitment hearings. I don't ask anyone else to prepare them. I think it was Judge Hargreaves who did all the materials for us and everything and what the state hospital wants. What I find a lot of times is the attorneys appearing to rely too much, in my opinion, on the court knowing what is supposed to happen at those hearings and what their role is and the law. It is complex and I think those are some of the most complex type of hearings. We don't do them enough to really stay up on them.

2:46:17 Hon. Elizabeth Welch They are ultimately challenging. You are automatically dealing with someone who is not going to be a very helpful client.

2:46:31 J. Bachart That is a particular area that I have concerns about.

2:46:31 Chair Ellis Thank you very much.

2:46:33 J. Bachart Thank you very much for the chance to be here.

2:46:21 I. Swenson Your lunch has arrived.

2:46:43 Chair Ellis Do we have other Lincoln County witnesses? We might as well eat lunch. Ingrid, any other Lincoln County witnesses?

2:47:01 I. Swenson Nobody is scheduled. If anybody wants to say anything you are welcome to do it.

2:47:09 G. Greco We are not going to hear from Mr. Bovett at all?

2:47:09 I. Swenson He had to leave and go out of town.

2:47:17 G. Greco I wish we could hear from him.

2:47:17 I. Swenson He did speak to us and we included his comments.

2:47:18 Chair Ellis Let me just tell you where we intend to go from here. It will take several months but at our next meeting we will comment to each other what we think we learned and

found here. There will be a big write up of the testimony that was given today. All our meetings are open. We welcome people coming although it won't be as convenient as this one. Then we will start moving towards our conclusions which may be that the status quo is fine. It may be tinkering. It may be more structural. Then depending on where that goes, our staff will keep interacting with the people in the community. We are not looking to impose. We are looking to stimulate a process where both sides of it are looking at the same issue and what makes sense. That is the process we follow. We very much appreciate the input. I thought this was a really interesting morning.

2:48:41 D. Taylor

I am one of the local practitioners that has a piece of the contract. I am Dan Taylor. I suppose you guys have probably already heard this a lot in every place that you have been. My largest concern as a practitioner is the issue of compensation. What I am really concerned about is trying to bring quality people into the county and being able to hold onto them for what we are being paid. We just recently had a prosecutor who was fired downstairs. You probably know a little bit about that story, maybe not, but it doesn't matter. He was making over \$70,000 a year with a full retirement package, full health benefits, and for me working my office I am a public defender to the core. I have been ever since I was in law school and will continue to be for as long as I practice. My office probably brought in a little over \$100,000 on the contract last year. I have 9.6% of the contract. Out of that money I looked at my tax returns last year. I actually put \$62,000 into my own pocket. The rest of the money went out for overhead. I have part-time staff. I only have a secretary in my office from 8:00 in the morning until 11:30, then from 1:00 to 2:00 in the afternoon four days a week. That is all I can afford to pay. Continually what I am seeing is costs being passed from the courts onto us. We seem to be the weakest link in the system in terms of funding.

2:50:24 Chair Ellis

Although it has been a lot better since '03.

2:50:27 D. Taylor

It has been better. I can't say that it has been significant. I have actually crunched the numbers. I am making less than \$45 an hour with the time I spend and the money I take home. I would probably be better off billing at \$45 an hour than I am making money on this contract right now. Out of that \$62,000 that I claimed on my taxes last year, five hundred and eighty and some odd dollars of that per month goes to my health insurance. I have no retirement plan. I am paying for all of my own bar fees and my PLF. I try to give my secretaries a living wage for what I can. One of my secretaries has dental insurance and the other, thank god, is married and her husband has full benefits that she is able to benefit from. I try to pay my staff something that they can afford to live on. There just really isn't a whole lot left for me when it is all over and done with. Again, I think compensation is a huge issue if the board is concerned about bringing quality representation to the county. I am going to do this work for as long as I am practicing law. I think if you are really trying to recruit people to come here and stay here, then you have to be able to offer them something more than they are being offered right now. They basically aren't making that much money. Consequently people go elsewhere. I think you see that in a lot of public defense firms throughout the state. I worked SWOPDS down in Coos County. I worked for a contract firm up in Washington County before I came down here. You would see a lot of movement in and out of those offices with new people. People were there a year or two to get their trial experience and then out the door they go. I think the under compensation that we receive now is reflected statewide. Again....

2:52:41 P. Ozanne

What would you like us to do?

2:52:52 D. Taylor

Advocate for more money in the legislature and emphasize that we are an important part of the public safety equation, and if you want to be able to prosecute people as much as you seem to want to and with as much money as you use for incarceration, law enforcement, prosecutor's offices, then we have to be on par with those ...

2:53:09 P. Ozanne In the 20 or 30 years that I have been at this, the people who do the work are the bureaucrats in Salem, and certainly since the board has been here we have been your advocates. The failure has been the individual lawyers who do the work don't contact their regular legislators. If you want us to advocate you have to talk to your local legislator. We are just basically a pass-through. We lobby on your behalf, as does John, but we need your help.

2:53:52 G. Greco You are the face of the legislature to him; that's why he says that.

2:53:52 D. Taylor Actually it's not.

2:53:59 G. Greco I don't know how many years ago it was, Ingrid, but I was brought up to Clackamas County to do a review of their consortium there. I was told that it was really working great and it was fabulous and that Ron Gray does a great job. I went to about four or five different offices of the lawyers. All of them were sole practitioners. All of them were working at slums. They were working in dives. You could tell that they were on the barest bottom budget. Their overhead had to be minuscule to be able to survive. The only reason I want to tie that together, and Dan may be different, is one of the things that Lincoln County has allowed me to do is I can use indigent defense money to supplement my income but I am not exclusively tied down to it. I am able to make a good living. One of the things you heard from people was that you could start with the firms and then go out on your own. In a community like this what do you do? I was on the Seafood and Wine Festival Committee for 15 years. You join the Kiwanis. You join the Optimists. You get your name out there. The local paper every week has the names of the lawyers who have handled cases. So if you are here three or four years you can build up a reputation and you can practice law and you can make a decent wage. In other words, it is almost impossible in Lincoln County to survive on what a lawyer is going to get from indigent defense. But this is a community where you can have a hybrid practice. I do quite well. I have heard some numbers and according to the ABA, I am above the medium income for lawyers in Oregon. That is only because I have a reputation and I am practicing in other areas. That is the practitioner's problem. Now maybe it is better if you had full-time lawyers in an office like you suggest. The question is can you afford it? You are going to have to crunch the numbers and decide whether or not you can rent the building and pay the lawyers and staff and decide if you will be ahead. Maybe it is as simple as that. Maybe Dan goes to work for that office and can get some benefits and can get a better wage.

2:55:56 P. Ozanne I think the model around the state and here in this county is that people are taking mostly indigent work. You are the unusual one.

2:56:07 G. Greco I am kind of like the firms. Maybe that is only because I have been here longer.

2:56:14 P. Ozanne It is possible to do what you have done.

2:56:17 G. Greco I work 70 hours a week.

2:56:18 P. Ozanne Most people haven't been able to accomplish that for lack of clients.

2:56:25 Chair Ellis Dan, thank you.

2:56:25 D. Taylor I am not being critical of the board. I am just trying to voice what I am sure you are hearing all over the state. We don't get much.

2:56:35 J. Hollen Dan Taylor was an associate in our firm and he was able to walk into an office ready to go. We provide a place for our associates to work and what does that consist of? He is describing the problem that our associates would face if they were on their own. Would they be better off without us providing them with a place? From the description you can say no.

2:57:00 D. Taylor I would have to say that Jeff was always available if I ever needed to knock on his door and I would knock on it very often and he was very happy to help.

2:57:10 Chair Ellis What do you suggest, Ingrid? Shall we eat? Let's go about 20 minutes and then pick up again at 12:30.

2:57:19 I. Swenson Sounds good.

(Lunch break)

**Agenda Item No. 6 Executive Director's Annual Report**

0:10 Chair Ellis Alright. Let's see. Let's do the director's report first. Then we will do the contract piece with you, Paul. Ingrid, do you want to walk us through the annual report?

0:43 I. Swenson Yes, Mr. Chair. I sent this out by email just yesterday or maybe the day before, so you haven't had much of a chance to look at it.

0:56 Chair Ellis I will admit that I am looking at it now for the first time.

1:00 I. Swenson It is one of my statutory obligations to prepare an annual report for the Commission. We also do a biennial report to the legislature. This is really just directed to you. The idea is to summarize for you the work that you have done and the work that the two divisions of OPDS have done and where we are in terms of fulfilling the obligations of our strategic plan and so forth. In the past I hadn't really detailed your activities over the year, so this report differs a little bit from previous ones in that it starts with the activities that the Commission itself engaged in during the year. Then it talks about OPDS's Contract and Business Services Division and I won't go over it in detail with you today but I would invite you to take a close look at it. Kathryn and her staff - many of whom from the analyst group are here today - have done excellent work in so many ways and this details some of their activities and some of the efficiencies they have been able to realize through new processes and developing new approaches to things. Then there is a little bit about Paul and some of the things he has been doing - the volume of complaints he deals with and managing the certification process and directing our site visits; then some things that Kathryn has been working on individually. Then it talks about the Appellate Division. You heard a report from Pete Gartlan last year about the structure of that division and how training and oversight and evaluation occur. This is an update on what they have been doing over the course of last year. I certainly want to point to the paragraph that talks about the juvenile section. I say that because I think the criminal appellate section....

3:10 Chair Ellis This is on page six?

3:10 I. Swenson Yes. With the criminal appellate section you have heard about their good efforts in the past and that continues to be the case. Our hope was certainly to add the same sort of expertise in the juvenile dependency area. It was Judge Brewer who wanted to put this unit together. He worked with a group of people - and Kathryn served on that work group - to identify ways of handling some of the juvenile dependency appellate work that would result in a better final body of appellate law and better trial level practice. He has expressed a great deal of satisfaction with the work that this small but very effective group has been doing. It is having its intended effect. Then I listed some of the things that I do beyond the things that you are familiar with. They mostly involve work with other groups whose missions overlap with ours. I try to work in areas where I think it will compliment what we are doing and be of benefit. Then the challenges are really budgetary at this point. I am sure there are others we could have focused on. That will be the biggest one for us as it will be for other state agencies - to see what we can do to come out of this legislative session with a budget that will allow us to continue to work on accomplishing our mission.

**Agenda Item No. 5**

**Preliminary Discussion of PDSC Policy and Procedure regarding Contracts for Personal Services**

- 4:53 Chair Ellis                    Okay. Any questions on that? Paul, do you want to discuss the policy and procedures, Attachment 5?
- 5:09 P. Levy                         Yes. What we will be doing is bringing to you at the next meeting the RFP that will be released seeking contracts to begin January 1 of 2012. What you will see at the next meeting is a number of housekeeping changes, but what we will also be asking you to approve, and will be discussing today, is a provision in the RFP that says, "This is the Commission's policy and procedures for contracting for public defense services." As you know Chapter 151 requires the Commission to adopt policies and procedures for most of its core functions including contracting. We have all regarded the RFP as containing the selection criteria, the methods of contracting, and actually the document you are familiar with does a good job of identifying how these contractors should be selected. We want to make it explicit now that this is the Commission's policy and procedure for contracting. That document already says, "This is a contract for personal services," and we will change some language, which you don't have here, to make sure that that is even more explicit. That is what you have before you. It will be incorporated in the document that you see next month.
- 6:56 P. Ozanne                    I just want to be sure that we are not saying, "This is our policy and procedures," by issuing the RFP. I mean the RFP is part of our policies and procedures, right, but some of us want to engage in the review of the submissions under the RFPs.
- 7:20 P. Levy                         Right. It is the articulation of the screening and selection procedures for contracting. It does not seek to describe the process that the Commission goes through in its meetings where you hear from Kathryn and her group at an executive session about what their plans are for contracting and then where you have the opportunity to review and approve. That process is not described here and I don't think it needs to be described for purposes of what we are trying to accomplish by making this an explicit statement.
- 8:00 I. Swenson                    And it is expressed in the Strategic Plan. We added some detail the last time we amended it to talk about the steps in that process. It is part of the plan that you adopted for the next two years.
- 8:17 P. Ozanne                    I wonder for the purposes of our contracting colleagues whether it isn't worth informing them that, indeed, we are not on autopilot about this. We are actually going to engage in a review. I don't have a strong feeling but it might be worth putting something in there.
- 8:37 P. Levy                         One thing that we are putting in here is the notice of intent to award contracts. That will happen. I think the way we envision it is that notice will be provided before the Commission holds its public hearing where you are reviewing contracts. We can be more explicit, either in this document or elsewhere, about the Commission's role.
- 9:14 P. Ozanne                    You are going to give us a draft next time and we can look at it then?
- 9:19 P. Levy                         The next meeting is at the end of April. We really need to release the RFP in early May. Is that right, Kathryn?
- 9:37 Chair Ellis                    I assume you have compared this to what DAS uses or other entities use?
- 9:45 P. Levy                         I have spent a great deal of time looking at the Public Contracting Code, the Attorney General's Model Code for Contracting. Our RFP has said since way back when it was a Judicial Department document that our contracting is not controlled by DAS procedures and that is absolutely correct. By being explicit that these are the Commission's policies and procedures for personal services contracting, we are in a sense providing another level of assurance that we are complying with the

requirement and the opportunity for an agency to identify a particular class of contracts as personal services contracts, and then to develop our own screening and selection procedures. There are benefits other than simply checking off and making sure we have done something that Chapter 151 requires the Commission to do.

- 10:55 P. Ozanne Back to my question, you were saying that we will have an April meeting and then you have to get it in May. Can we give input on the RFP at the April meeting in time for you to get it to wherever you have to get it?
- 11:12 K. Aylward Assuming that you tell us what you want and we do it and don't have to show it to you again. If we can just do it.
- 11:22 P. Levy Assuming we are able to follow your directions.
- 11:24 Chair Ellis They are always articulated.
- 11:41 I. Swenson In our draft we could certainly amend this draft RFP to include reference to your strategic plan statement about how you will review proposals.
- 11:58 P. Ozanne That might be a way to do it.
- 12:00 P. Levy The RFP won't look terribly different from the document that you have seen before, except for the addition of the language that you see here today. Then we are meeting next week after this meeting to review the document.

**Agenda Item No. 7 OPDS Monthly Report**

- 12:29 Chair Ellis Any other questions on this? Then you want to go to the staff report?
- 12:38 I. Swenson Yes. That would be good. Kathryn, we have you up first on a budget report.
- 12:45 Chair Ellis Come out from hiding.
- 12:54 K. Aylward I think Ingrid sent you all an email regarding a change to the current biennium's budgeting. We returned \$110,000 from the Appellate Division that was a result of unexpected vacancy savings. The bill hasn't passed ...
- 13:14 I. Swenson I think it is done.
- 13:17 K. Aylward We don't have our money yet, but it is going to happen. We requested \$905,000 to be added to the Public Defense Services account to finish out this biennium. We are good to go next biennium.
- 13:32 J. Potter That is a big deal. I know you have sort of downplayed it and maybe still do. That is a big congratulations.
- 13:43 K. Aylward For what?
- 13:46 J. Potter For getting us through without a crisis. There is none of this shutting down in May or June, whatever it might have been.
- 13:58 Chair Ellis So it is only the federal government that is going to shut down.
- 14:04 K. Aylward Again, a lot of this information Ingrid has conveyed in emails but it doesn't hurt to have it as part of the record as well. Our current service level budget for next biennium, which does not include any policy option packages, is about \$242,000,000. The figure in the Governor's budget is \$210 million. That is \$32 million short which is a big number. One of the things we have done, and LFO asks us to do it with regularity, is to reforecast our budget. It doesn't change a lot except in sort of six months intervals because we reconcile the caseload only every six

months. We did re-estimate the number of attorneys and additional staff needed for the appellate division. We had actually put in mandated caseload that we projected we would need 14 new positions, 12 attorneys and two support staff. We have looked at those numbers again and that figure has dropped down to six attorneys and one support staff. That is a drop of about \$1.3 million. So the 2.42 is now 2.40.7 or something. It has dropped down. It may go down again. It could also go up. You heard testimony today about Lincoln County's caseload being unpredictable as well as Lane County's. The change can be significant from month to month. We will keep an eye on that.

15:46 I. Swenson

On the Governor's budget, it wasn't any animosity towards us that caused them to select the figure that they did.

15:54 K. Aylward

Part of the problem with the Governor's budget is that what they did for our agency was to say, "We will give you the same amount of general fund money that you had this biennium. That is our starting point. If you got through this biennium it should be enough for next biennium. Here you go." It didn't really look at other funds because for most agencies whatever the source of the funding is they just want permission to spend it. You don't ask for permission to spend money that you really don't think is there. But in our case because this biennium we have \$12.4 million dollars in other funds generated by House Bill 2287, which was the additional fees and surcharges for court filings that is going to sunset June 30 of this year, our budget for next biennium basically said, "Okay, we are not asking for that \$12.4 million of other fund because the money is not going to be there, so you need to provide it as general fund money. Well, or course, the Governor's office would not necessarily have that much understanding and detail of how our budget works as a judicial branch agency. Nobody would be there to say, "Excuse me, this is the situation here." So that \$12.4 million did not appear in the general fund and, of course, did not appear in the other fund either. Even with their attempt to keep us at what we had this time, we are \$12.4 million short of that. Because we have mandated caseload, what we have this time is not going to be enough. We already know that we need more than that – nearly \$20 million. Those two together make up the \$32 million dollar hole. We will see. We do not yet know when our budget hearings are going to be. Tentatively it might be March 30 and then continue on April 4, but it is all flexible and if somebody runs over we tend to get bumped.

17:49 Chair Ellis

Do you have any ability to manage that? April 4th is going to be a far easier time for me than March 30 if I were to be involved.

18:03 K. Aylward

I'm not sure anybody has the ability to control that. I think even LFO is pretty much winging it and the committee might say, "We want to hear more and need more time."

18:15 I. Swenson

We can certainly request it. We have talked with LFO about that date. They are not very flexible. We will do our best.

18:31 Chair Ellis

There are other Commissioners who could play that role. It is not the end of the day.

18:42 I. Swenson

We will see what we can do, but April 4 would be better?

18:45 Chair Ellis

As of yesterday afternoon. Okay, then these legislative discussions on death penalty, which was also a March 30 event. Do you want talk about that?

19:05 I. Swenson

I asked Kathryn to comment on that. Based on your direction we did make an overture to legislative staff about, "Shouldn't we be talking about the cost of death penalty representation and whether there are other models you could use?" We also were asked to participate in a work group about potentially lowering the crime seriousness level of some drug offenses, which would have a big impact not just on us but on corrections spending as well. So Kathryn has put together some data for those groups.

19:46 K. Aylward            Everyone wants to know how much it will save. I always have an issue with that because are you going to do it if it saves \$1.1 million, but not going to do it if it saves \$1 million? You sort of want them to settle on what they want to do and then you tell them how much that will save. They don't want to do it that way. A lot of these numbers are not going to go anywhere. For example, under one of the drug bills they were looking at a first offense of possession of a controlled substance, Schedule I or Schedule II, would drop down from either a B or C felony to a misdemeanor. They actually have three separate bills that would do various things. On the first offense one - that would save maybe \$1.3 million dollars a year if it is "user quantities" of drugs that they are talking about. Now this task force is going to debate about what is a user quantity. The bill as written says anything below a substantial quantity is a user quantity. The DAs are feeling that a user quantity is, in fact, quite a bit smaller than what is defined in statute as a substantial quantity. So, again, it is a sliding scale. It is like, if all of those that were just below a substantial quantity became misdemeanors it would be \$1.3 million, but as you make the quantities smaller and smaller user quantities then you are going to lose that savings. That would be the maximum on the first offense PCS cases. The death penalty stuff is a little bit trickier to estimate. We did, and have done in the past, some comparisons of regular murder cases compared to aggravated murder. The problem with that is that we have had so few aggravated murder cases go through all the stages of state representation. We have only maybe four cases that have gone through PCR. You look at the cost of the four cases and it is not very much. That is because they rack up - the ones that are still on the meter that are now eight, 10 years old - those aren't going to come in as inexpensively as those four that you have an example of. I know it is an underestimate. Again, we tried to look at the difference between juveniles charged with aggravated and adults charged with aggravated murder figuring it is really the death or non-death aspects that they are trying to get at, not whether there are aggravating factors and not changing the charge. I don't know but juveniles did come out cheaper. But, again, there could be all sorts of reasons for that.

22:43 Chair Ellis            Have we talked to the DA groups about the difference between Washington and Oregon?

22:46 I. Swenson            Yes. Bill Taylor, counsel to the judiciary committee, convened a work group with some legislators and DAs present at the table with Kathryn and me and the OCDLA people. It was a lengthy discussion looking for some common ground. We were really not able to arrive at any. There were different understandings of what causes the numbers to be different, why Oregon's are higher and whether that is appropriate or not appropriate. I don't think we will get to a consensus on any of those issues.

23:26 P. Ozanne            The difference between the ethics or the - there was a prosecutor in Washington who said we use ...

23:36 I. Swenson            As leverage, that's right.

23:40 P. Ozanne            As leverage, and it was overtly said here, and it has been said numerous times, that we do use it for leverage here.

23:45 I. Swenson            That was one place of disagreement and there were others. The form of the proposed measure that will be presented to the committee on March 30 will have three elements. One will be that it will require the district attorney to file notice of intent to seek the death penalty and establish a time period of 60 or 90 days within which they have to make that decision initially but which can be changed. Did it delete any of the death penalty grounds? I think maybe felony murder. We had a whole array of options and decided to go forward with just three. One of them is to eliminate life with parole as an option for the jury in an aggravated murder case. So their only choices would be true life or death.

24:48 J. Potter That is similar to Washington.

24:55 I. Swenson That is exactly right.

25:07 K. Aylward One question instead of four.

25:11 I. Swenson That's right. They are eliminating the current four questions and substituting just one question which says, "Has the state produced sufficient evidence to prove beyond a reasonable doubt that there are insufficient grounds to mitigate this penalty." It is a little confusing.

25:30 Chair Ellis So they don't expressly find future ...

25:30 I. Swenson No. That is the point - to eliminate future dangerousness. That is a very expensive inquiry that the defense is not particularly pleased with.

25:42 P. Ozanne They are not pleased with that factor?

25:42 I. Swenson Yes. So whether anybody will support the final measure is not yet known.

25:55 Chair Ellis It is interesting how the DAs universally say, "I don't consider costs when I make the decision whether to seek the death penalty or not." I can see the legislature saying, "Well, we don't consider costs because it is a policy kind of issue." I bet you in the back of their minds they are thinking, "Yeah, we do consider costs or we should." Okay. The statewide survey looked very upbeat.

26:33 P. Levy I didn't provide much commentary with the report. The numbers say what they say and I am not really sure what they say or why they are saying it. We have never said, in fact we have been quite explicit, that this is not a scientifically validated measure of the quality of representation, but it does indicate changes since we have been asking the same questions.

27:05 P. Ozanne Changes of the scores but hopefully of what we have been doing too.

27:08 P. Levy I think for the most part we are being told that the important players in the system are satisfied with the services that we are providing and that they are getting better, especially in the critical areas of juvenile and death penalty representation. That is good to hear. In connection with each of the areas of practice there is a question that says, "Do you question the competency of any person practicing in these areas?" In the criminal area a majority of the people say, "Yes, we do." That is not terribly surprising, that there would be lawyers out there that people would question.

28:01 Chair Ellis What is our come back on the Measure 11 report that says there was a distinction in quality of representation between indigent counsel and retained counsel? They said it not once but three or four times in there. Do we have an explanation of the data they based it on?

28:27 I. Swenson We are working on it.

28:29 P. Levy In the report, but in only one place, do they offer an explanation for why that may be the case. Kathryn is working on it.

28:41 K. Aylward One of the things that the analysts did is they looked up a sampling of the data that the Criminal Justice Commission had used. We talked a little bit and we have gotten some feedback from the Contractor Advisory Group. The notion is sort of that people who have money and have jobs do better.

29:00 P. Ozanne Better clients.

29:01 K. Aylward All that kind of stuff. What we thought we would do is see how many of those actually were found eligible for court appointed counsel, but then had family or friends or went out themselves and managed to retain an attorney. That would then eliminate the people who actually had jobs and money and assets. You could control that one. Rather than try to do complicated regression analysis ourselves, I think what I will do is offer the Criminal Justice Commission this subset of data and ask if they can do their magic again and tell us if they see a difference between retained or court appointed.

29:44 I. Swenson We have been able to identify different issues that we want to explore, one of which is that many of these are the same attorneys. We want to compare the outcomes in those attorney's retained cases with the outcomes in those attorney's court appointed cases. Then our Contractor Advisory Group...

Oh, hello, Judge. If you have a minute come on up. This is Judge Branford. He is engaged in a very long trial but I am glad he has a few minutes.

30:22 Chair Ellis Sit down, Judge. Nice to see you. How much of your time do we get here?

30:33 J. Branford We are in week 10 of a big trial. We have 14 lawyers in there.

30:42 Chair Ellis So, you are the head of the complex litigation trial group here. Have you had a chance to see the draft report?

30:55 J. Branford No. I have just been swamped. We talked a month ago.

31:04 Chair Ellis What do you have to share with us that you think would be helpful for us to be thinking about?

31:12 J. Branford Judge Bachart and I think very much alike on a lot of issues. I talked to her briefly about what she had said here today. I agree with everything she said. Let me start at the top. I would say that I prefer that we not have a public defender's office. There are people who have done a good job for a long time, and if there is to be a change I would hate to see them effectively cut out of that line of work. They have been good for a long time and for them it wouldn't work.

31:56 Chair Ellis Are you thinking of the individual lawyers in the consortium?

32:00 J. Branford Yes.

32:03 Chair Ellis If we were able to structure the caseload allocation... I will be quite candid. We have been open about this all day. It has struck us as really odd, certainly compared to law firms that are either consortium participants or direct providers elsewhere, to have this situation that we have here where a firm has two partners who spend next to no time and two associates who are doing all the defense work.

32:34 J. Branford I don't like it at all.

32:37 Chair Ellis Well, we have been asking a lot of questions about that all day. If the way it goes is we try to migrate that piece, and maybe some additional piece into a public defender office and not this odd arrangement that we have now, wouldn't that work in this county? It sounds to me like it probably would.

33:02 J. Branford It might be one avenue, I guess. I hadn't thought about them applying for that but they might.

33:10 Chair Ellis I'm not sure who the individuals would turn out to be.

- 33:16 J. Branford We have seen some turnover because of that setup over the years. We have not had people who have gained talent and stayed. That has been frustrating for me as we have lost some attorneys.
- 33:33 Chair Ellis It sounds like the turnover has been in the other firm.
- 33:38 P. Ozanne The Pidgeon firm.
- 33:37 J. Branford There has been a lot of turnover there.
- 33:40 Chair Ellis And next to no turnover in the Hollen firm.
- 33:53 J. Branford There are a couple of the attorneys among those who are doing the work there who are doing a good job and have real promise for the future. You know better than I how it ought to be structured. I would like to see those who have chosen to make Newport or Lincoln City a home, and who are doing good work, not be undercut financially because they get cut out of something. That is kind of a concern. I would like to have people have a financial incentive to stay here to build a career.
- 34:31 P. Ozanne We do too, Judge. I know this is a ticklish for a judge to be commenting on lawyers, but we struggle in all parts of the state about the firm model. We give folks lots of money. We were told it was \$1.1 million a year here. With the firms, the way they are structured, we really have no business looking at what these newer lawyers are getting paid. We can't really look in there. We know there is some profit being made but very little in the way of the oversight we would like to see. That is kind of what we are struggling with.
- 35:04 J. Branford I struggle very much with that, with the lack of oversight. I haven't seen it during the entire time. I don't see it with anybody new. People are really put out to sea and I don't like that. It is not right for the defendants. There is really nothing right about that.
- 35:24 P. Ozanne Guy Greco put it well just recently. The last Chief Justice told me when I had Ingrid's position that you are dealing with cultures both at the state level and the county. We are cognizant that there is a culture here that has been developed over time and ways of doing things. We are cautious about putting people out of business.
- 35:56 Chair Ellis I would say the population is different and Marion County has some unusual circumstances, with both a high percentage of Hispanics and the prison population and so on. In Marion County we had a model not too different from what you have here. It is a single consortium provider model. It didn't have the law firm component but lots of issues on quality. We worked with the community and it took a while to get there, but we developed a defender office to be a component of the system and MCAD continued. What has happened there has been a big, big success. The Marion PD is sitting in the back of the room here, but he knows my thinking on this and it has been a wonderful addition in Marion County. Among other things what has happened is that MCAD has regrouped. They have improved themselves and are doing a much better job. We went through a period where we were trying to get a defender office as a component in Marion County and it was pretty easy to see that all the MCAD lawyers didn't want that. If you ask them today they would say they are so glad we did that. It has made them both better and stronger.
- 37:39 J. Branford If that would work here it would be great. The system only works if everybody is doing a good job.
- 37:45 Chair Ellis I would just caution the people here to work with us on this. We are not here to bash heads, but we are here with limited resources and a requirement - constitutional, legislative, and otherwise - to have a really quality defense system.

38:09 J. Branford That is wonderful. Forgive me because I didn't understand that a PD wouldn't replace all of the individual providers.

38:14 P. Ozanne We don't want to take away your senior people that are working well for you.

38:17 Chair Ellis To be honest, judge, we couldn't do that even if we were of the mind to. Public defenders are firms and they are subject to the unit conflict rules. You can't have a PD dominant or only provision. You have got to have the other component as well.

38:39 J. Branford I didn't know that. That is good news as far as I am concerned. That might well be a very workable solution here. I certainly favor a change.

38:53 J. Potter It strikes me that you have a model here but you don't have a structure. You mentioned we know what the structure should be. We do have some sense of a structure. We can apply a structure to any model. In this case I have say that you have a model with multiple law firms providing the service, but there is no structure underlying the model. There is nothing that says how are you going to train? How are you going to administer? How are you going to deal with recruitment? How are you going to integrate new players into this? The structure doesn't exist.

39:30 P. Ozanne No bylaws for a group that is handling a million dollars a year. Nothing in writing.

39:35 J. Potter You could put a public defender in here without a structure and it would fail. You can put any model in without a structure and it would fail. Part of our job is trying to help build the structure around models. We can talk about different delivery systems as the model, but without a structure you are not going anywhere. At the ground level for me, at least, it is looking and saying, "In this community you have a model and let's say you stay with the model, how are you going to make that model work?" The answer is by building a structure.

40:18 J. Branford That is encouraging to hear. I will be very happy if that sort of improvement can occur.

40:29 P. Ozanne We will need your help - support.

40:33 Chair Ellis Any other thoughts that would help us do our job?

40:37 J. Branford I am sure you all know what you are doing. I am just happy to get a chance to speak. I didn't think I was going to. I don't know what Judge Littlehales said and if you have heard from him yet...

40:52 Chair Ellis We had a meeting with him this morning.

40:56 J. Branford I think Judge Bachart is real sharp. She is a smart one. I think she is astute at making observations, more so than I. I am sure if you listen to what she said that will be helpful.

41:17 P. Ozanne One of the things that Judge Littlehales said was he had questions about which cases were selected for trial and which ones were being dealt. We see statistics here that suggest - maybe this isn't the case - that there is a lower than average felony trial rate and a higher than average misdemeanor rate. Whether that supports the thesis or not, he felt that maybe people weren't assessing their cases as well as they should.

41:47 J. Branford I would certainly agree to that and that is on both sides.

41:50 P. Ozanne That is what he said too.

41:52 J. Branford Thank you. I am sorry to interrupt.

41:58 Chair Ellis Thanks for joining us and good luck with your 14 lawyers.

42:13 P. Levy Can I just make a couple more comments about the survey? I think Ingrid said on the Measure 11 matter that the Contractor Advisory Group is meeting. They have the report and they will be talking about it. Lane Borg had mentioned a law review article that talked about some of the factors that might cause the disparity in outcomes between appointed and retained counsel. The group has that law review article and it is very interesting. I think it will be helpful in identifying some interesting dynamics.

42:52 Chair Ellis This is along the line that Kathryn is saying can be really multicollinearity.

43:04 P. Levy Exactly, Mr. Chair. Finally, in connection with the survey, in response to the questions that asked if respondents had concerns about competency, we then asked for their comments. Then we had a comment section at the end of the survey. We had close to 200 comments.

43:42 Chair Ellis I want to thank you for not adding that to our materials.

43:45 P. Levy I have read every single one of them and the analysts have too, I think, and we are now in the process, where people have identified themselves, of contacting specific people or talking to providers or other people in local systems, about some of the concerns that were brought to our attention with these comments. Unfortunately some people said, "I can name five people" and then they don't provide their names.

44:20 Chair Ellis That sounds like Joe McCarthy.

44:24 P. Levy Before I get out of this easy chair – on April 14 we are having a day long diversity program. We are inviting members of the local public defense community as well as having our whole staff at this event. We certainly wanted to invite you. We talked about this before and ...

44:45 P. Ozanne This is DHS. Did you go to a DHS program?

44:52 P. Levy I did. I have recruited what I thought were the best of the folks that I heard there. These are some really interesting and dynamics folks. Don't let Kathryn see this but I am providing you paper. This is the program and there are bios for the speakers. We have one more speaker to add to the program. You will see one who has become widely known, Dave Dahl of Dahl's Killer Bread. He is a very interesting person to talk to. We hope you can come if you are available.

45:35 Chair Ellis Okay. Pete, are we up to you?

45:38 I. Swenson Almost.

45:40 Chair Ellis Oh, oh, the immigration piece.

45:44 I. Swenson At the December meeting you asked us to follow up on a couple of things. Paul had reported to you on the Padilla case and its implications for criminal defense lawyers. Kathryn has been working with some of our contractors to talk about what would be a good way to concentrate that work in a way that made sense financially.

46:05 Chair Ellis We are talking about immigration specialists?

46:08 I. Swenson That is right.

46:13 K. Aylward We contacted MPD and we received a suggested format for how this might work from Lane Borg and it looks good. In their case – compensation – we can look at how much time is actually used. We can wait until six months have passed and say, "Okay, it is now half an FTE or a quarter of an FTE." We can credit their contract and that will sort of fill the hole created by the missing misdemeanors. That will

work well for them. There obviously has to be a backup provider. One of the things that MPD is saying is that the way you could do it is have someone fill out a form that says, "To the best of my knowledge, I am not going to be asking you about a case on which MPD has a conflict." Even if they don't name names or give the particulars. They are just saying, "Here is the situation and can I have some advice on how immigration issues would impact this situation?" But if they know there is a conflict, than rather than ask MPD for the advice, we want to have somebody else who can also provide that service. We checked with the other PDs. Tom Sermak said that there may be some interest in his office participating, although we haven't gotten very far in discussions.

47:31 Chair Ellis

What they would do is have one of their people become sophisticated...

47:38 K. Aylward

MPD has an attorney on staff already who had worked in immigration law before. In addition to that one person there are a couple who are interested in getting more training and experience in this area. Those two PDs are a possibility. I haven't spoken to Caroline about this, but we will also be getting in touch with JRP to see if they would be interested and have some expertise with regard to juvenile cases.

48:09 Chair Ellis

Then the idea is to make that resource known and available to lawyers statewide.

48:19 K. Aylward

That is correct. We had sort of talked about whether we should have one person that we would contract with. I think our existing contractors are sufficiently in need of work to replace a declining caseload. If there are contracts being awarded or more work available to be done that we are going to pay for, I would rather concentrate it in the hands of our existing public defender offices especially if it doesn't amount to as much as a full-time or a half-time FTE, if it is a small enough contract I would feel more comfortable placing it in one of the larger entities.

48:53 Chair Ellis

But whoever it is is going to have to do a fair amount of self-education to get up to the level that they need to be.

49:03 K. Aylward

Unless it is somebody who before they went to work ...

49:05 Chair Ellis

Already had that...

49:07 K. Aylward

They were an immigration attorney and that is what they did.

49:12 Chair Ellis

I am glad we are following up. This just called out for us to craft a way to make that specialized knowledge available. This sounds like an incredible way to do it.

49:26 I. Swenson

We will keep you updated on those developments. The other related piece from that same meeting was an issue that was raised by Commissioner Welch about whether there was some way for us to pay for, or in some way require our dependency lawyers to take whatever steps need to be taken in a domestic relation action between parties in the juvenile dependency case so as to establish custody or to address whatever the unresolved issue is before the juvenile court can dismiss its petition. We heard in Deschutes County about the frequency with which those lawyers are voluntarily taking on that work, but that is not universally true. At least anecdotally we know that there are cases that go to repeated review hearings awaiting a final domestic relations order. I don't have a solution today. I did want to report on two things. One was I was hoping to find some data because I think if we were either going to ask you as a Commission to authorize us to engage our contractors in doing that kind of work, or to seek special legislative authority or anything else, we would need some data about the cost of the way those cases are currently being handled. Neither the Judicial Department nor the Department of Human Services has any such data available. It is not something they would have collected and can't easily compile. However, there is a meeting of the Juvenile Court Improvement Project Advisory Group on Monday and I will explore with that group - I mean I think the juvenile judges would have as much interest in the issue as we do - whether they

would inquire of their judges. I think sometimes the inquiries they send to their judges are more easily responded to than another poll by us. We have been doing a fair amount of polling lately and there comes a point at which they probably get tired of hearing from us. I will check into that on Monday. If for some reason that group doesn't wish to do it, I am happy to make the effort and will probably seek the assistance of the Chief Justice in getting it out to the juvenile judges. I hope I sent you, maybe I didn't, the colloquy that was finalized in early February, which Chief Justice De Muniz approved and sent to all the juvenile judges. It is a sample colloquy that they can use in waiver of counsel situations in juvenile delinquency cases. His letter encourages their use of that document. The document includes a number of considerations for the judges in deciding whether this is a voluntary waiver. Included among those considerations is a list of collateral consequences that may occur as a result of a delinquency adjudication. The chief pointed out that there was no mention of potential immigration consequences. It is different in juvenile delinquency cases than in criminal cases because a juvenile delinquency adjudication is not a conviction for purposes of the immigration law, but there are other impacts and so we are going to add that and send our colloquy out one more time. It is out there now and I am hoping is in use.

53:14 Hon. Elizabeth Welch

Ingrid, I don't understand what you are going to ask the judges going back to the domestic relations issues. What is it you want them to tell you?

53:22 I. Swenson

How often that occurs. Now some courts have staff who assist in that process and they don't have the same problem that some counties do where cases just get continued from one review hearing to another, awaiting an action which nobody is working on to come to a final resolution in the domestic relations case. The idea would be to get some information about the volume.

54:03 Hon. Elizabeth Welch

I just wonder - this issue has been around for a long, long time - if there wouldn't be some way to design some kind of a record keeping system prospectively for a period of time for trial court administrator's to implement in a few jurisdictions and keep track of it that way. One of the questions is when does a case fall into that category? I promise I won't get into the details. At what point in the case does that actually become an important issue? That is something that a judge has to be in charge of and needs to say, "Okay, it is time." There needs to be a way to sort of track that. The problem with those facilitators - again, there is a lot to be said here and I won't say it all - those facilitators haven't worked very well. This is a very, very complicated subject. Without the lawyer actually taking the bull by the horns the facilitator effort in juvenile court that we were far and away the leaders on was pretty much a failure. I think it was a failure because people don't follow through because they are ambivalent.

55:51 I. Swenson

I think that is true.

55:55 Hon. Elizabeth Welch

I don't see that you are going to get anything very compelling or helpful from just asking judges if they have a lot of cases like this. If they know what their cases are they are going to say yes. Then what will you know?

56:10 I. Swenson

I like the idea of tracking into the future. It is a good idea.

56:18 Chair Ellis

Alright. Now.

56:22 P. Gartlan

Thank you, Mr. Chair. I only have a couple of topics. I think Ingrid's report summarized what happened to AD during the past year. We have completed the evaluations. You have heard about the evaluations. They are kind of extensive. Every attorney writes a self-evaluation and then their team leader writes an evaluation. They meet and then management meets with the individual attorney, so

it is time consuming. We do it annually and it is fatiguing but also comforting. I am happy to report that I think every attorney improved over the last year. We are really happy about that because people are developing.

57:16 Chair Ellis

You know that report process in terms of the psychological effect is really a good thing. All of these, particularly the younger lawyers, they have been going through a graded environment all their academic years and then they get to be a fish in the open ocean. If they don't get a sense of progress and report and milestones it is upsetting. The flip side is you do those reports it can be a real incentive to push yourself to actually improve.

57:59 P. Gartlan

I agree. It is beneficial for the individual attorney and ultimately it is beneficial for management. I think the individual attorney feels like people are paying attention and giving them good, supportive and critical feedback. I am really happy because everybody wants to improve. People take the feedback and they incorporate it into their practices and they are doing really well. I am really happy about that. We as management get a sense of comfort to see that there is this kind of growth ongoing.

58:40 P. Ozanne

One of the things that we talked about a lot and I know all of us have been in a situation where organizations promised to give us evaluations and maybe it happens for a year or two and then drifts off. It is always important to figure out if this is something that we can really do in the long haul and that your successors will do. Do you think there is any place where it could be streamlined to get all of those benefits? Maybe just have the team leaders do it one year? Two year evaluations are pretty good too. They are better than none. Is there a place where you are thinking about ...

59:08 P. Gartlan

Ingrid asked me that recently. I honestly don't know the answer. I do know that I like the idea of giving people feedback. They need the feedback.

59:22 P. Ozanne

Will it be sustainable over a long period? Usually they aren't because they are usually too ambitious or too long or too frequent. I am sure you have thought about it.

59:32 P. Gartlan

I am hesitate to tinker with it because it has proven successful. I think it also points out that our structure works. I am really happy with our team structure. I don't know if you remember but our office is divided up into teams. The teams meet every Wednesday. There is a team leader and there is a variety of experience on the team. The team leaders are doing so much teaching. They are really bringing the younger attorneys along.

1:00:04 P. Ozanne

The whole process has grown your management structure. Now you have some people who have grown up to take responsibilities that you and Becky once solely had. That is great. Congratulations.

1:00:22 P. Gartlan

Thank you. It is not just me it is the structure, the chief deputies and the team leaders. The other is just a quick report on the bills. AD has three bills. One is the mailbox rule. That is people who are involuntarily confined and what is the filing date for them? There was a case that said that unless you use certified mail, the filing date is the date that the initiating document is received. That is going well. That is going to the Senate floor. There was no opposition. Everyone approved of it. We think that is going to be successful. Now when somebody who is involuntarily confined gives the document to the people in charge of that institution that is when the filing will occur. The other is a forfeiture by wrongdoing fix. We talked about this as an evidentiary rule. The evidentiary rule is kind of a spin off of the *Crawford* confrontation right. For instance if I am on criminal trial for something and I do something to make a witness unavailable, and I am doing it intentionally so that the person cannot be a witness at the trial against me, if I do that then I am effectively waiving or forfeiting my right to challenge the introduction of hearsay evidence from

that witness against me. I am losing or forfeiting my confrontation rights. That is going to a work committee. It is going to have a work session hearing.

1:02:12 Chair Ellis

What would the bill do?

1:02:11 P. Gartlan

What the bill does is it tries to – actually what it did was repeal one provision in the evidence code, which was adopted in response to *Crawford*. When *Crawford* came out the legislature adopted two provisions of the evidence code to implement this forfeiture by wrongdoing concept. We had argued that one was overbroad. A U.S. Supreme Court decision came out in the interim recently, last year or the year before, which kind of agreed with our position. We advised to delete, to repeal that one provision. The state came in and said, “No, that is not necessary because the provision does have effect in non-criminal cases.” The AG wanted to have that hearsay in effect in civil cases. The truth of the matter is our proposal was overbroad and the state’s proposal doesn’t conform to the U.S. Supreme Court case. There is a middle ground. So hopefully in the work session the middle ground will be found and identified and approved. That is the status of that one. The other is the *Partain* fix. We talked about this one a while ago, that is if a criminal defendant is successful on appeal, the rule in this state had been that when the case goes back on remand, whatever the sentence had been originally from that judgment set the ceiling which a judge could not exceed. If I were convicted and received five years and I successfully appealed and got a new trial and was convicted again, on remand at resentencing the judge can impose anything up to five years. That would be the ceiling. The Oregon Supreme Court issued a decision last year that said we are not so comfortable that that rule is really a clear reflection of legislative intent. We think that when we announced the rule in 1967, maybe we went too far and subsequent legislative enactments kind of give the impression that the legislature is now retreating from that rule. The Oregon Supreme Court rule has said that that rule is no longer in effect. They said that we are not going to observe that.

1:05:06 P. Ozanne

Kind of an unusual treatment of legislative history, isn’t it? “We kind of think...” I know you are just paraphrasing.

1:05:15 P. Gartlan

They were saying that the foundational underpinning to that was a little bit suspect and maybe a little overreaching in 1967. Subsequent legislative enactments give us the impression that, “Yes, if a case is remanded there should no longer be a ceiling on what can occur on remand.” They put those two together and decided that what the court did in 1967 may have been a little bit too much gloss on an existing statute that was more general than specific. “We are not going to sustain that rule.” If the legislature wants to step in and re-impose that rule it can do so. That is what we tried to do. Senator Prozanski has not tabled it, but sent it to an interim work committee.

1:06:27 Chair Ellis

Which you told me last night probably means it is not going anywhere.

1:06:29 P. Gartlan

Probably not this session.

1:06:38 Chair Ellis

Anything else? No further updates. Our next meeting is April 28 and we will be in Salem.

1:06:58 P. Ozanne

Can I make one further announcement and commend one of our providers who I work with a lot in Multnomah County in another capacity. I just want to tell you what a great job Lane Borg is doing for the system up there. I am director of the local Public Safety Coordinating Council. Lane and the public defender have always been a member. He is very well spoken, highly respected for his background. He was a trial court administrator. He comes with a lot of background. I just want to thank Lane for that participation and let you know that he is doing a very good job for the defense system in our county in terms of being an ambassador and conveying the message. It is a good function and he is fully participating in the policy making role.

1:08:02 Chair Ellis Thank you, Lane.

**Agenda Item No. 8 Executive Director Recruitment Plan**

1:08:01 I. Swenson Mr. Chair I apologize. There is another item on your agenda.

1:07:48 Chair Ellis Did I skip it?

1:07:54 J. Potter It is on the back page.

1:08:16 Chair Ellis Well you make it sound like there is an executive director recruitment plan. My plan is at the April meeting we should discuss this. It will depend somewhat on what you tell us your schedule is, but I think we have been through the drill twice. Last time was easier than the first time. It was easier because you were there. Maybe you could submit to me by email what your thinking is on your time and plan.

1:09:15 I. Swenson I still think the end of the July would be a good time. The legislature should adjourn around the end of June, a little bit later maybe. Given a month past that to let things sort of settle down... I think Kathryn might have some thoughts on things that you might want to undertake sooner than the April meeting.

1:09:36 K. Aylward I took a look at what we did last time and the timeline that we had. As you may recall we used Geoff Gilfoy to the tune of \$18,000. I am just thinking about our budget. I don't know if you want to go through a similar process but there were six weeks from the time the job was announced and then it was closed. Then the AKT firm did the first cut. Even though you were given all the applications I think AKT made the first cut. Then they made calls to set up interviews for the people that you wanted to interview. I think that whole process took probably about two months after it closed. I didn't follow it anymore because there was a secret place to meet. You guys arranged it and I don't know what happened after that. I know somebody said they were blindfolded when they were taken there.

1:10:51 Chair Ellis We had to shoot them. I do remember that we tried to get a very wide announcement. I have some humorous memories of some of these applicants. Are you suggesting you think we could do a lot of the staff work in house and not use the outside service?

1:11:22 K. Aylward I am not necessarily suggesting that because I don't know how much value was provided to the Commission for that expenditure. Was it a huge relief and he did a great job and he culled the list and picked the people you would have picked?

1:11:38 Chair Ellis I don't have a memory of him actually doing much sifting. My memory is we did the announcement. We did get applications both in state and out of state. It wasn't hard to draw the line. There were about four that were really viable candidates. I can't remember the number but I don't think we had any real disagreement. We had a smaller group with the Commission running it. Then they did set up interviews and those are very significant. There is no great worry. If you would be willing to help us on this....

1:12:34 K. Aylward If I decide not to apply I will be happy to help you.

1:12:50 Chair Ellis Let us know. I wonder if between now and the April meeting you could put together the job description and what the notice would look like. Then if we are in accord on that let's send it out right after.

1:13:05 J. Potter I am a little concerned about waiting until April. The timeframe scrunches down. If Ingrid is saying she is out of here at the end of July and we are not meeting until the end of April when we start putting it out. We are not talking to people in interviews until sometime in June.

1:13:26 P. Ozanne It would be nice to have an overlap with Ingrid for two weeks or a month.

1:13:27 Chair Ellis I remember yours. You were driving your truck out of town the day Ingrid said she would do it.

1:13:41 P. Ozanne I had so much confidence in Ingrid. Just passed the baton.

1:13:44 Chair Ellis You were behind the wheel of that truck. You don't know what...

1:13:51 K. Aylward I don't know how much you want to spend on advertising, but some kinds of publications that are monthly publications or quarterly need lead time.

1:14:06 Chair Ellis I hadn't actually seen this was on the agenda so I am winging it. Why don't we, if you don't mind, put together the job description and circulate that to the whole Commission and we will just by committee of the whole get that. Why don't you look at what we did by way of publication last time, price it out, and let us know what that will involve. We may well have a telephone meeting to get agreement on the description.

1:14:45 K. Aylward We didn't do a lot last time. When it was first filled I had a huge long list of all the places you might advertise and what it would cost and we did those. Then the second time it was just Monster.com, NLADA and OCDLA were pretty much it.

1:15:07 P. Ozanne Are we going to change the description? I don't think so.

1:15:12 K. Aylward I was just going to send you the same email that I sent you in 2006.

1:15:19 P. Ozanne We know the process. Why don't we just let it rip.

1:15:20 Chair Ellis Tell you what. Let's do that. Give everyone a few days to respond by email. If you could let us know what the publication procedure was last time just so we are doing our job. Put together what you think the schedule ought to be in terms of publication and closing of the applications. I remember this was not that hard last time. I don't feel the need for an outside sorting firm. This will be after April. Then get people's thoughts on who really wants to spend time on this and have a subcommittee. The key is the interviews. All that is really going to require is a location. I am sure I can arrange that.

1:16:26 Hon. Elizabeth Welch A couple of things. I just got through going through a very elaborate hiring process. There are a couple of things that come to my mind. Maybe at the same time that the board receives copies of the job description that at least key staff also be given an opportunity to comment on the job description. My experience was that that was very useful.

1:16:57 K. Aylward I thought you were going to say on the applications. Because that would have been nice.

1:17:05 Chair Ellis I think last time we did get staff input on the finalists.

1:17:11 Hon. Elizabeth Welch I am talking about the job description.

1:17:11 Chair Ellis I am talking about applicants.

1:17:15 Hon. Elizabeth Welch The next thing that I was going to mention is that one of the more challenging things that I found in that most recent experience was the questions that were asked of interviewees was probably the most challenging part of the effort. You had to have written questions and everybody had to be asked the same questions - what those

questions ought to be. I was thinking maybe that is something that could be worked on now, maybe by different people who are working on the job description, if there is anything being done on the job description other than just sharing it. Just what do you ask? How do you keep track of answers?

1:18:18 K. Aylward

Was that part of the service that Geoff Guilfoxy provided? Did he sit in on the interviews with you?

1:18:21 Chair Ellis

I don't recall that we had a set standard of questions. I remember the interviews were fairly free ranging. Let me just say that I do know that Paul has indicated an interest in applying, so let's isolate him from your process. And if you decide to go that route we will isolate you from the process.

1:18:54 K. Aylward

Thank you.

1:18:54 Chair Ellis

Thank you for making me turn the page. I would like to get some initial reactions on Lincoln County. We had quite a lot of input today. John, how about you? Any thoughts?

1:19:15 J. Potter

You talked a lot about a public defender and floated that idea out there. I think that was appropriate to do. The comments that I made to the judge sort of sum up my comments. To me it isn't as much about the model that we use as it is about the structure and the implementation of the structure. I think we can go around the state and we can point out successful models and unsuccessful models. They are the same models but the implementation didn't work. There are public defenders in the state that are doing a tremendous job – a majority of them. But there are those who aren't doing such a good job. There are good law firm contractors. There are good consortium providers and there are ones that needed help. It strikes me that the structure and how it is put together is more important than the model itself. In this county we may change models, but I would say before we jump into it too far we talk about the structure of any model and the structure of this one. This one seems to have nothing underneath it. There are no bylaws. There is no vision for the future. There is no training or mentoring. There is no anything other than getting the money and distributing it and then counting the cases and giving reports back to OPDS. I came away from this not alarmed by the system that they are using, but alarmed by the fact that they have no way to tell us what the system is. There is nothing there. It is just a hollow shell. I mentioned it to Guy Greco after the end of the meeting as well. When we start massaging this process, for me as a Commissioner I would want to see him coming back and filling this in, making a case for what the structure is going to look like and how they are going to implement it. You may say, "Well, John, you did that in Lane County." I argued, successfully I think, to hold on to the communist system that they had in Lane County of 50 lawyers and an administrator and everybody was in a happy place. That didn't work as it turned out and I would suggest it didn't work in large part because it didn't have a really good structure and a really good manager to manage the structure. In Lane County we now have essentially the same system in a much more compressed version with a good, turning out to be a good, manager. Maybe it is Guy who decides to step up to the plate and become a manager, which I don't think he is right now and doesn't appear to want to be. He wants to be a lawyer and that is fine. Brad, who we heard from originally in Lane County, didn't want to be a manger but he was sort of recruited and is doing a good job at it. He was given some direction and the expectations were clear. I think that if we came back to this county and made sure the expectations were really clear and set out a structure we want to have achieved that they might be able to make it. Peter may shake his head. We have a sort of deja vu of all this in this county. We have seen this. We have been here before. We have talked to people before and really nothing has changed.

1:23:30 P. Ozanne

I like your structure/model distinction. We have always been rather abstract about this because we want to avoid personalities which isn't fair. Structure yes, but a

manager, people to fill these roles who take it seriously. We have problems in others of the state with that deficit.

1:23:56 Hon. Elizabeth Welch

I think I agree with what has been said so far. All I would say is that I think these people should be told what is the matter with what they have been doing.

1:24:05 P. Ozanne

Well they have.

1:24:09 Hon. Elizabeth Welch

I think that is the first step. What is the matter with what they are doing? Several people today said, "I don't like this situation with this law firm." I am really interested what it is they don't like? Are we all actually talking about the same thing?

1:24:29 Chair Ellis

I can tell you one reaction that I was having was, start with CBS and they contract with this very amorphous, no bylaws group. That is what they are doing. The group includes a law firm. The law firm has two owners, two partners who are not players and then you get down to the two that are players. I found about five points of connection, no one having any real ability to do the fundamental things we really care about, the recruitment, training, supervision, mentoring and the discipline. I found not only no structure but no model. These are all nice people. No one is a bad actor in this. It is this way because, as one of the witnesses said, we have always had it this way. That is just how we have done it. Then it did strike me that this is a county where it could be a lot easier than it was in Marion County to move to the model of a defender and a consortium. I think there is a big vacuum to fill. If we went that route and got the right person to head up what would become a PD office, and might well have those two associates as part of it, I don't think Jeff would be that far out of joint, particularly if they subleased his building. In that sense I was encouraged that I think the climate is right. I thought we had two judges saying they could see that. That might well be something they would be supportive of so long as it didn't lead to one of the individual practitioners, whose is essentially full-time and as far as I could tell performing adequately, being left in the lurch. I don't see why that would have to happen at all.

1:27:09 P. Ozanne

I don't think that I have much to add. I was down here. Kathryn alerted me to the issues and I knew Pridgeon and Ouderkirk as students and we came down here and told them what the problems were. I have to say that we were received far better this time and I think has been due to lots of informal communications.

1:27:37 Chair Ellis

I think Shelley has probably helped on that.

1:27:37 P. Ozanne

I am saying that is true. They were about ready to throw me out of here.

1:27:52 Chair Ellis

It was probably your abrasive personality.

1:27:54 P. Ozanne

They are much more amenable. The judges have changed and that has probably helped.

1:28:09 Chair Ellis

Ingrid, what is your reaction to all this.

1:28:10 I. Swenson

I have listened with interest to all of these thoughts. One piece that didn't get emphasized that maybe we need to keep in mind is that the independent lawyers that were mentioned, the five consortium people who are not part of firms...

1:28:24 Chair Ellis

Two we heard from, actually three.

1:28:26 I. Swenson

They do a substantial part of that caseload and by everybody's account, without any organization they are all doing good work. These are people you don't want to displace if you can avoid that. You want them to have enough of a caseload to

maintain them. I think a public defender office, to be functional, would have to take a big part of that caseload and you might lose some of your very good providers. I also get a sense here, and I know you and Peter did a lot of work in Marion County to put together that public defender office. I think it would be a very difficult undertaking in this county. I don't sense that the bench here is quite where the Marion County bench was in terms of dissatisfaction. They have a couple of issues. They can identify them for you and they can identify potential solutions. I am just not sure that you want to, over the objection of so many people, try to pull together a group that doesn't have local support.

- 1:29:35 P. Ozanne And the big addition was we had the chief's help in Marion County. He said this was a problem and he made some calls. He made it happen. He helped us with the board and that was a big factor in Marion.
- 1:29:49 I. Swenson I think it would be hard. Some of the judges suggested that you look at contracting directly with the lawyers you want to deal with. That would be a model sort of like Lane County which is a consortium composed of all individual lawyers instead of with firms. Just eliminate the firms. "If a lawyer in your firm wants to join our consortium, fine, but that lawyer is going to be the designated person to take cases not whomever you decide to assign to this contract work." That is a possibility. I won't even mention my voucher proposal to you again. If there was ever a county where it would be an interesting experiment, you could simply tell the defendant, "Here is your voucher. You decide which of these law firms you want to take your case and OPDS will pay whatever the going rate is for that case." It is just a threat.
- 1:30:50 Chair Ellis I remember my reaction when you raised it before was I am really not sure many defendants are able to play that market function. That is almost the role that we are supposed to play which is to have really good providers available. I certainly listened and heard resistance in some quarters. To be honest, it was much less than I expected. I think it is an idea, if we percolate it and work with people, it could happen. It doesn't have to be to bring them in from outside and impose them on the county. I think if we found the right person who wanted - the Tom Sermak of Newport or Lincoln City - I think it could be done without too much disruption. I think down the road it would be a far better structure than we are looking at now.
- 1:31:59 I. Swenson It is a pretty small caseload here. It is a little bit different from Marion with a very large caseload.
- 1:32:08 Chair Ellis I understand that.
- 1:32:09 J. Potter How does it compare to Coos County?
- 1:32:11 I. Swenson That is much closer. Probably bigger than Coos.
- 1:32:15 K. Aylward Very, very similar, and in Coos the PD takes 62% of the caseload.
- 1:32:26 P. Ozanne We could start a lot smaller here. How many are there in your group, Tom?
- 1:32:30 T. Sermak Seven.
- 1:32:30 P. Ozanne What did you start out with, Tom, four?
- 1:32:39 T. Sermak Two initially and then added a third very quickly after that. We built up gradually to four, but four was going to be the initial business model and then we added the others as we took more cases.
- 1:32:57 P. Ozanne We could do it gradually with the aging of the bar. Some of these people are not going to be around.

- 1:33:06 I. Swenson I just wanted you to remember those lawyers who are doing good work on their own and probably are not interested in working in a public defender office.
- 1:33:17 Chair Ellis I respect that. In my mind I thought given the odd structure that we ended up with you could almost get to the PD model without any major disruption. It takes one good manager person and I think we could get that. Any other thoughts?
- 1:33:45 P. Ozanne This is just more appropriate for a retreat but I will just plant it. When is our retreat? Next winter?
- 1:33:53 I. Swenson Whenever you would like it.
- 1:33:53 P. Ozanne Now that there has been so much good work over time and our lawyers in the state generally know what we do and trust us - when I say “we” mostly I am talking about the staff - I wonder whether it is time to break down that barrier between the site visits and the structural reviews. It really is kind of an artificial division. There would be some things we wouldn’t talk about about individuals. When you think about how well is it working? I have a sense, and I am not picking on Lincoln now, but each county is kind of a world to itself. Some of them have a very different view about what quality is. When you are talking about structure and having these abstract conversations about what is really going on. I would think if I was a provider I would say, “Come on.” I wonder if anybody really believes that there is a separation between the two processes.
- 1:35:13 I. Swenson It is certainly an ongoing discussion. I think Paul, among others, would say they ought to be consolidated. I will just tell you my main reservation about that is that we rely on volunteer lawyers for those site visits. I don’t think they do that to assist us. They do it to assist their colleagues and to have....
- (tape ends abruptly – no adjournment)

**Meeting was adjourned at 2:20**

# Attachment 2

# D R A F T

## **Public Defense Services Commission Service Delivery Plan for Lincoln County**

(March 2010)

### **Introduction**

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

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

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

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

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

### **Lincoln County Reviews**

PDSC's first service delivery plan was developed for a region that included Lane, Lincoln, Linn and Benton Counties in 2004. At that time although PDSC

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

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

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

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

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

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

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

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

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

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

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

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

Rob Bovett is the elected District Attorney who replaced long term Lincoln County District Attorney Bernice Barnett. Mr. Bovett, who was previously with the Lincoln County Counsel's office, served as the chair of Oregon's Meth Task Force and is the primary author of the state's meth lab control laws. He has a chief deputy and seven deputy district attorneys. The office also has eight legal assistants. Mr. Bovett has been skillful in obtaining grant funding to retain positions that otherwise would have been cut when the office lost 8.1% of its County General Fund support. Commentators note that relations between the District Attorney's office and the defense bar have improved significantly over the relations that existed under his predecessor.

#### **Criminal Court System**

The Lincoln County Circuit Court does not use a central docketing system. Individual judges manage their own dockets. Each criminal case is assigned to a particular judge at arraignment. All future hearings in the case are heard by the same judge unless that judge is unavailable on the assigned trial date due to a conflict. The case may then be assigned to another judge for trial if one is

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

available. Measure 11 cases, however, are rotated in order that all of the judges have a similar number of Measure 11 cases. Hearings on motions must be scheduled with the individual judge's staff. Out-of-custody cases are assigned an Early Case Resolution (ECR) hearing date approximately six weeks after arraignment. It is expected that discovery will have been provided by this date and that attorneys will be able to report whether the matter will be scheduled for a Final Case Resolution (FCR) date or for trial. A Trial Report Hearing is held three weeks before trial to confirm whether the matter will remain on the trial docket.

For in-custody matters there is usually only an FCR date which is set approximately three weeks after arraignment.

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

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

An LDC attorney is present for all arraignments.

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

There are four specialty courts in Lincoln County: a drug court, a domestic violence court, a mental health court and a "HOPE" court. The oldest of these is the drug court, which has been in place for approximately four years. Judge Branford serves as the drug court judge. The Lincoln County drug court has implemented the Ten Key Components of Drug Court recommended by the National Association of Drug Court Professionals. If a defendant in a criminal case is determined by the state to be eligible for drug court participation, the defendant discusses the program with the attorney who is initially appointed to represent him/her and makes a decision whether to participate in the court. Most participants are eligible for a conditional discharge upon successful completion but some defendants who are on probation volunteer to participate in order to achieve sobriety. In the past drug court participants were not represented once they were accepted into the program. For the last year, however, representation has been provided by consortium attorney Dan Taylor. There are currently 18 to 20 people participating in the court. Initially they are required to appear weekly,

then bi-monthly and then monthly until graduation after participating for a year or more. The court continues to work with participants who are struggling with sobriety.

There is a Domestic Violence Court (DV Court), which emphasizes speedy resolution of the charges and regular compliance review hearings during the course of supervision. This court has been in place for approximately a year. The state provides full discovery at arraignment, including police reports. Most cases involve deferred sentencing agreements but for those who contest the charges and are found guilty it is also available as part of a probationary sentence. Compliance reviews are scheduled after 60, 120 and 365 days. No contact is usually permitted between the defendant and the victim until after the first compliance hearing. There are approximately 100 people in the program. The rate of compliance with program requirements has been high. All of the criminal lawyers participate when they have clients in the program. The program is partially grant funded. Judge Bachart presides over DV Court cases.

Hope Court is a prison diversion program funded by a Department of Corrections grant. It is directed at repeat property offenders who are facing presumptive prison sentences. It is modeled after the drug court but the focus is on victim restitution. Judge Branford presides over the Hope court.

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

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

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

### The Juvenile Delinquency System

There are three juvenile court counselors and one supervisor in the Lincoln County Juvenile Department. Positions have recently been lost both in the detention facility and in the juvenile department. The department uses Formal Accountability Agreements with many first-time offenders and in most misdemeanors. Under an agreement with the District Attorney's office the juvenile counselors prepare most of the petitions. The county has an 8-bed detention facility and a 12-bed shelter which is used for both delinquent and

dependent youth. Most other placement resources are through the Oregon Youth Authority. Measure 11 youth (16 and older) are held in the county jail. Alternative approaches to the handling of juvenile sexual offenses has permitted some youth to expunge their records and be relieved of the obligation to register as sexual offenders.

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

The juvenile court schedules “compliance hearings” for some probationers in an effort to prevent violations. Once an attorney is appointed for a youth, the court does not terminate the appointment. When probation violations are filed, however, whichever attorney is next in the rotation system is appointed rather than the original attorney<sup>2</sup>.

### The Juvenile Dependency System

Attorneys are appointed for parents at shelter hearings. Court staff notifies attorneys several hours in advance that they will need to be present. They receive the petition and the DHS shelter summary and sometimes a police report before going to court and usually have a few minutes to meet with the client before the hearing. Attorneys are rarely appointed for children except at the request of another party to the action. CASAs are appointed in most cases however. (There are currently 38 CASA volunteers in the county.) Since Paulette Sanders became the pro tem judge, there have been more review hearings than in the past. She usually schedules reviews 90 days and six months after jurisdiction. A pre-permanency hearing is scheduled to determine what the agency’s permanent plan will be so that parties can be prepared to litigate the issue at the permanency hearing if necessary.

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

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

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<sup>2</sup> This approach by the consortium is not considered a best practice. Youth offenders benefit from having continuity of representation and being able to contact “their attorney” with questions and concerns during the probation period.

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

The Confederated Tribes of Siletz Indians of Oregon is the largest tribe in the area. No tribal representative participates in the Model Court team or other policy making bodies. Tribal experts are available to testify in Indian Child Welfare Act cases but the tribe rarely intervenes in these cases, never seeks transfer of cases to the tribal court and rarely has services to offer to native families involved in state juvenile court dependency matters although the tribe does have a social services department and a number of caseworkers.

### Civil Commitment Hearings

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

### Public Defense Provider

PDSC contracts with a single provider for non-death penalty cases in Lincoln County, the Lincoln Defense Consortium. Guy Greco is the administrator of the consortium. The consortium contracts to handle 3,108 cases per year. The group includes five individual attorneys and two law firms. The law firms are Ouderkirk and Hollen and Pridgeon, Bjornsen and McCrum. Senior members of both firms handle some public defense cases and each firm currently has two associates who also handle public defense cases.

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

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

New consortium attorneys are added either by being hired by one of the member firms or with approval from OPDS. The consortium provides no orientation or training to members. Each firm has very experienced senior members. The consortium administrator is a highly regarded criminal defense lawyer who is available to provide advice and assistance upon request. The consortium does

not monitor the caseloads of individual attorneys. Such monitoring is deemed a function of the law firm rather than the consortium. Similarly, training and oversight of the work of these attorneys is not considered a consortium function in Lincoln County although the administrator has recently taken a more active role in identifying concerns about performance and seeking to resolve them.

#### Case distribution within the consortium

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

### **Comments from Lincoln County Stakeholders regarding Provider**

#### Dependency Representation

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

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

for placement, visit supervision and the like.<sup>3</sup> There is a high level of competence in termination cases.

### Representation in Criminal Cases

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

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

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

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

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

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

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

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

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

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

### *Role of compensation:*

Prior to 2008, the Lincoln Defense Consortium's contract established a single flat rate for all case types with the exception of TPR cases and included a provision for hourly billing on Measure 11 cases after a certain number of hours. During every contract negotiation prior to 2008, CBS tried to persuade the consortium to move to individual case rates. Finally in 2008, CBS insisted that cases be weighted according to seriousness. However it appears that while agreeing to a contract that valued cases appropriately, the consortium decided to continue the single rate model internally. Since under their internal model attorneys receive no more compensation for handling Measure 11 cases than they do for handling misdemeanors, it may not be surprising that some lawyers prefer not to handle the more serious cases and assign them instead to associates in their firms<sup>5</sup>. Attorneys handling termination of parental rights cases do receive a fixed amount for those cases and the quality of representation in those cases is considered to be very good<sup>6</sup>.

### *Weaknesses of the consortium model:*

In earlier service delivery reports, OPDS has described the types of entities with which it contracts and noted the relative strengths and weaknesses of each type. That information is set forth in Appendix A to this report. As the Commission has found in other counties the organizational structure of consortia varies from one county to another. When a consortium is the sole provider in a county some of

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<sup>5</sup> Some of the law firm associates are described as offering excellent representation, others as needing more training.

<sup>6</sup> Lawyers in these cases were described as "being on full alert."

the traditional weaknesses of loosely organized consortia may not be offset by the presence of other providers.

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

*Qualification standards:*

The law firms clearly have senior members who are experienced and capable of doing all of the necessary training and monitoring but currently do not perform this function. The senior partner in one firm when informed about the comments regarding the lack of training and monitoring, noted that the firm never assigns lawyers to handle cases for which they are not qualified under PDSC's own qualification standards. While these standards are intended to express the minimum qualifications attorneys must have in order to be approved to handle particular case types, they are not meant to serve as a substitute for comprehensive quality assurance systems which contractors should have in place, and which they will be required to have in place for contracts beginning in January of 2012. Nevertheless, PDSC could expand the qualification standards to include specific categories of training and preparation that would have to be demonstrated before attorneys could appear at particular types of hearings without a supervisor or mentor.

*Special contract terms:*

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

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

*Restoration of court appointed list:*

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

*process for a court appointment list in Lincoln County might result in improved representation in Measure 11 and other serious cases.*

*Outside training resources:*

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

*Statewide mentor attorney program:*

There are many areas of the state in which training for new attorneys is not as comprehensive as it should be. One approach to meeting the need for training statewide would be to use skilled attorneys who want to devote a portion of their time to the training of new lawyers as traveling mentors. At least one of these attorneys has indicated a willingness to provide such assistance. OPDS would need to either compensate these trainers for their time or provide adequate contract funds to allow providers to retain their services.

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

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

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

Guy Greco testified that he had been doing public defense work in Lincoln County since 1977. In those days there were a lot of attorneys who accepted court appointments. The Indigent Defense Services Division [of the Oregon

Judicial Department] introduced contracts and two groups successfully bid for the initial contracts. PDSC later recommended formation of a single contract entity consisting of the two law firms and five individual attorneys.

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

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

He said that consortium members don't compete with each other for public defense cases. They have agreed among themselves how the cases are to be distributed. Some lawyers prefer to handle juvenile matters and others prefer to focus on criminal cases. Members devote varying percentages of their time to public defense. Mr. Greco devotes approximately 10% of his time to consortium management. Jeff Pridgeon said that three of the independent attorney members of the consortium were associates in one of the firms before establishing their own offices. Other associates and one of the firm partners left the area seeking a drier climate or a more prosperous community in which to practice.

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

Guy Greco said that the consortium has a board of directors that includes one member per office and meets approximately every six months. The focus of board meetings has been on controlling the flow of funds to each firm so that there will be sufficient funds available to repay OPDS if the group is under its contract quota. Last biennium they had to repay \$136,000. Their caseload, like Lane County's, fluctuates wildly. One reason for the fluctuation is the influx of tourists in the summer months. There are an additional 100,000 people in the

county in August and September. With regard to the Commission's requirement for contracts beginning in 2012 that contractors have a board with outside members, Mr. Greco said that lawyers in private criminal practice and possibly an accountant could make a contribution to the board. The consortium has largely been trying to meet the needs of the court and responding to the court's requirements that they be present for all hearings. The consortium could develop bylaws but it has seen itself as largely just responding to the court's demands. The firms have had the obligation to mentor and train their own attorneys.

Jeff Pridgeon said that none of the current public defense providers came to the county for the purpose of handling public defense cases. People came to the firms and then went out on their own. Chair Ellis said that public defender offices are working well in other counties and the training and supervision offered by these offices is one of their strengths. Jeff Pridgeon said that no one had considered starting a public defender office in Lincoln County and if one were started there would be a loss of the senior people. He would not be interested in working in such an office. His impression is that there is a high level of turnover in public defender offices. In Lincoln County the same lawyers have represented members of multiple generations of the same families over the years. The lawyers know the county and are part of the community. Chair Ellis inquired whether training was an issue first raised by the Commission. Mr. Pridgeon said that it was. Guy Greco said that lawyers are expected to fulfill their own training obligations. Jeff Pridgeon said that attorneys do receive CLE training but the questions may be more about training on local practice issues. This is an area of weakness.

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

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

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

Guy Greco said that the system is not broken, why fix it? Chair Ellis read a passage from the initial report about senior partners not handling Measure 11 cases and two senior attorneys who appear apathetic and who fail to file motions or take cases to trial. Chair Ellis asked Guy Greco whether the consortium's decision to continue using a single rate model internally despite a contract that values cases by seriousness level didn't make Measure 11 cases less attractive. Guy Greco said that the lawyers don't think in terms of case weight but only in terms of volume and assume that the heavier cases will average out. He, for example, would rather do Measure 11 cases than juvenile cases even though they take more time. Each firm receives a fixed amount per month regardless of the case mix. He does not see any cherry picking occurring.

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

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

double payments for these cases.

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

With respect to the use of non-routine expense funds Guy Greco said that he regrets that he may get only seven to nine hundred dollars for handling a murder case but the expert witness he uses may be paid six or seven thousand dollars.

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

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

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

Judge Cheryl Bachart said that the initial report appeared to be thorough and reflected her own concerns about the weaknesses of the system. She said she took the bench in 2008 after practicing in the district attorney's office since 1997. She handles many case types but not all of them. Chair Ellis asked her to comment on the use of law firm associates to handle public defense cases. She said she sees the associates daily but has no contact with the partners. There is a learning curve for new attorneys. Mentoring would help these lawyers. She has not seen a senior partner or other mentor actually observe the new lawyers

in trial. Commissioner Ozanne asked her how she as a judge felt about the lack of a centralized court docket. She said that she likes knowing her cases and their history and having control over the trial status. She tries to be sensitive to the needs of the attorneys who might have multiple trials set for the same week in different courtrooms. Guy Greco said a centralized docket would make life easier for the lawyers. Commissioner Welch asked whether she was concerned about the availability of qualified lawyers to handle Measure 11 cases. She said that the lawyers who are handling them appear to be qualified. But she does see inexperienced lawyers who don't appear to be using all the tools available to them in negotiating with the state and at sentencing. Newer lawyers need to have somewhere to go with their questions. Commissioner Welch said that she sees it as part of a judge's job to raise concerns about the qualification and training of the lawyers who appear in court and asked whether there had been a culture of silence in Lincoln County in the past. Judge Bachart responded that she would feel comfortable letting Guy Greco know if she had concerns. She said that as a district attorney she sought out the judges' comments and that judges would not have been reluctant to contact her boss if there were a problem. She said that Guy Greco had given the judges questionnaires to complete and that she completed hers. She said that after jury trials she often debriefs the jury and is willing to share that information with counsel as well. Richard Scholl asked whether a juror had ever told her that a lawyer had done a terrible job. She said she had received such a comment and had passed it on to Guy Greco. She said that as a judge she tends to be more critical of deputy district attorneys than of defense lawyers since that is her background. She is sensitive, however, to needs of the defendant. If defense lawyers don't know the sentencing guidelines they cannot give proper advice so it means a lot and she holds defense lawyers to a higher standard as far as their ability to handle complex cases is concerned. Commissioner Potter asked about the quality of representation in civil commitment cases. She said that there are not a lot of them in the county and it is an area of concern for both the lawyers and the court.

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

Dan Taylor said that he is one of the sole practitioners who handles public defense cases. His largest concern is the issue of compensation. It is hard to attract and retain quality people when the compensation is so low. He explained his personal financial situation and said that out of contract funds he has to pay all his own costs and can only afford part-time staff. His own salary is less than \$45 per hour and he has no retirement plan. If the Commission wants to recruit people to come to Lincoln county and stay it will have to offer something more than is being paid right now. Attorneys in public defense offices that he worked in in Coos and Washington County seemed to stay a couple of years and then leave. He suggested that the Commission advocate for more money in the legislature since public defense is an important part of the public safety system.

Commissioner Ozanne said that lawyers who do the work have not communicated with their own legislators.

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

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

Chair Ellis said he would like to get some initial reactions from commissioners on Lincoln County. John Potter said that it was important to talk about a public defender office but that more important than the model is the structure. There are a variety of successful models around the state. The same model doesn't work everywhere. There are examples of good providers with each model but

the structure and how it is put together is more important than the model itself. The Lincoln County system has no structure. There are no bylaws, no vision for the future, no training or mentoring, nothing other than receiving and distributing the funds and reporting on case numbers to OPDS. It is a hollow shell. He mentioned to Guy Greco that he would like to see him come back and fill in the blanks. In Lane County the system he recommended to the Commission didn't work because it didn't have a good structure and a really good manager. The system in place there now is the same model that hasn't worked here. But it is working in Lane County with someone who is turning out to be a good manager. If PDSC were really clear about the structure it wants to see in Lincoln County, the providers might be able to make it happen. The Commission has been here before, however, and has talked to people and really nothing has changed.

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

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

Comments provided after the March 10, 2011 PDSC Meeting:

On April 12, 2011 Guy Greco informed OPDS that the consortium is in the process of finalizing new bylaws and attorney agreements and is creating a nonprofit corporation. A new board of directors will be formed that meets the PDSC requirements for contracts beginning in January of 2012. The new body will be creating a complaint policy and possibly a conflict of interest policy for board members. It will be creating a form for attorneys to complete after all trials so that the group can objectively measure whether members are getting effective results in bench and jury trials. OPDS's Best Practices are being used as a model. Mr. Greco also reported that the consortium's new attorney agreement includes mandatory minimum CLE requirements and provides that any member with less than five years experience will be required to complete a trial skills course. There are five Measure 11 lawyers who appear to be doing good work and three who were identified as having issues that need to be addressed. The consortium has a new evaluation process that will allow its board of directors to prohibit a lawyer from handling Measure 11 cases if they are no longer qualified to do so. The Board will also ensure that there are an adequate number of Measure 11 qualified lawyers available.

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

Mr. Greco plans to attend the May 5, 2011 PDSC meeting.

**A Service Delivery Plan for Lincoln County**

[This portion of the report will be completed after the PDSC has developed its service delivery plan for Lincoln County.]

## APPENDIX A

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

1. Not-for-profit public defender offices. Not-for-profit public defender offices operate in eleven counties of the state and provide approximately 35 percent of the state's public defense services. These offices share many of the attributes one normally thinks of as a government-run "public defender office," most notably, an employment relationship between the

attorneys and the office.<sup>7</sup> Attorneys in the not-for-profit public defender offices are full-time specialists in public defense law, who are restricted to practicing in this specialty to the exclusion of any other type of law practice. Although these offices are not government agencies staffed by public employees, they are organized as non-profit corporations overseen by boards of directors with representatives of the community and managed by administrators who serve at the pleasure of their boards.

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

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

Due to the frequency of cases in which public defender offices have conflicts of interest due primarily to cases involving multiple defendants or former clients, no county can operate with a public defender office alone.<sup>8</sup> As a result, PDSC expects public defender offices to share their management and law practice expertise and appropriate internal resources, like training and office management systems, with other contractors in their counties.

2. Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or

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<sup>7</sup> Spangenberg and Beeman, *supra* note 2, at 36.

<sup>8</sup> *Id.*

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

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

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

# Attachment 3

PUBLIC DEFENSE SERVICES COMMISSION

REQUEST FOR PROPOSALS

FOR

PUBLIC DEFENSE LEGAL SERVICES CONTRACTS

BEGINNING

JANUARY 1, 2012

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**PART IV - CONTRACT GENERAL TERMS**

## PART I – GENERAL INFORMATION

### **1.1 Request For Proposals (RFP) Description**

The Public Defense Services Commission (PDSC) is seeking contract proposals to provide legal services to persons determined by the state courts to be financially eligible and entitled to court-appointed counsel at state expense. **PDSC is accepting proposals for all case categories in all counties. The contracts awarded may have one-year, two-year, or four-year terms beginning January 1, 2012, or other such length of term and beginning date as determined by PDSC.** The basic services required are legal representation and support services necessary to provide adequate and effective legal representation that meets established professional standards of practice.

This RFP contains the applicable procedure, instructions and requirements for proposals. It is organized in four parts:

- Part I     General Information
- Part II    Proposal Application Instructions and Requirements
- Part III   Proposal Application Summary and Proposal Outline
- Part IV    Contract General Terms

### **1.2 Applicable Contracting Procedure**

ORS 151.216 authorizes PDSC to adopt policies and procedures for the contracting of public defense services. As part of the Judicial Branch, PDSC is not subject to the Department of Administrative Services administrative rules and procedures that govern contracting for personal services contracts. PDSC adopts the policies, procedures, instructions, requirements and other provisions of this RFP as the PDSC procedures for contracting for personal services. The model rules of the Oregon Attorney General do not apply to PDSC contracting but will be reviewed each time the Attorney General modifies them to determine whether PDSC should modify the policies and procedures contained herein.

### **1.3 Authority**

ORS 151.219 authorizes the PDSC executive director to contract for legal services for financially eligible persons in proceedings in which:

- 1) a state court or magistrate has the authority to appoint counsel to represent the financially eligible person, and
- 2) the PDSC is required to pay compensation for that representation.

PDSC may contract with individual attorneys, groups of attorneys, private firms, and full-time, not-for-profit public defender organizations for these services.

Awarding these contracts is a proprietary function of PDSC. All such contracts are:

- 1) subject to PDSC's express approval under ORS 151.216(1)(d), and

- 2) contracts with independent contractors for personal services.

PDSC reserves the right to reject any or all proposals received by reason of this RFP or to negotiate separately in any manner necessary to serve the best interests of the PDSC and the state. PDSC reserves the right to seek clarifications of proposals and to award a contract(s) without further discussion of the proposals submitted. PDSC reserves the right to amend or cancel this RFP without liability if it is in the best interest of the state and public to do so.

#### **1.4 Funding Source**

Under ORS 151.225, the Public Defense Services Account in the General Fund is continuously appropriated to PDSC to pay attorney compensation and other expenses related to the legal representation of financially eligible persons for which PDSC is responsible, including contract payments under ORS 151.219.

#### **1.5 Minorities, Women and Emerging Small Businesses**

Pursuant to ORS 200.035, PDSC shall provide timely notice of RFPs and contract awards to the Advocate for Minorities, Women and Emerging Small Businesses if the estimated value of the contract exceeds \$5,000.

Responses to RFPs shall include a certification, on a form provided by PDSC, that the applicant has not and will not discriminate against a subcontractor in the awarding of any subcontract because the subcontractor is a minority, woman or emerging small business enterprise certified under ORS 200.055 or against a business enterprise that is owned or controlled by or that employs a disabled veteran as defined in ORS 408.225.

#### **1.6 Schedule of Events**

Release of RFP	May 6, 2011
Proposal Submission <u>Deadline</u> (Received via email by 11:59pm)	June 13, 2011
Commission review of statewide contracting plan	July 28, 2011
Notice of intent to award contracts	September 8, 2011
Commission review of proposals and award of contracts	September 15, 2011

PDSC presently intends to award public defense legal services contracts according to the above time schedule. By publishing this schedule, PDSC does not represent, agree, or promise that any contract will be awarded on a specified date or any other time in any particular county or judicial district. PDSC intends, however, to adhere to these time frames as closely as possible.

PDSC will provide notice of its intent to award contracts to all applicants at least seven (7) days before the award of contracts, unless exigent circumstances require a shorter period of notice.

#### **1.7 General Proposal Review Procedures**

The instructions and information necessary to prepare and submit proposals are found in Part II of this RFP. PDSC will evaluate proposals based on the contents of the applications, their review by the affected court(s), and any other information available to PDSC. Applicants must

submit a completed application using the forms and format provided. Applications **MUST** be received by PDSC by 11:59 p.m. on the submission deadline date. The following events will then occur.

A. Inadequate Proposals

PDSC may immediately reject proposals that do not meet the minimum RFP requirements. If a proposal is unclear or appears inadequate, PDSC may give the applicant an opportunity to further explain or provide additional information. If PDSC finds the explanation or additional information inadequate, PDSC's decision to reject the proposal will be final and not subject to appeal.

B. Facially Adequate Proposals

PDSC will evaluate proposals that meet the administrative and contractual minimum requirements as set forth in Part II of the RFP. PDSC will evaluate each proposal based on its total characteristics and any other information available to PDSC. During the evaluation period, PDSC may:

- 1) request additional information from applicants to clarify information or material in the proposal;
- 2) consult with judges, court administrative staff, and others who have knowledge of the applicant or the local caseloads and practices to aid in the review of the proposal's merits; and
- 3) request individuals with experience and expertise in the proposed case types to review the apparent qualifications of the applicants, the strengths and weaknesses of the management plans submitted by applicants and the apparent cost-effectiveness and quality of the various proposals.

C. Negotiations

PDSC must ensure that each contract is compatible with:

- 1) the needs of the particular court(s), county(ies), judicial district(s), region(s), and the state;
- 2) other public defense contracts in place or contemplated; and
- 3) budget allocations.

During negotiations, PDSC may discuss adjustments to proposed costs, caseload types, coverage, level of services, or service providers necessary to meet these objectives.

D. Contract Awards

**Award of any contract will be final only when the applicant and the PDSC have properly completed and executed the contract documents.**

E. General Contract Terms

PDSC will offer all applicants the same general contract provisions. Successful applicants will enter into a contract substantively similar to the general contract document in Part IV of this RFP, unless otherwise specifically agreed by PDSC.

An applicant may request in the proposal to amend general terms of the contract. PDSC must approve any change. Applicants who do not otherwise accept the general terms contract in Part IV may be disqualified.

**1.8 Proposal Evaluation Criteria**

PDSC shall evaluate proposals based on the criteria listed below. PDSC reserves the right to reject any proposals that do not comply with the RFP requirements. PDSC shall be the sole determiner of the relative weight given any criterion. Although price is an important criterion, the intent is to provide financially eligible persons with effective legal representation. The applicant with the lowest cost proposed will not necessarily be awarded a contract. PDSC reserves the sole right to make this determination.

**CRITERIA:**

- 1) The proposal and any modification is complete and timely, in conformance with the RFP.
- 2) The applicant meets the minimum attorney qualification standards for the types of cases proposed, as specified in PDSC's Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense.
- 3) The proposed plan for delivery of services is adequate to ensure effective legal representation. Among the factors PDSC may consider are the quality of legal representation, the experience of the attorneys, staffing patterns, available support staff and other services, and caseload per attorney.
- 4) The applicant has the ability to perform the contract effectively and efficiently and to provide representation in the types of cases proposed. Among the factors PDSC may consider are financial ability, personnel qualifications, and successful experience providing public defense services under contract or on a private bar basis.
- 5) The cost for services is reasonable. PDSC may consider factors that affect the cost, including those outside the applicant's control, such as district attorney (DA) negotiation practices, local jail facilities, and court programs and procedures.
- 6) The budget is reasonable, and expenses are prorated to the proportion of applicant's time to be devoted to the contract. Among the factors PDSC may consider are the ratios of administrative cost, support services, and non-personnel expenses to direct legal services, as well as compensation, benefit, and other resource levels.
- 7) The proposal is consistent with the needs and best interests of the court(s), county(ies), judicial district(s), and region(s) involved. Among the factors PDSC may consider are the other service methods and service providers available, the applicant's ability to work with the court(s) and within its procedures, and the mix of service providers.
- 8) The proposal is consistent with the needs and best interests of the state as a whole. Among the factors PDSC may consider are the other service methods and mix of service providers available, and the applicant's ability to work with other groups affected

by the contract, legislative mandates, or other directives that affect the entire statewide contracting patterns or terms.

In addition to the criteria listed above, PDSC will evaluate the available caseload, the current number of contractors or private bar providers, and the relative cost of administering current contracts and/or new contract proposals.

PDSC has the sole discretion to apportion or not to apportion caseloads between applicants AND to award or not to award contracts.

### **1.9 Proposal Records**

Materials submitted by applicants will not be available for public review until all contracts awarded pursuant to this RFP have been fully executed.

Written inquiries on preparing applications may be directed to Kathryn Aylward, Director of the Contract and Business Services Division at:

kathryn.aylward@opds.state.or.us

## **PART II -- PROPOSAL APPLICATION INSTRUCTIONS AND REQUIREMENTS**

This part of the RFP contains the instructions and requirements for preparing and submitting proposals for public defense legal services contracts.

### **2.1 Submitting Proposals**

The applicant is responsible for any costs incurred in preparing or delivering the proposal. The applicant is responsible for ensuring that the proposal is received timely by the Public Defense Services Commission.

There is no implied promise to award a contract to any applicant based upon the submission of a proposal.

#### A. Form of Submission

**Proposals MUST be submitted as an email attachment in a searchable Portable Document Format (PDF). The PDF must not be password protected nor copy protected.**

Any text in the body of the transmitting email will not be reviewed and will not be considered to be part of the proposal.

The email should be sent to: mail@opds.state.or.us

#### B. Deadline

Proposals MUST BE RECEIVED by PDSC no later than 11:59 p.m. on the submission deadline date.

**The submission deadline for proposals is June 13, 2011.**

If the applicant fails to submit the proposal(s) in accordance with the deadline to PDSC, PDSC will disqualify the proposal(s), unless authorization for late submission is granted in writing by PDSC.

### **2.2 Application Format**

Applicants must use the attached application format for submission of all proposals and must answer all questions or state the reason why a specific question is not relevant to the particular proposal. PDSC may disqualify any proposal that is not in the required format or is incomplete.

### **2.3 Acceptance of RFP and General Contract Terms**

A. Applicants are responsible for reviewing the terms and conditions of the RFP and the general terms of the contract.

- B. By signing and returning the application form, the applicant acknowledges that the applicant accepts and intends to abide by the terms and conditions of the RFP. Further, the applicant accepts the terms and conditions of the general terms of the contract contained in Part IV, unless and only to the extent that the applicant proposes exceptions as described below.
- C. The applicant must clearly state in the proposal any proposed exceptions to the general terms of the contract, including reasons to support the exceptions and estimated efficiencies and/or cost savings. PDSC reserves the right to accept, reject, or negotiate exceptions to the contract terms.
- D. Any changes to the general terms of the contract terms proposed by PDSC will be provided, in writing, to each applicant.

## **2.4 Multiple Proposals**

An applicant may submit more than one proposal. Each proposal must be complete in itself. The proposal must state whether it is in addition to or an alternative to other proposals submitted by the applicant.

## **2.5 Modification of Proposals**

### **A. When Permitted**

Applicants may not modify proposals after the submission deadline, unless PDSC agrees thereto, upon written request by applicant. Until that date, an applicant may modify its proposal(s) in writing. Modifications must be:

- 1) prepared on the applicant's letterhead;
- 2) signed by an authorized representative(s); and
- 3) must state whether the new document supersedes or modifies the prior proposal.

### **B. Delivery**

Applicants must deliver any modifications in the same manner as required by Section 2.1.A for original proposals.

### **C. Included in Proposal File**

All documents relating to the modification of proposals will be made part of the proposal file.

## **2.6 Mistakes in Submitted Proposals**

### **A. When Corrections Permitted**

PDSC will permit applicants to correct mistakes on a proposal only to the extent correction is not contrary to PDSC's interest or to the fair treatment of other applicants.

PDSC has sole discretion to allow an applicant to correct a mistake. PDSC will notify the applicant if and when PDSC allows corrections to proposals.

B. Procedure When PDSC or Applicant Discovers Mistake

If PDSC or the applicant discovers a mistake before the proposal deadline, the applicant may amend the error using the procedures for proposal modification in Section 2.5 above.

PDSC will proceed as follows when PDSC discovers or is notified of mistakes in proposals after the submission deadline but before contract awards are made:

1) Minor Inaccuracies

PDSC may waive or correct minor inaccuracies or insignificant mistakes. Minor inaccuracies are:

- a) matters of form rather than substance that are evident from the proposal documents; or
- b) insignificant mistakes that do not prejudice other applicants; e.g., the inaccuracy or mistake does not affect price, quantity, quality, delivery, or contractual conditions.

2) Mistakes Where Intended Correct Proposal is Evident

If the mistake and the intended correct proposal are clearly evident on the face of the proposal or can be determined from accompanying documents, PDSC may consider the proposal. Examples of mistakes that may be clearly evident on the face of the proposal are typographical errors, transposition errors, and mathematical errors.

3) Mistakes Where Intended Correct Proposal is Not Evident

PDSC may not consider a proposal in which a mistake is clearly evident on the face of the proposal but the intended correct proposal is not evident or cannot be determined from accompanying documents, including requests for correction or modification under Sections 2.5 and 2.6.

C. Included in Proposal File

All documents relating to correcting a mistake will be made part of the proposal file.

## **2.7 Withdrawal of Proposals**

A. Request to Withdraw

An applicant may withdraw a proposal at any time by written request. Requests to withdraw a proposal from consideration must be:

- 1) on the applicant's letterhead;
- 2) signed by an authorized representative(s); and

- 3) submitted to PDSC in the same manner as required by Section 2.1.A for original proposals.

B. Included in Proposal File

All documents relating to the withdrawal of proposals will be made a part of the proposal file.

## **2.8 Evaluation of Proposals**

PDSC will begin to evaluate proposals upon receipt, subject to the procedures and criteria described in Part I.

## **2.9 Categories of Cases Available for Contract**

A proposal for public defense legal services may include coverage of all, some, or any of the following categories of cases for which financially eligible persons have a right to appointed counsel payable from the Public Defense Services Account:

- Capital Murder (death penalty)
- Noncapital Murder
- Felony
- Misdemeanor
- Probation Violation
- Juvenile
- Post-Conviction Relief
- Habeas Corpus
- Civil Commitment
- Extradition
- Contempt
- Psychiatric Security Review Board
- Post-Conviction Relief and Habeas Corpus Appeals

Applicants should refer to Part IV, the General Terms of the contract, section 10 for specific definitions of the categories.

## **2.10 Number of Cases**

A. Available Caseload

To obtain the number of contract cases and/or workload likely for a particular court, county, or case type, the applicant should contact the Contract and Business Services Division of the Public Defense Services Commission at (503) 378-2478.

B. Fixed Caseloads and Value- or Hourly-Based Workloads

PDSC will contract for:

- 1) fixed workload by value of cases for non-death penalty contracts; or
- 2) hourly-based workloads for death penalty contracts.

C. Proposed Caseload

The applicant should propose no more than the number of cases or hours for which the applicant can provide effective and efficient representation and adequate staff support resources.

2.11 Cost of Services

A. Expenses Included in Contract Price

Public defense contractors are responsible for all reasonable and necessary expenses that are ordinary and related to the proper preparation and presentation of the case.

PDSC bears the costs outside of any public defense contract for:

- 1) discovery;
- 2) transcripts;
- 3) witness fees and expenses; and
- 4) non-routine case expenses that are preauthorized (e.g., expert witnesses; psychiatric exams; and investigation requiring an investigator's services, unless applicant has staff investigator(s) for this purpose).

Applicants should not include these case-related expenses in calculating the cost of providing contract services.

B. Reasonable Expenses

Applicants should project the cost of occupancy, staff, or other contract expenses at rates no greater than customary for the community and the type of service or expense. PDSC will not pay premium rates. PDSC expects contractors to provide facilities reasonably adequate to ensure an environment conducive to providing effective and efficient legal services and to maintaining the dignity of attorney, staff, and clients.

C. Factors to Consider

In calculating overall case cost figures, applicants should consider the percentage of appointments by case type (the "mix" of cases) and the percentage of appointments that:

- 1) usually terminate before trial or contested adjudication, and at what stages and why they terminate (such as, withdrawals, dismissals, multiple cases negotiated together, and bench warrants); and
- 2) usually go to trial or contested adjudication.

The applicant may consider any other relevant factors in constructing costs, as long as these factors do not jeopardize the delivery of adequate legal services at the prices proposed. Applicants must describe in the application all factors or premises on which costs are based.

**2.12 Proposal Application Format (Part III of RFP)**

The application format consists of:

- 1) Application Summary;
- 2) Certification Form; and
- 3) Proposal Outline divided in the following sections:
  - a) Service Delivery Plan
  - b) Proposed Estimated Allocation of Contract Funds
  - c) Proposed List of Contract Attorneys
  - d) Proposed List of Contract Non-Attorney Staff
  - e) Certificate of Attorney Qualification and Supplemental Questionnaire
  - f) Proposed Contractor Certificate of Compliance with Applicable Oregon Tax Laws
  - g) Proposed Contractor Independent Contractor Certification Statement

**THE FOLLOWING PAGES APPL. 1 THROUGH APPL. 16 ARE THE RFP APPLICATION AND PROPOSAL OUTLINE.**

PUBLIC DEFENSE SERVICES COMMISSION  
REQUEST FOR PROPOSALS  
FOR  
PUBLIC DEFENSE LEGAL SERVICES CONTRACTS

PART III

PROPOSAL APPLICATION SUMMARY AND PROPOSAL OUTLINE

**(TO BE COMPLETED AND SUBMITTED TO PDSC  
BY APPLICANTS WHO DO NOT CURRENTLY CONTRACT WITH PDSC)**

**PART III  
PROPOSAL APPLICATION SUMMARY AND PROPOSAL OUTLINE**

**3.1 APPLICATION SUMMARY**

<b>APPLICANT INFORMATION</b>	
County or Counties to be served: _____	
Formal Name of Applicant: _____	
Contact Person for Proposal: _____	
Address: _____ _____	
Telephone: _____ Fax: _____	
Email (required): _____	
Fed. I.D. No.: _____ <b>or</b> S.S.N.: _____	
Type of Business Entity ( <i>e.g. LLC, Non-Profit, Corporation</i> ): _____	

**CASELOAD INFORMATION**

A. Case Types Covered: All case types as defined in the general terms of the contract document that are subject to this RFP excluding:

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B. Complete the section below:

Case Types	Value	# of Cases	Total Value
First Year			
	\$		\$
	\$		\$
	\$		\$
	\$		\$
First-Year Total			\$
Second Year			
	\$		\$
	\$		\$
	\$		\$
	\$		\$
Second-Year Total			\$
Contract Total			\$

(Add additional years if necessary.)

**A. METHODOLOGY, EXPLANATIONS AND ESTIMATES**

- 1) Service Cost Basis. For the types of cases, extent of coverage, and services proposed, explain how costs were projected and the premises underlying the projection.
- 2) Case Costs.

Explain:

- a) how the various case types were weighted;
- b) how the cost varies by case type; and
- c) how staff investigator, paralegal, and/or interpreter costs were factored.

Estimate:

- d) what percentage of each case type is disposed by jury trial, court trial, plea, dismissal, withdrawal, and bench warrant;
- e) the average number of hours required for each case type proposed;
- f) the cost of providing contract counsel at arraignments to advise defendants regarding plea offers or resolution of probation violation or contempt matters if a

program were established to facilitate early resolution of cases. Describe the time required and the potential number of cases involved; and

- g) the percentage of attorney time and staff time required for administrative duties, CLE, and other professional duties not related to a particular case.
- 3) Other Information. Include any other relevant information that PDSC should consider in evaluating proposal costs.

**B. PROPOSAL STAFFING SUMMARY** ("FTE" means "full-time equivalent"; e.g., four attorneys each committing 50% of their full time to contract work equals two FTEs.)

Number of Attorneys \_\_\_\_\_ / FTE\_\_\_\_\_

Number of Secretarial/Receptionist Staff \_\_\_\_\_ / FTE\_\_\_\_\_

Number of Paralegals/Legal Assistants \_\_\_\_\_ / FTE\_\_\_\_\_

Number of Administrative Staff \_\_\_\_\_ / FTE\_\_\_\_\_

Number of Investigators \_\_\_\_\_ / FTE\_\_\_\_\_

Number of Interpreters \_\_\_\_\_ / FTE\_\_\_\_\_

Number of Other Staff \_\_\_\_\_ / FTE\_\_\_\_\_

Identify "Other Staff" type: \_\_\_\_\_

**3.2 CERTIFICATION FORM**

I hereby certify that I have the authority to submit this proposal on behalf of the applicant and that I have read and understand the terms and conditions of the general terms of the contract.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Typed or Printed Name of Authorized Representative

\_\_\_\_\_  
Title or Representative Capacity

\_\_\_\_\_  
Applicant Name

### 3.3 PROPOSAL OUTLINE

The following is an outline of the information each applicant **MUST** provide. ALL questions must be answered and all requested information must be completed. If a certain question or requested information is "Not Applicable" to the applicant's proposal, please note "NA."

#### A. SERVICE DELIVERY PLAN

The purpose of a public defense legal services contract is to provide cost-effective delivery of legal services that meet constitutional, statutory, and other legally mandated standards. Please describe, in detail, applicant's service delivery plan and how it will ensure effective and efficient legal representation. Include information on the following:

1. Contractor Staff Services. Describe legal, support, and other services to be provided under the contract. Include any express limitations on the range of services.

IN ADDITION to providing the information requested above, each attorney included within applicant's proposal must complete a Certificate of Attorney Qualification and Supplemental Questionnaire, to be included with applicant's proposal (see pages Appl. 12-14).

2. Case Services. Describe the caseload and case types to be covered. Include any limitations in coverage by case type. Include any differing values per type of case that applicant proposes.
3. Service Delivery. Describe how applicant will provide timely, effective, and efficient case-related services. Include:
  - a) how the court would assign cases to applicant;
  - b) whether applicant attorneys would be present at first appearances;
  - c) how applicant would assign cases to attorneys;
  - d) how applicant would provide for interviews with both in-custody and out-of-custody clients in accordance with the general terms of the contract;
  - e) how applicant would process cases from assignment through reporting to PDSC;
  - f) how applicant would work with the court to coordinate services with other contractors and with the court; and
  - g) how applicant would investigate and provide information, if any, on sentencing alternatives to the court.
4. Facilities. Describe applicant's office(s). Include information on:
  - a) office sharing arrangements;
  - b) conference room(s);
  - c) library (size and contents);
  - d) disabled access (if none, describe alternative arrangements for meeting disabled clients or witnesses) (if applicant is a consortium, describe the disabled access or alternative arrangements for each consortium member's office); and
  - e) number of separate law firms/sole practitioners included.

Does each of applicant's attorneys have his/her own office?

Are any offices housed in a residence?

Does applicant or any of its members own or have an interest in the office building(s)?

If yes, please explain: \_\_\_\_\_

5. Equipment. Describe equipment or information systems applicant has or will obtain to improve the provision of services under the proposal. If applicant uses or will use a computer system, please specify hardware and software to be used.
6. Professional Education and Supervision Plan. Describe plans for professional development and supervision of all attorneys, direct support, and administrative staff. Include:
  - a) training;
  - b) CLE;
  - c) educational methods to maintain current awareness of new developments in criminal and public defense-related case law and procedures; and
  - d) supervision and development of less experienced attorneys.
7. Readiness Status. Describe what applicant needs to do to be ready and able to begin services on the proposed contract effective date. If more time is needed, explain why and when applicant will be available. Include information on positions that need to be filled and equipment or facilities that need to be procured. If positions need to be filled, describe recruitment procedures and affirmative action plans.
8. Local Factors. Identify and discuss, in detail, local factors that affect caseload and case processing that may affect cost.
9. Board of Directors. Contractor shall be governed by a board of directors that includes at least two independent members who do not provide services under the entity's contract and are not elected by those who do. In lieu of a board of directors, Contractor shall demonstrate effective and appropriate financial safeguards and quality assurance mechanisms. Describe either the composition of applicant's board of directors, or the financial safeguards and quality assurance mechanisms.
10. Other Information. Include any other information you believe is important or relevant to PDSC's review of the service delivery plan.
11. Contract Terms. Include any requests to modify terms in the general terms of the contract. Explain the purpose of and need for modification and how it will affect the service delivery plan and cost. Again, PDSC has sole discretion to allow modification of any contract term.

## **B. PROPOSED ESTIMATED ALLOCATION OF CONTRACT FUNDS**

All applicants must complete the forms contained on the following five pages and estimate how contract funds would be allocated to cover service costs.

If applicant is a consortium, submit a separate form for each firm or member. In addition, you must compile all members' estimated allocations into one, overall consortium contract fund allocation form. To arrive at allocation figures, each member should estimate by line item the amount of funds reasonably necessary to perform the public defense services contemplated under the proposal. Generally, an attorney who would be spending 50 percent of his/her total billable time on public defense contract cases may allocate no more than 50 percent of total rent and other overhead costs to the proposed allocation.

**Under no circumstances will the PDSC fund any lobbying or other political activities for a public defense contractor.**

**Each consortium must provide expense information in the allocation categories for all members, not just for the umbrella corporation or other umbrella entity.** Any nonprofit organization or consortium that has expenses related to its Board of Directors' or Trustees' meetings should include that expense information with the proposed estimated allocation as well as any other expenses not otherwise listed.

## APPLICANT'S PROPOSED ESTIMATED ALLOCATION OF CONTRACT FUNDS

Directions: Provide estimated cost information for all applicable categories. If a category is not applicable, list "N/A." Add any necessary categories not listed below. **Prorate all estimated expenses for part-time attorneys or staff by the percentage of time they will spend on contract work.** (Use additional pages if needed for longer-term proposals.)

<b>1. GROSS SALARIES</b>	<u>First Year</u>	<u>Second Year</u>
Attorneys (estimated gross income to attorneys after attorneys' overhead and F.I.C.A. self-employment taxes are deducted) _____# _____FTE	_____	_____
Secretarial/Reception/Clerical Staff _____# _____FTE	_____	_____
Paralegal/Legal Assistant Staff _____# _____FTE	_____	_____
Investigation Staff _____# _____FTE	_____	_____
Other Staff (identify _____ _____) _____# _____FTE	_____	_____
<b>SUBTOTAL:</b>	_____	_____
<b>2. STAFF BENEFITS</b>		
F.I.C.A. Self-Employment Tax (if applicable)	_____	_____
F.I.C.A. (Employer's portion or Social Security only)	_____	_____
Unemployment Insurance	_____	_____
Health and Other Insurance	_____	_____
Workers' Compensation	_____	_____
Retirement Program	_____	_____
<b>SUBTOTAL:</b>	_____	_____
<b>3. STAFF EXPENSES</b>		
Malpractice Insurance check _____ PLF or _____ NLADA	_____	_____
Other Professional Insurance (describe _____) _____)	_____	_____
OCDLA--Membership Dues	_____	_____
OSB--Membership Dues	_____	_____
Other Membership Dues Necessary to Contract (explain _____) _____)	_____	_____

**3. STAFF EXPENSES (continued)**

**First Year**

**Second Year**

Professional Licenses/Certificates  
(explain \_\_\_\_\_)  
\_\_\_\_\_)

\_\_\_\_\_

\_\_\_\_\_

Education Training/CLE's--Attorneys

\_\_\_\_\_

\_\_\_\_\_

Education Training--Other Staff  
(explain \_\_\_\_\_)  
\_\_\_\_\_)

\_\_\_\_\_

\_\_\_\_\_

Attorney Travel

\_\_\_\_\_

\_\_\_\_\_

Other Staff Travel

\_\_\_\_\_

\_\_\_\_\_

**SUBTOTAL:**

\_\_\_\_\_

\_\_\_\_\_

**4. OVERHEAD (OCCUPANCY)**

Office Rent/Lease

\_\_\_\_\_

\_\_\_\_\_

Office Insurance

\_\_\_\_\_

\_\_\_\_\_

Building Utilities

\_\_\_\_\_

\_\_\_\_\_

Building Maintenance

\_\_\_\_\_

\_\_\_\_\_

Real Estate Taxes (if separate from rent)

\_\_\_\_\_

\_\_\_\_\_

**SUBTOTAL:**

\_\_\_\_\_

\_\_\_\_\_

**5. OVERHEAD (OPERATIONS)**

Phone Services (Equipment/Local Calls)

\_\_\_\_\_

\_\_\_\_\_

Long Distance Calls

\_\_\_\_\_

\_\_\_\_\_

Office Supplies

\_\_\_\_\_

\_\_\_\_\_

Postage

\_\_\_\_\_

\_\_\_\_\_

Outside Photocopying/Printing

\_\_\_\_\_

\_\_\_\_\_

Library

\_\_\_\_\_

\_\_\_\_\_

Subscriptions

\_\_\_\_\_

\_\_\_\_\_

Other Case Expenses  
(explain \_\_\_\_\_)  
\_\_\_\_\_)

\_\_\_\_\_

\_\_\_\_\_

**SUBTOTAL:**

\_\_\_\_\_

\_\_\_\_\_

**6. OVERHEAD (NONCAPITAL EXPENSES)**

Furniture & Equipment Leases

Description

Annual Cost

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**6. OVERHEAD (NONCAPITAL EXPENSES) (continued)**

First Year

Second Year

Equipment Repairs/Maintenance

\_\_\_\_\_

\_\_\_\_\_

**SUBTOTAL:**

\_\_\_\_\_

\_\_\_\_\_

**7. OVERHEAD (OTHER)**

Personal Property Taxes

\_\_\_\_\_

\_\_\_\_\_

Professional Contract Services (specify)

\_\_\_\_\_

\_\_\_\_\_

Miscellaneous (specify)

\_\_\_\_\_

\_\_\_\_\_

**SUBTOTAL:**

\_\_\_\_\_

\_\_\_\_\_

**8. TOTAL OPERATIONS (total of 1-7)**

\_\_\_\_\_

\_\_\_\_\_

**9. CAPITAL (Items costing over \$500 each and funded separately)**

Computer--Hardware

\_\_\_\_\_

\_\_\_\_\_

Description	Quantity	Unit Cost
_____	_____	_____
_____	_____	_____
_____	_____	_____

Computer--Software

\_\_\_\_\_

\_\_\_\_\_

Description	Quantity	Unit Cost
_____	_____	_____
_____	_____	_____
_____	_____	_____

Office Furniture

\_\_\_\_\_

\_\_\_\_\_

Description	Quantity	Unit Cost
_____	_____	_____
_____	_____	_____
_____	_____	_____

Office Equipment

\_\_\_\_\_

\_\_\_\_\_

Description	Quantity	Unit Cost
_____	_____	_____
_____	_____	_____
_____	_____	_____

**SUBTOTAL:**

\_\_\_\_\_

\_\_\_\_\_

**GRAND TOTAL\* (total of 8 and 9):**

=====

=====

<p>* Grand total must equal total proposed annual contract price.</p>
---

**C. PROPOSED LIST OF CONTRACT ATTORNEYS**

Directions: List every attorney position that applicant has budgeted to perform work under the contract. If the position is vacant, note that fact.

<b>Firm or Office</b>	<b>Name</b>	<b>Bar #</b>	<b>FTE Contract Work</b>	<b>Annual Salary from Contract Funds</b>
-----------------------	-------------	--------------	----------------------------------	--

---

**Total FTEs:** \_\_\_\_\_

**D. PROPOSED LIST OF CONTRACT NON-ATTORNEY STAFF**

Directions: List every non-attorney position that applicant has budgeted to perform work under the contract. If the position is vacant, note that fact.

<b>Firm or Office</b>	<b>Position Title</b>	<b># of Employees</b>	<b>FTE Contract Work</b>	<b>Annual Salary from Contract Funds</b>
-----------------------	-----------------------	-----------------------	--------------------------	--

---

**Total FTEs:** \_\_\_\_\_

**E. CERTIFICATE OF ATTORNEY QUALIFICATION AND SUPPLEMENTAL QUESTIONNAIRE**  
 (Submit one certificate and questionnaire for each attorney proposed to provide contract services.)

Name: \_\_\_\_\_ Bar Number: \_\_\_\_\_  
 Address: \_\_\_\_\_ 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**

- 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
  
- Civil Commitment
- Contempt
- Habeas Corpus
  
- Post-Conviction Relief
  - Capital Murder
  - Murder
  - Other Criminal

**APPELLATE LEVEL**

- 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
  
- Civil Commitment
- Contempt
- Habeas Corpus
  
- Post-Conviction Relief
  - Capital Murder
  - Murder
  - Other Criminal

**Please check only one box below:**

I certify that I have read the PDSC Qualification Standards for Court-Appointed Counsel (Rev. 5-21-09) and that I meet the requirements of those standards and wish to be listed as available to accept appointment to the case types checked above. If I have checked any case types because I believe I possess equivalent skill and experience, pursuant to Standard III, section 2.B, I have submitted supporting documentation and explained how I am qualified for those case types.

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.3.B.

\_\_\_\_\_  
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?
  
  
  
  
  
  
  
  
  
  
10. What has been the extent of your participation in the past two years with continuing legal education courses and/or organizations concerned with law related to the case types you have certified?

11. List at least three names and addresses of judges and/or attorneys who would be able to comment on your experience in handling the case types you have certified.
  
12. List the most recent two cases by county and case number that have been tried and submitted to a jury, or if the attorney is certifying qualification for juvenile delinquency or civil commitment cases, tried and submitted to a judge, in which you served as counsel or co-counsel.
  
13. Have you ever been convicted of a crime? If yes, please provide the crime(s) of conviction, date and jurisdiction. (Do not answer yes or provide information for convictions that have been expunged or sealed.)
  
14. Are there any criminal charges currently pending against you? If yes, please identify the charges, the jurisdiction and the status of the proceedings.
  
15. Is there any complaint concerning you now pending with disciplinary counsel of the Oregon State Bar, or otherwise pending formal charges, trial or decision in the bar disciplinary process?
  
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

**F. PROPOSED CONTRACTOR CERTIFICATE OF COMPLIANCE WITH APPLICABLE OREGON TAX LAWS**

Must be provided for a consortium (corporation) as well as for each consortium member.

I, the undersigned, being first duly sworn,

Mark only one: ( X )

\_\_\_\_\_ hereby certify under penalty of perjury that I am not in violation of any Oregon tax laws.

\_\_\_\_\_ authorized to act in behalf of \_\_\_\_\_,  
*(name and address of firm, corporation, or partnership [PLEASE TYPE])*

hereby certify under penalty of perjury that \_\_\_\_\_  
*(name of firm, corporation, or partnership [PLEASE TYPE])*

is, to the best of my knowledge, not in violation of any Oregon tax laws.

For purposes of this certificate, "Oregon tax laws" are ORS chapters 118, 119, and 305 through 324; and any local tax laws administered by the Oregon Department of Revenue under ORS 305.620.

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Federal ID # or  
Social Security #: \_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

**G. PROPOSED CONTRACTOR INDEPENDENT CONTRACTOR CERTIFICATION STATEMENT**

You can qualify as an independent contractor by certifying that you meet the following standards as required by ORS chapters 316, 656, 657 and 670:

1. You provide labor and services free from direction and control, subject only to the accomplishment of specified results.
2. You are responsible for obtaining all assumed business registrations or professional occupation licenses required by state or local law.
3. You furnish the tools or equipment necessary to do the work.
4. You have the authority to hire and fire employees to perform the work.
5. You are paid on completion of the project or on the basis of a periodic retainer.
6. You filed federal and state income tax returns for the business for the previous year, if you performed labor or services as an independent contractor in the previous year.
7. You represent to the public that you are an independently established business, as follows:

**YOU MUST MEET FOUR (4) OR MORE OF THE FOLLOWING:**

- A. You work primarily at a location separate from your residence.
- B. You have purchased commercial advertising, business cards, or have a trade association membership.
- C. You use a telephone listing and service separate from your personal residence listing and service.
- D. You perform labor or services only pursuant to written contracts.
- E. You perform labor or services for two or more different persons within a period of one year.
- F. You assume financial responsibility for defective workmanship and breach of contract, as evidenced by performance bonds or liability insurance coverage.

I hereby certify that the above information is correct.

Signature \_\_\_\_\_ Date \_\_\_\_\_

Entity \_\_\_\_\_

PUBLIC DEFENSE SERVICES COMMISSION  
REQUEST FOR PROPOSALS  
FOR  
PUBLIC DEFENSE LEGAL SERVICES CONTRACTS

PART IV  
CONTRACT GENERAL TERMS

**PUBLIC DEFENSE LEGAL SERVICES CONTRACT  
GENERAL TERMS**

**JANUARY 1, 2012 TO DECEMBER 31, 2013**

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KEY:

Public Defender

Consortium or Law Firm

# GENERAL TERMS

## 1 DEFINITIONS AND CASE CREDIT RULES

### 1.1 Interpretation of Terms

Words, terms, and phrases not specifically defined in this contract shall have the ordinary meaning ascribed to them unless the context clearly indicates otherwise. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. The word "shall" is mandatory and not merely directive.

### 1.2 Construction and Jurisdiction

This contract shall be construed in accordance with the laws of the State of Oregon. A party shall bring any action or suit involving any question of construction arising under this contract in an appropriate court in the State of Oregon.

### 1.3 Severability

If a court of competent jurisdiction declares or the parties agree that any term or provision of this contract is illegal or in conflict with any law:

- (a) the remaining terms and provisions shall remain valid; and
- (b) the rights and obligations of the parties shall be construed and enforced as if the contract did not contain the particular term or provision held to be invalid.

## 1.4 Definitions

### 1.4.1 Public Defense Services Commission

Public Defense Services Commission (PDSC) and "State of Oregon" includes the respective agents, employees, members, officers, representatives, and successors of PDSC and State of Oregon.

### 1.4.2 Contractor

"Contractor" includes Contractor's agents, employees, members, officers, representatives, successors, and subcontractors.

### 1.4.3 Public Defender

A "public defender" is a nonprofit organization established solely to provide contract services to persons qualifying for court-appointed legal representation.

### 1.4.4 Law Firm

A "law firm" is a sole practitioner, partnership, or professional corporation which provides contract services to persons qualifying for court-appointed legal representation and which may engage in non-court-appointed legal representation.

### 1.4.5 Consortium

A "consortium" is a group of attorneys or law firms that is formed for the sole purpose of providing contract services to persons qualifying for court-appointed legal representation. In addition to participating jointly to provide contract services, Consortium members retain their separate identities and may engage in non-court-appointed legal representation.

### 1.4.6 Client

A "client" is a person whom a state court has determined to be eligible for and entitled to court-appointed counsel at state expense.

### 1.4.7 Appointment

An "appointment" is the assignment of a contractor to represent or advise an eligible person on any matter under the terms of this contract.

### 1.4.8 Case

A "case" is any action in this state in which Contractor has been appointed to represent a client under the terms of this contract. Specific definitions of case types are listed in Section 10.

### 1.4.9 Credit

A "credit" is an event or circumstance which counts toward Contractor's satisfaction of this contract.

### 1.4.10 Value

The "value" of a credit is the negotiated rate by type of credit as set forth in the Caseload and Case Value Matrix.

### 1.4.11 Complex Case

A "complex case" is an appointment on a case type valued at \$2,000 or more. Withdrawal or substitution for any reason from a complex case changes the credit type to "Other" (OTHR).

## 1.5 Rules for Counting Appointments

An appointment is credited, according to the following rules:

### 1.5.1 Criminal Complex Case Credit

An appointment to a client indicted on a complex case is one credit. No extra credit may be taken for multiple incident dates or charges.

### 1.5.2 Criminal Appointment Case Credit (Non-Complex Case Credit)

- (a) An appointment on criminal charges alleged to have occurred on **specific calendar days** is one credit for each count charged in the charging instrument alleged to have occurred on different specific calendar days, regardless of the number of victims involved, up to a maximum of five credits per case.
- (b) An appointment on criminal charges alleged to have occurred on **indeterminate dates** (e.g., "on or between January 1, 1996, and July 1, 1996") is a credit for each count charged in the charging instrument which can be determined to allege different calendar days, up to a maximum of five credits per case.
- (c) Separate counts in a charging instrument that allege alternative theories of criminal liability on the same date are only one credit.
- (d) One additional OTHR credit may be claimed when Contractor is appointed on a criminal matter that includes one or more counts of criminal forfeiture.
- (e) No additional credit may be taken due to the following circumstances:

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- (i) more than one charging instrument (including Uniform Traffic Citation) is filed; or
- (ii) more than one case number is assigned.

### 1.5.3 Case Type Credit

Unless Section 1.4.11 applies, the case type credited is for the most serious offense alleged to have occurred on a specific calendar day, even if the charge is later changed to a different case type. For cases in which the most serious charge is a Class C felony, the most serious offense is assault IV domestic violence, DUII felony, or Class C felony, in this order.

### 1.5.4 Credit for Recommended Representation

Except for complex cases, if a contract case proceeding has been interrupted for the following reasons and time intervals, Contractor receives a new credit if:

#### (a) 365 Days After Aid and Assist Delay

more than 365 days have passed since the client was originally found unable to aid and assist and the client is brought before the court for a rehearing on the issue or trial; or

#### (b) 180 Days After Bench Warrant

more than 180 days have passed since a bench warrant was issued; or

#### (c) 18 Months with Repeated Bench Warrants

more than 18 months have passed since Contractor was originally appointed and the case is recommenced and no additional credit has been received because of Section 1.5.4(b); or

#### (d) 180 Days After Pre-Indictment Dismissal

on a felony case, more than 180 days have passed since a dismissal of a case pre-indictment; or

#### (e) After Appeal or Post-Conviction Relief

a new trial or sentencing follows an appeal or post-conviction relief; or

#### (f) After Interlocutory Appeal

a case resumes at the trial level, following an interlocutory appeal by the state; or

#### (g) After Mistrial or Hung Jury

a new trial is scheduled after a mistrial or hung jury; or

#### (h) After Prosecutorial Misconduct

a case is refiled after dismissal without prejudice and 180 days have passed since the dismissal.

### 1.5.5 Probation Violation Credit

An appointment on a probation violation proceeding arising out of a criminal or civil contempt sentencing(s), is one probation violation credit for each court case number to which Contractor is appointed. Provided however that if Contractor is appointed to more than one case number, additional credit is received ONLY for those case numbers

in which the convictions involve different incident dates. Contractor receives no additional credit for appointments on new alleged probation violations if the original probation violation matter on which Contractor was appointed has not been adjudicated.

### 1.5.6 Show Cause Hearing for Diversion or Conditional Discharge Agreement

An appointment for a show cause hearing to address non-compliance issues related to a diversion agreement, conditional discharge agreement or any other type of deferred or delayed adjudication agreement is an SCDV credit if:

- (a) Contractor did not receive a credit for the underlying charge; or
- (b) more than 180 days have passed since Contractor represented the eligible person at a previous court appearance.

### 1.5.7 Juvenile Case Credit

#### 1.5.7.1 General Provisions

A petition which is amended from or to a delinquency or dependency petition or the dismissal of one type of petition and refiling of another type of petition is not a new credit.

#### 1.5.7.2 Prepetition Matters

An appointment to represent a child who is in custody and being interrogated or is otherwise detained is a credit, even if no petition is later filed on the allegations involved. The appointment continues through disposition on any petition that is later filed on those allegations and no additional case credit is received.

#### 1.5.7.3 Delinquency Petitions

An appointment on a delinquency case is credited under the rules set out in Sections 1.5.2 - 1.5.4.

#### 1.5.7.4 Dependency and Termination Petitions

An appointment to represent children, parents, or legal guardians on a dependency petition is generally one credit regardless of the number of petitions filed (see Section 1.5.7.4.1 for exceptions). Case credit in a dependency proceeding covers representation from appointment to the court's entry of the dispositional order required under ORS 419B.325. An appointment to represent children, parents, or legal guardians on a termination of parental rights petition is always one credit.

##### 1.5.7.4.1 Representation of Multiple Children

An appointment to represent two or more related children in a dependency proceeding is a maximum of two credits if:

- (a) the petition names as parents different mothers of different children; or
- (b) the petition names as parents different fathers of different children, not including any putative father unless the putative father also appears in the case; or
- (c) the children are living in more than one location.

SEC. 1 INTRODUCTION

**1.5.7.4.2 Maximum Credit for Representing Parents**

The maximum number of credits that may be counted when a Contractor attorney represents more than one parent or legal guardian in a dependency proceeding is one.

**1.5.7.5 Postdispositional Juvenile Hearings**

A postdispositional juvenile hearing is limited to a hearing before the court or Citizen Review Board (CRB) that is held **after** the juvenile court enters the dispositional order required under ORS 419B.325 or ORS 419C.440. Postdispositional juvenile matters are a new credit for each hearing attended by Contractor. A single postdispositional hearing, even if it involves matters relating to more than one original juvenile petition, counts as only one postdispositional credit. Postdispositional hearings do not include probation violation hearings.

**1.5.7.6 Juvenile Probation Violation Hearings**

Juvenile probation violation hearings are governed by Section 1.5.5.

**1.5.7.7 Waiver Proceedings**

Contractor shall receive one additional "Juvenile Other" (JUDO) credit beyond that assigned for the original appointment for each waiver proceeding under ORS 419C.349.

**1.5.8 Mental Health Case Credit**

An appointment to represent an allegedly mentally ill or mentally retarded person is a credit. The appointment ends at the original disposition of that matter.

**1.5.9 Contempt Case Credit**

An appointment to represent a client on a contempt case is one credit. Contractor receives no additional credit for appointments on new allegations of contempt if the original contempt allegation on which Contractor was appointed has not been adjudicated.

**1.5.10 Post-Conviction Relief Case Credit**

An appointment to represent a client on petitions filed at the same time or petitions with sequential numbers counts as one credit. The appointment ends at the original disposition of that matter.

**1.5.11 Habeas Corpus Case Credit**

An appointment to represent a client on a petition for a writ of habeas corpus is one credit if Contractor does not represent the petitioner on the charge to which the habeas corpus case is related. Petitions filed at the same time or petitions with sequential numbers count as one credit. The appointment ends at the original disposition of that matter.

**1.6 Appointments That Do Not Qualify for Credit**

**1.6.1 Verification Removal**

All appointments and reappointments are subject to verification of financial eligibility for counsel at state expense and do not count as a case credit where:

**(a) Finding of Ineligibility**

the court finds, after screening or verification, that the client is not financially eligible for appointed counsel at state expense; or

**(b) Withdrawal of Application for Counsel**

the court withdraws counsel because the client withdraws the application for appointed counsel before the court completes verification.

**1.6.2 Client Retains Counsel**

An appointment to represent a client who later retains Contractor or, in the case of a consortium, retains the same consortium member, on the same case does not qualify for credit.

**1.6.3 Reassignment Within Consortium**

If a case is reassigned within a consortium for any reason, no new credit may be claimed.

**2 MUTUAL RIGHTS**

**2.1 Waiver**

Either party's failure to enforce any provision of this contract shall not constitute a waiver by the party of that or any other provision.

**2.2 Attorney Fees**

If a party brings any action, suit, or proceeding to enforce this contract or to assert any claim arising from this contract, the prevailing party shall be entitled to such additional sums as the court may award for reasonable attorney fees and costs incurred as a result of the action, suit, or proceeding, including any appeal.

**2.3 Termination**

The parties may agree in writing to terminate this contract at any time. Unless otherwise agreed in writing, termination or expiration of this contract does not affect any existing obligation or liability of either party. In lieu of terminating the contract, PDSC may agree in writing to alternative measures.

**3 RIGHTS OF PDSC**

**3.1 Subcontracts**

Contractor shall not subcontract for or delegate any of the services required under this contract without obtaining PDSC's prior written consent. PDSC shall not unreasonably withhold consent to subcontract. Under this contract, PDSC incurs no liability to third persons by making contract payments to Contractor.

**3.2 Assignment of Contract**

Contractor shall not assign Contractor's interest in this agreement without PDSC's prior written consent. PDSC shall not unreasonably withhold consent to assignment. Under this contract, PDSC incurs no liability to third parties, including subcontractors, for making contract payments to Contractor.

## SEC. 3 RIGHTS OF PDSC

### 3.3 PDSC Powers for Failure to Obtain Workers Compensation

If Contractor fails to secure and maintain workers' compensation coverage or to provide PDSC with a certificate of exemption, PDSC may:

- (a) withhold payment of any amount due Contractor until such coverage or certification is provided;
- (b) suspend this agreement until Contractor complies; and
- (c) terminate this contract:
  - (i) for willful or habitual failure to comply; or
  - (ii) for failure to comply within 30 days after PDSC suspends this contract.

### 3.4 De Minimis Changes in Contractor Reports/Documents

At any time and by written instructions, PDSC may make de minimis changes to the terms and conditions of this contract regarding any one or more of the following:

- (a) format or content of any report or other document to be submitted by Contractor;
- (b) number of copies of any report or other document that Contractor must submit; and
- (c) time in which, or place at which, Contractor must submit any required report or other document. (See Section 6.2)

### 3.5 Termination by PDSC for Cause

#### 3.5.1 Reasons for Contract Termination

PDSC may terminate this contract for cause, for the following reasons:

- (a) Contractor's material breach of this contract including material misuse of contract funds;
- (b) Contractor's willful or habitual disregard of the procedures required by the courts in which Contractor provides services;
- (c) Contractor's demonstrated continued inability to serve adequately the interests of its contract clients;
- (d) Contractor's willful failure to abide by minimum standards of performance and rules of professional ethics; or
- (e) some other cause which has substantially impaired Contractor's ability to provide adequate legal services under this contract or fulfill the obligations of this contract.

#### 3.5.2 No Appointments After Notice

When Contractor receives PDSC's notice of termination for cause, Contractor shall not accept any further cases under the contract unless PDSC otherwise agrees in writing.

### 3.6 Funding Modification, Suspension, or Termination

At the time this contract is executed, sufficient funds either are available within PDSC's current appropriation or are expected to become available to finance the costs of this contract. However, payments under this contract are subject to the availability of funds. PDSC may propose to modify, suspend, or terminate this contract if PDSC reasonably believes that funds will not be sufficient to pay anticipated costs of public defense services and PDSC has complied with the procedures set out below in Section 6.3 (State Funding Shortfall).

### 3.7 Increasing Workload: Renegotiation at PDSC Option

The parties may renegotiate this contract to increase the total work to be performed by Contractor under this contract at additional cost to the state, if:

- (a) the probable number of available cases increases substantially; and
- (b) PDSC determines that renegotiation is in the state's interest.

PDSC will not pay Contractor for credits in excess of the maximum value agreed to under the original contract, unless renegotiation and agreement occurs prior to Contractor's assignment to such excess cases.

### 3.8 Review, Verification and Inspection of Records

#### 3.8.1 Request

PDSC may review or verify Contractor's records that relate to the performance of this contract:

- (a) on reasonable written notice; and
- (b) as often as PDSC reasonably may deem necessary during the contract term.

#### 3.8.2 Access to Facilities and Provision of Records

PDSC may conduct fiscal or performance audits to monitor and evaluate the services provided under this contract. PDSC will give reasonable written notice to Contractor before any evaluation. On PDSC's proper request, Contractor shall provide access to its facilities and make records available to PDSC or PDSC's designee or agent at all reasonable times. PDSC will not remove Contractor's original office records or other property of Contractor from Contractor's premises without Contractor's approval. PDSC and its agents will comply with the American Bar Association's "Standards for the Monitoring and Evaluation of Providers of Legal Services to the Poor" (1991) when conducting any fiscal or performance audit.

Contractor shall keep such data and records in an accessible location and condition. Notwithstanding any other provisions of this section, no constitutional, statutory, or common law right or privilege of any client or Contractor employee are waived by Contractor.

## SEC. 3 RIGHTS OF PDSC

### 3.8.3 Other Information

Upon the PDSC's determination that a significant question exists of Contractor's ability to perform this contract and subject to client confidentiality, personnel confidentiality and de minimis limits (Sections 4.4, 4.5 and 6.2), Contractor shall provide any other information that PDSC reasonably identifies and requests as needed to ensure proper disbursement of state funds.

### 3.8.4 Timely Reports by PDSC

When PDSC undertakes a review of Contractor, PDSC shall provide Contractor a draft review report for comment, clarification or rebuttal information. PDSC shall issue a final report to Contractor. Draft and final reports shall be provided in a timely manner.

### 3.9 Use of Equipment Purchased with Contract Funds

Contractor may purchase in whole or in part from contract funds equipment required to perform services under this contract. Any equipment Contractor acquires with funds expressly provided by this contract shall be used for these purposes.

### 3.10 Return of Equipment Purchased with Contract Funds

Any equipment purchased with expressly identified contract funds shall accrue to PDSC when this contract is terminated or expires and no new contract is agreed upon within 60 days of termination, expiration, or completion of a negotiated wind-down, whichever occurs last, if:

- (a) Contractor purchased the equipment with separately identified funds from this contract or public defense services contracts with similar provisions or with insurance proceeds to replace equipment that Contractor had purchased with funds from this contract;
- (b) had an original dollar value of \$500 or more; and
- (c) whose useful life exceeds the term of this contract.

### 3.11 Limit on Return of Equipment to PDSC

Section 3.10 does not apply to any Contractor that is a nonprofit, tax-exempt corporation whose articles of incorporation require the transfer or distribution of equipment to another nonprofit, tax-exempt corporation that provides public defense services in the event of full or partial wind-down.

## 4 RIGHTS OF CONTRACTOR

### 4.1 Termination By Contractor For Cause

Contractor may terminate this contract for cause should PDSC materially breach any duty or obligation under this contract.

### 4.2 Court Appointments Outside Contract

Contractor may accept additional court appointments to cases in excess of contract coverage or excluded from contract coverage, but only to the extent that the additional appointments do not interfere with Contractor's ability to

fulfill this contract. PDSC shall not pay Contractor outside the contract for any services falling within the definition of "representation", set forth in Section 7.1, for cases assigned under this contract.

### 4.3 Request for Additional Credit

Contractor may make a written request for additional credit for cases Contractor believes required an extraordinary amount of time, effort, or expense, etc., on cases closed since the preceding periodic review (see Section 5.7). Only PDSC may approve additional credit for cases assigned under this contract. Contractors shall not make requests of the court or court staff to approve additional credit.

#### 4.3.1 In General

Contractor shall submit in writing any materials needed to show extra services beyond the contract and the amount of additional credit proposed.

#### 4.3.2 Complex Cases in Which Contractor Withdraws

Contractor shall submit any materials needed to show extra services performed prior to a withdrawal for any reason on a complex case and the amount of additional credit proposed beyond one OTHR credit.

### 4.4 Client Records

Contractor grants no right to PDSC or designee of PDSC to observe attorney/client consultations or to review information in case files that is:

- (a) privileged because of the attorney/client relationship; or
- (b) work product identifiable to a particular case or client unless the client expressly, knowingly, and voluntarily agrees in writing. Contractor shall keep records, including time records, in such a manner as to allow PDSC or PDSC's designee reasonable access to other information for review purposes. Notwithstanding other provisions of this section, Contractor does not waive any client's constitutional, statutory, or common law right or privilege.

### 4.5 Personnel Records

Contractor grants no right to PDSC or designee of PDSC to review information in any personnel file unless the Contractor's employee expressly, knowingly, and voluntarily agrees in writing. Contractor shall keep records in such a manner as to allow PDSC or PDSC's designee reasonable access to other information, including specific compensation of individual staff members, for review purposes. Notwithstanding any other provisions of this contract, Contractor does not waive any of its employees' constitutional, statutory, or common law rights or privileges to the confidentiality of personnel records.

## 5 MUTUAL OBLIGATIONS

### 5.1 Successors in Interest

This contract shall bind and shall inure to the benefit of the parties and their respective successors and assigns.

## SEC. 5 MUTUAL OBLIGATIONS

### 5.2 Compliance with Applicable Law

#### 5.2.1 In General

The parties shall comply with all federal, state, and local laws, regulations, and ordinances applicable to the work to be done under this contract. Such laws include, but are not limited to, those pertaining to tax liability and independent contractor status.

#### 5.2.2 Laws Incorporated by Reference

The provisions of ORS 279.312, 279.314, 279.316, and 279.320 are incorporated herein by reference as conditions of this contract and shall govern performance of this contract.

### 5.3 Notice of Contract Modification, Suspension, or Termination

A notice to modify, suspend, or terminate this contract shall:

- (a) be in writing;
- (b) state the reasons therefor and may specify what may be done to avoid the modification, suspension, or termination;
- (c) become effective for willful breach not less than 14 days from delivery by certified mail or in person; and
- (d) become effective not less than 60 days from delivery by certified mail or in person for non-willful breach.

### 5.4 Modification or Termination Due to Legislative Action or Court Interpretation

PDSC and Contractor may renegotiate this contract if there is a significant change in workload or cost of doing business contemplated under this contract due to amendments to or court interpretations of federal or state laws. In addition, PDSC may modify, suspend, or terminate this contract as needed to comply with amendments to or court interpretations of federal or state statutes that make some or all contract services ineligible for state funding.

### 5.5 Modification or Termination Due to Decreased Caseload

PDSC and Contractor may renegotiate this contract if there is a significant decrease in the probable number of cases available.

### 5.6 Renegotiation Shall Minimize Reductions in Staff

PDSC shall renegotiate with all Contractors affected by case decreases to apportion decreases in a manner that minimizes reductions in staff. Such renegotiations shall:

- (a) reduce the total number of cases for the contract period and adjust the monthly payments to Contractor accordingly; or
- (b) have Contractor refund or otherwise repay to the State any moneys saved.

### 5.7 Periodic Review

At the request of either party, PDSC and Contractor will periodically review case assignment trends, requests for

additional credit and any other matters needed to determine contract compliance or any necessary contract modifications.

### 5.7.1 Review of Assignments to Multiple Contractors and Mixture of Cases

In counties where more than one Contractor provides legal services, periodic review shall include a review by PDSC, the court, and the Contractors of the number of appointments made to each Contractor. If the review shows that there is a substantial disparity in the actual appointment rates and the rates contemplated under the contracts, PDSC shall notify the court and Contractors that appointment rates must be adjusted and corrected, to the extent total cases are available. Similarly, if the periodic review discloses a substantial disparity between the case mix under the contract and the case mix actually assigned to Contractor, PDSC will notify the court and Contractors that appointment case mix must be adjusted and corrected, to the extent total cases are available. (See Section 7.8.2.5)

### 5.7.2 Fungibility

The parties agree that PDSC is contracting for the provision of legal representation by Contractor, as measured by value, and that the estimated workload, by case type, is the parties' expectation as to the distribution of the cases which may be available during the contract period. The parties expressly agree that Contractor may substitute one type of case for another, for the purposes of contract performance, with cases being fungible, except as specifically provided to the contrary in this contract.

### 5.8 Other Contractors and Vendors

PDSC may undertake or award other contracts for additional or related work. Contractor shall cooperate with PDSC and the courts to coordinate appointment procedures and other court activities necessary for efficient and effective administration of this and other contracts for public defense services.

Contractor shall reasonably assist non-attorney vendors in billing for services provided at Contractor's request.

## 6 OBLIGATIONS OF PDSC

### 6.1 Indemnity of Contractor by PDSC

PDSC shall protect, indemnify, defend and hold harmless Contractor from all liability, obligations, damages, claims, suits, or actions of whatever nature that result from or arise out of the activities of PDSC or State of Oregon under this contract.

### 6.2 De Minimis Changes in Contractor Reports/Documents

PDSC shall not make any change that would cause more than a de minimis increase in cost or time required to perform the contract except by written agreement signed by both parties. (See Section 3.4)

**6.3 State Funding Shortfall**

**6.3.1 PDSC to Seek Additional Funding**

If PDSC reasonably believes that appropriated funds will not be sufficient, PDSC shall seek additional funds from the Legislative Emergency Board or legislature at the earliest opportunity and, if possible, before modifying, suspending, or terminating this contract.

**6.3.2 Negotiations**

If the Emergency Board or legislature does not appropriate sufficient funds, PDSC shall seek to apportion expenditure reductions equally and fairly among all public defense service providers, including the private bar. PDSC shall seek first to modify the contract through negotiation with Contractor. In negotiating any modification, the parties will consider both cost and the level of representation that meets minimum allowable professional standards. PDSC may suspend or terminate the contract if the parties cannot agree to modification.

**6.4 Accounting Model**

Payment under this contract shall be based on when work is performed, consistent with Oregon state government accounting procedures. Except for contracts based on number of hours, the accounting model used for payment under the contract assumes the disposition of an average case assigned under the contract occurs within 90 days of the assignment. The model also assumes approximately one-third of the work is performed in the month the case is assigned and one-third of the work is performed in each of the following two months. PDSC shall pay Contractor according to this accounting model out of funds for the biennium during which the work is performed.

**6.5 Payments in Addition to Contract Price**

PDSC shall pay for the following case expenses from funds available for the purpose:

**(a) Discovery**

Discovery expenses include material provided by DHS or a county juvenile department for representation in a juvenile case. For post-conviction relief cases, discovery includes the cost to obtain a copy of the defense, district attorney or court files pertaining to the underlying case;

**(b) Preauthorized Non-Routine Expenses**

Non-routine case expenses requested by Contractor and preauthorized by PDSC or other authority designated to approve non-routine expenses in compliance with the requirements of ORS 151.216 and ORS 135.055(3). Unless the services are performed by Contractor's staff or subcontractors, non-routine expenses include, but are not limited to:

- (i) medical and psychiatric evaluations;
- (ii) expert witness fees and expenses;
- (iii) interpreters who charge a rate above the guideline amount as shown in the payment policy or interpreters for services other than attorney/client communication;
- (iv) polygraph, forensic and other scientific tests;

- (v) computerized legal research;
- (vi) investigation expenses; and
- (vii) any other non-routine expenses PDSC or other authority designated to approve non-routine expenses preauthorizes and finds necessary and proper for the investigation, preparation, and presentation of a case;

**(c) Lay Witness Fees**

Lay witness fees and mileage incurred in bringing defense witnesses to court, but not including salary or expenses of law enforcement officers required to accompany incarcerated witnesses;

**(d) Copying Clients' Files**

The cost, if it exceeds \$25, of providing one copy of a client's or former client's case file upon client's or client's appellate, post-conviction relief or habeas corpus attorney's request, or at the request of counsel appointed to represent the client when the client has been granted a new trial;

**(e) Copying Direct Appeal Transcripts for PCR Trial-Level Representation**

The cost, if it exceeds \$25, of making copies of direct appeal transcripts for representation in post-conviction relief cases. Contractor is limited to no more than two copies;

**(f) Records**

Medical, school, birth, DMV, and other similar records, and 911 and emergency communication recordings and logs, when the cost of an individual item does not exceed \$75; and

**(g) Process Service**

The cost for the service of a subpoena as long as the rate per location does not exceed the guideline amount as shown in the payment policy.

**7 OBLIGATIONS OF CONTRACTOR**

**7.1 Obligations To Appointed Clients**

**7.1.1 Representation At All Court Proceedings in the Relevant Court**

Contractor shall provide representation at all stages of a case assigned under this contract as limited by this contract. Representation means the provision of competent legal advice and assistance by appointed counsel to a person that a state court has determined to be financially eligible and entitled to appointed counsel at state expense on all matters related to the appointment, except DMV license suspension hearings, civil forfeiture proceedings, domestic relations proceedings and other civil proceedings.

**7.1.2 Standards of Representation**

Representation further means providing a level of legal service that does not fall below the minimum professional standards and canons of ethics of the Supreme Court of Oregon, the Oregon State Bar, the American Bar Association, and any applicable case law and court rules that define the duties of counsel to their clients.

## SEC. 7 OBLIGATIONS OF CONTRACTOR

### 7.1.3 Specific Representation Services

Contractor shall provide services on any and all matters necessary to provide adequate representation of the client, including but not limited to:

- (a) having an attorney present at regularly scheduled arraignments or other initial appearance to make the necessary contact and appointments with clients assigned to Contractor (Contractor may make alternative arrangements with the court for actual presence);
- (b) establishing and following procedures to ensure prompt notification to the court of the specific attorney assigned to each case;
- (c) filing all necessary motions, including pre- and post-judgment motions;
- (d) representation through judgment or other final order of the court on the case, including but not limited to:
  - (i) filing timely motions to dismiss in cases subject to diversion agreements, conditional discharge or similar provisions,
  - (ii) filing necessary paperwork under ORS 161.705 ("reduction of certain felonies to misdemeanors"), and
  - (iii) all prejudgment proceedings arising from a petition for a writ of mandamus or habeas corpus related to the case on which counsel was appointed;
- (e) legal assistance to individuals who would be eligible for counsel at state expense if charged with a crime and where exigent circumstances preclude an appointment order (e.g., interrogation);
- (f) preparing all documents, letters, research and referrals to appropriate agencies;
- (g) continuous legal and support staff services, during case substitutions, to the extent necessary to ensure continuous representation and the establishment of the new attorney/client relationship;
- (h) consulting with clients regarding appellate review;
- (i) upon request, assisting in filing a notice of appeal and motion for appointment of appellate counsel and timely responding to appellate counsel's questionnaire or questions regarding the case;
- (j) to the extent ethically possible, representing a client at a show cause hearing to determine client's financial eligibility;
- (k) to the extent ethically possible, consulting with appellate or post-conviction relief counsel on an appeal or post-conviction relief proceeding; and
- (l) upon request, providing copies to appellate or post-conviction relief counsel in a timely manner.

### 7.1.4 Client Contact

#### 7.1.4.1 In-Custody Initial Interviews

Contractor shall, whenever possible, speak to and conduct initial interviews in person with in-custody clients:

- (a) within 24 hours of appointment; or
- (b) by the next working day if the court appoints Contractor on a Friday, weekend, or holiday.

#### 7.1.4.2 Out-of-Custody Interviews

Within 72 hours of the appointment, Contractor shall arrange for contact with out-of-custody clients, including notification of a scheduled interview time or what client must do to schedule an interview time.

### 7.1.5 Contractor Responsibilities – Financially Ineligible Clients

Contractor shall comply with the requirements of federal and Oregon constitutions, the Oregon Rules of Professional Conduct, and consider OSB Ethics Opinion 2005-34 if Contractor learns that the client is ineligible for state-funded legal services under this contract.

### 7.2 Withdrawal From Case Only on Court Approval

Contractor may withdraw only with the court's approval. Contractor shall promptly notify the court of any conflict of interest or any other reason requiring withdrawal from a case assigned under this contract. If the court approves Contractor's request to withdraw, the case shall be reassigned in the normal course.

### 7.3 Special Obligations To State of Oregon

#### 7.3.1 Indemnity of PDSC By Contractor

Contractor shall protect, indemnify, defend and hold harmless PDSC and the State of Oregon from all liability, obligations, damages, losses, claims, suits, or actions of whatever nature that result from or arise out of Contractor's activities.

#### 7.3.2 Independent Status of Contractor

For purposes of this contract, Contractor is an independent contractor and has so certified under Oregon laws. Neither Contractor nor any of its employees is an employee of the State of Oregon or a state aided institution or agency, by reason of this contract alone.

##### 7.3.2.1 Ineligibility for Public Employee Benefits

Payment from contract funds does not entitle Contractor, its employees, officers, agents, members, and representatives, to any public employee benefits of federal social security, unemployment insurance, workers' compensation, the Public Employees Retirement System, leave benefits, or similar employment-related benefits.

##### 7.3.2.2 Wages and Taxes

Contractor shall pay any compensation, wages, benefits, and federal, state, and local taxes to be paid under or as a result of the contract.

##### 7.3.2.3 Workers' Compensation

As an independent contractor Contractor shall provide workers' compensation coverage for all subject workers performing work under this contract, including Contractor if self-employed or a business partner, to the extent required by all applicable workers' compensation laws and for the entire contract term. Contractor, its subcontractors, if any,

## SEC. 7 OBLIGATIONS OF CONTRACTOR

and all other employers working under this contract are "subject employers." As such, they shall provide coverage for workers' compensation benefits for any and all of their subject workers as required by ORS chapter 659A and for the entire contract term.

### **7.3.3 State Tort Claims Act Not Applicable**

For purposes of this contract, Contractor is not an officer, employee, or agent of the State of Oregon as those terms are used in ORS 30.265. Contractor accepts responsibility for all actions of its members, officers, employees, parties, agents and subcontractors.

### **7.3.4 Equal Rights of Contractor's Employees**

Contractor shall comply with Title VI of the Civil Rights Act of 1964, with Section V of the Rehabilitation Act of 1973, and with all applicable requirements of federal and state civil rights and rehabilitation statutes, rules, and regulations. Contractor also shall comply with the Americans with Disabilities Act of 1990, including Title II of that Act, ORS 659A.142, and all regulation and administrative rules established pursuant to those laws.

### **7.3.5 Contractor Insurance To Protect State of Oregon**

Contractor shall secure and maintain insurance coverage as set out below. Contractor shall provide PDSC a copy of the certificate of insurance listing the coverage and additional insured information.

#### **7.3.5.1 General Liability Insurance**

At its expense, in whole or in part from contract funds, Contractor and each law firm or sole practitioner member of a consortium shall procure and keep in effect during the contract term comprehensive general liability insurance with an extended coverage endorsement from an insurance company authorized to do business in the State of Oregon. The limits shall not be less than five hundred thousand dollars (\$500,000) per occurrence for personal injury and property damage.

#### **7.3.5.2 Casualty Insurance**

At its expense in whole or in part from contract funds, Contractor shall procure and keep in effect during the term of this contract, sufficient casualty insurance to replace any and all property losses caused by theft, fire, flood, or other casualty.

#### **7.3.5.3 Additional Insured**

The liability and casualty insurance coverages required for performance of the contract shall include the State of Oregon, PDSC, and their divisions, officers, and employees as additional insureds but only with respect to the Contractor's activities to be performed under this contract.

#### **7.3.5.4 Cancellation or Change**

There shall be no cancellation, material change, potential exhaustion of aggregate limits, or intent not to renew insurance coverage without notice by Contractor to PDSC. Any failure to comply with the provisions of these insurance requirements, except for the potential exhaustion of aggregate limits, shall not affect the coverage provided to the State of Oregon, PDSC, and their divisions, officers and employees.

### **7.3.6 Malpractice Insurance**

During the entire contract period, and at the Contractor's own expense in whole or in part from contract funds, Contractor shall ensure that each of its attorneys has malpractice insurance coverage in the minimum amount required by the Oregon State Bar. Contractor shall provide proof of such insurance to PDSC on request.

### **7.3.7 Internal Controls**

Contractor shall establish internal controls, such as segregation of duties with respect to financial accounting, to ensure that contract funds are properly received, expended, and accounted for.

### **7.3.8 Oregon Judicial Information Network (OJIN)**

For juvenile cases, Contractor shall limit use of OJIN to access only those cases that involve parties Contractor represents.

### **7.3.9 Protection of Consumer Personal Information**

Contractor shall develop and implement appropriate privacy safeguards to protect the security of any consumer personal information that it will possess in its performance of this contract pursuant to the Oregon Consumer Identity Theft Protection Act of 2007, ORS 646A.600 to 646A.628.

## **7.4 Staff and Equipment**

### **7.4.1 Staffing Levels**

Contractor has secured, or will secure at its own expense in whole or in part from contract funds, all personnel or employees necessary to perform services that this contract requires. Contractor shall maintain an appropriate and reasonable number of attorneys and support staff to perform its contract obligations.

### **7.4.2 Assigning and Associating Attorneys**

#### **7.4.2.1 Diligence in Hiring**

Contractor shall use due diligence to hire, assign, or associate attorneys for this contract who are qualified to provide competent and effective services to their clients and the courts.

#### **7.4.2.2 Supervision**

Contractor shall have more experienced attorneys closely supervise lesser experienced attorneys' performance. Contractor shall provide information on the extent of supervision on PDSC's request. However, Contractor shall not provide to PDSC or any other person the contents of any employee's personnel files unless Contractor's employee expressly, knowingly, and voluntarily agrees in writing.

#### **7.4.2.3 Certification**

Contractor shall provide to PDSC the name and qualifications of any attorney added during the contract term to perform contract services. The newly added attorney shall meet the qualification standards established by PDSC, for the type of cases that will be assigned. A "certificate of attorney qualification" shall be provided to PDSC for each newly added attorney.

## SEC. 7 OBLIGATIONS OF CONTRACTOR

### 7.4.3 Interpreters

For out-of-court attorney/client communications, Contractor shall give preference to interpreters who are certified by the Office of the State Court Administrator (OSCA), under ORS 45.291. If no certified interpreter is available, Contractor may use a qualified interpreter, as defined in ORS 45.275(9)(c). Contractor shall ensure that all interpreters who are staff employees or who subcontract with Contractor and provide in-court interpretation comply with all certification requirements established by OSCA and the Code of Professional Responsibility for Interpreters in Oregon.

### 7.4.4 Limit on Contractor and Staff Noncontract Work

Contractor and Contractor's staff shall not let noncontract work interfere with adequate representation of court-appointed clients under this contract.

## 7.5 Record Keeping

### 7.5.1 Case Records

Contractor shall maintain current information, including case log notes, on individual contract cases. To the extent ethically possible, records shall be kept in a manner to be available on request for inspection by PDSC, or PDSC's designee or agent.

### 7.5.2 Financial Records

Contractor shall maintain financial records on an accrual basis. Contractor's records shall show that all disbursements or expenditures of contract funds were ordinary, reasonable and necessary, and related to providing direct services required under the contract or services necessary to performance of the contract.

### 7.5.3 Retention Period

For purposes of this contract only, Contractor agrees to preserve all appointment, service and financial records for a period of five (5) years after this contract expires. In addition, Contractor agrees to preserve all case files a minimum of ten (10) years from the date the case is closed for all cases except aggravated murder and Measure 11 cases. Case files in aggravated murder and Measure 11 cases shall be preserved a minimum of twenty (20) years from the date the case is closed.

## 7.6 Reports to PDSC

### 7.6.1 Case Inventory

Within twenty (20) days of the end of each month, Contractor shall provide to PDSC, in a format specified by PDSC, a reasonably accurate monthly case inventory report for the preceding month. Contractor may submit amended case inventory reports, if necessary, at any time up to forty-five (45) days after completion of a periodic review that includes the monthly case inventory report to be amended.

### 7.6.2 Case Disposition and Withdrawal Data

Contractor shall maintain data, using codes specified by PDSC, to track the disposition of, or withdrawal from, all cases reported under the contract. Contractor will make the data available for PDSC to review on request.

### 7.6.3 Penalty for Late Reports

Contractor shall submit timely and properly completed reports. If Contractor fails to submit a proper, reasonably accurate report within thirty (30) days of its due date, PDSC may withhold the next monthly payment until PDSC receives the report and supporting documentation.

### 7.6.4 Enforceability

The reporting requirements set forth in this section are enforceable after the expiration of this contract.

## 7.7 Costs, Expenses and Client Clothing

### 7.7

### 7.7.1 Costs and Expenses

Except for the expense items listed in Section 6.5, Contractor shall pay for:

- (a) all ordinary, reasonable and necessary costs, fees, and expenses incurred in providing contract services;
- (b) all other routine expenses related to case preparation and trial; and
- (c) staff services, including routine travel expenses, if Contractor has staff investigators, interpreters, or polygraphers.

Contractor shall not expend contract funds for out-of-state travel or other costs unrelated to a specific case without the express written authorization of PDSC.

### 7.7.2 Client Clothing

Prior to requesting preauthorization to purchase clothing for a client's court appearance, Contractor agrees to contact contractors who maintain "clothing rooms" to determine whether suitable clothing is available. (Contact PDSC for a current list.) If Contractor receives preauthorization to purchase clothing for a client, that clothing shall be provided to a "clothing room" upon completion of the case.

## 7.8 Special Notices

Contractor shall provide PDSC written notice of any significant changes affecting this contract. Such changes include, but are not limited to:

- (a) Contractor's ability to carry out this contract, including changes in staff attorney names, staffing levels and office location;
- (b) Contractor's ability to meet financial obligations; and
- (c) matters affecting Contractor's ability to provide services to clients.

### 7.8.1 Time Requirement for Notices

All notices shall be provided to PDSC within thirty (30) days of the occurrence requiring the notice, unless a shorter time is provided.

## 7.8.2 Specific Notices and Responses Required

### 7.8.2.1 Insurance Cancellation or Change

Contractor shall provide notice of any material changes to any insurance policy listed in Sections 7.3.5 - 7.3.6 and immediate notice of the cancellation of any such policies.

SEC. 7 OBLIGATIONS OF CONTRACTOR

**7.8.2.2 Staffing**

Contractor shall provide, to PDSC and the affected court, notice of the names of attorneys who are hired or leave Contractor's employ and any other substantial staffing changes. Upon request by PDSC, Contractor shall provide a current list of attorneys and staff positions by full time equivalent, and provide timely responses to PDSC surveys or other inquiries concerning the diversity of attorneys and staff employed by or otherwise performing services for Contractor.

**7.8.2.3 Change in Contractor's Organization**

Contractor shall notify PDSC of any change in Contractor's organization that might affect staffing, payment, or tax reporting under the contract. Contractor shall assure PDSC of its continued ability to meet contract requirements or shall propose reductions in caseload and price if Contractor is unable to meet contract requirements because of such organizational change.

**7.8.2.4 Events Which Could Impair the Contract**

Contractor shall notify PDSC within fourteen (14) days of when Contractor learns that one of the following has occurred:

**(a) Criminal Charges**

A member of Contractor's attorney or investigator staff has been charged with a crime.

**(b) Criminal Conviction**

A member of Contractor's attorney or investigator staff has been convicted of a crime punishable by a term of incarceration of one or more years or involving moral turpitude.

**(c) Formal Bar Complaint**

A formal accusation of misconduct, that is alleged to have occurred with respect to representation provided in a contract case, has been filed by the Oregon State Bar against a member of Contractor's attorney staff.

**(d) Bar Discipline**

Disciplinary action is taken by the Oregon State Bar against one of Contractor's attorney staff.

**(e) Uninsured Practice of Law**

A member of Contractor's attorney staff has engaged in the practice of law in an area not covered by Contractor's or the attorney's professional liability insurance coverage.

**7.8.2.5 Nonassignment of Available Cases or Early Quota**

Contractor shall notify PDSC immediately upon determining that:

- (a) the court is not assigning Contractor to cases available for appointment; or
- (b) Contractor will reach its total contract quota before the expiration of the contract.

Within forty-five (45) days of notification to PDSC that the court is not assigning Contractor to cases available for appointment, PDSC shall propose a plan to Contractor and the court to remedy the nonassignment of available cases.

**7.9 No Dual Payments for Contract Work**

Contractor shall not:

- (a) expend funds under this contract for work performed outside this contract;
- (b) accept funds from anyone other than PDSC for work performed under this contract, except for grants or funds for work study, job experience, internships, or other such grants or funds; or
- (c) accept or keep credit for a case for which Contractor's attorney is subsequently retained.

**7.10 Independent Audit Required**

Contractor shall, from contract funds, be subject to an annual independent audit by a CPA firm and shall provide a copy to PDSC.

**7.11 Annual Expenditure Report**

Forty-five (45) days after the end of each one-year period under the contract, Contractor shall provide to PDSC a one-year expenditure report listing the amounts of contract funds expended by the same line items as are listed in Contractor's "Estimated Allocation of Contract Funds".

**7.12 Limits on Full Time Public Defender Attorneys**

Attorneys employed full time by nonprofit public defender offices shall not accept employment for legal services on a retained basis and shall not accept appointment to a public defense case outside this contract without the authorization of PDSC.

**7.13 Limits on Pro Bono Work**

Nonprofit public defenders may provide pro bono representation only for:

- (a) cases covered by contractor's or another's malpractice insurance; and
- (b) cases that are:
  - (i) related to cases to which contractor's attorneys have been appointed; or
  - (ii) unrelated to contract cases, provided the pro bono services are rendered outside of the contract.

**7.14 Public Defender Employee Compensation**

No public defender employee shall receive a salary higher than that set by the legislature for a circuit court judge in ORS 292.416.

**8 MUTUAL RISKS**

**8.1 Impossibility of Performance**

Neither party shall be held responsible for delay or default caused by theft, fire, flood, or other casualty, if the delay or default was beyond the party's reasonable control. In the event of circumstances beyond a party's control that may

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render timely performance by that party impossible, either party may terminate this contract, or the affected part, by written notice.

8.2 Tort Liability

Each party shall be responsible for the torts only of its own officers, employees, and agents committed in the performance of this contract.

9 RISKS OF CONTRACTOR

9.1 Refund for Shortage

If Contractor's actual caseload value, at the expiration or termination of the contract, is less than the workload value Contractor agrees to refund to PDSC the shortage, unless PDSC agrees in writing otherwise.

9.2 Wind-Down Procedures

Unless PDSC agrees in writing, if either party suspends or terminates the contract, or the contract expires, Contractor shall complete timely and adequate legal services on all existing contract appointments on cases assigned before the effective date of suspension or termination.

9.2.1 Negotiations

If the contract expires or terminates, PDSC and Contractor shall negotiate wind-down procedures. Whenever possible, Contractor shall wind down pending cases within three months of contract expiration or termination by completing or, with PDSC's agreement, reassigning the cases.

9.2.1 Negotiations

Except when PDSC terminates the contract for cause under Section 3.5 and unless otherwise agreed, the parties shall, whenever possible, agree on wind-down procedures before the contract expires or terminates. If the parties cannot agree on wind-down procedures, PDSC alone shall decide what state funds, if any, will finance wind-down procedures based on what PDSC reasonably believes is necessary to ensure the clients' right to adequate assistance of counsel and that Contractor's legal obligations are met.

9.2.2 Reduction in Contractor's Caseload

If Contractor's caseload or contract amount is reduced significantly resulting in layoffs, whether as a result of contract modification or contract renewal, PDSC and Contractor may negotiate wind-down procedures.

10 APPOINTMENT TYPE DEFINITIONS

( ) denotes the applicable appointment code.

10.1 CRIMINAL CASES

10.1.1 Appointments After Diversion or Conditional Discharge Agreement (SCDV)

For all criminal cases, Contractor shall report separately on cases where Contractor is first appointed:

- (a) after the defendant enters into a diversion or conditional discharge agreement or any other type of deferred or delayed adjudication agreement, and
(b) when the court orders the defendant to show cause why the agreement should not be terminated.

Contractor shall report these cases as SCDV rather than as the original case type.

10.1.2 Capital Murder Case (CMUR)

A capital murder case is any appointment to represent a person charged with aggravated murder as defined by ORS 163.095 except as provided under paragraph 10.1.3., below.

10.1.3 Noncapital Murder Case (MURD)

A noncapital murder case is any appointment to represent a person charged with:

- (a) murder as defined by ORS 163.115; and
(b) aggravated murder where the person is a juvenile under 15 years of age who is waived to circuit court on the charge (a convicted juvenile cannot be sentenced to death or life without parole under ORS 161.620) or aggravated murder where the person was 15, 16 or 17 years of age on the date the crime is alleged to have occurred (no death sentence may be imposed under ORS 137.707(2)).

10.1.4 Felony Case

A felony case is any appointment to represent a person charged with one or more crimes described by ORS 161.525, excluding capital murder and noncapital murder. It includes manslaughter and negligent homicide. A case is a felony case if it includes a felony charge at any time after defendant appears in circuit court, even if later reduced to a misdemeanor.

10.1.4.1 Measure 11 Felony (AM11, BM11, JM11)

Other than murder, a felony that is the subject of Measure 11 and ORS 137.700 or ORS 137.707. AM11 is a Class A Measure 11 felony with an adult defendant; BM11 is a Class B Measure 11 felony with an adult defendant; and JM11 is a Class A or Class B Measure 11 felony where a 15-, 16- or 17-year-old is indicted as an adult in circuit court.

10.1.4.2 Class A Felony (AFEL)

A Class A felony is a crime that a statute expressly designates as a Class A felony, other than an AM11 case.

10.1.4.3 Class B Felony (BFEL)

A Class B felony is a crime that a statute expressly designates as a Class B felony, other than a BM11 case.

10.1.4.4 Class C Felony (CFEL)

A Class C felony is a crime that a statute expressly designates as a Class C felony, other than a DUII felony (DFEL), or domestic violence Class C felony (DVIO).

KEY: Public Defender Consortium or Law Firm

SEC. 7 OBLIGATIONS OF CONTRACTOR

**10.1.4.5 DUII Felony (DFEL)**

A DUII felony is a DUII case in which an element of the crime charged is that the defendant has at least three prior DUII convictions within the past ten years (ORS 813.010(5)).

**10.1.4.6 Domestic Violence Class C Felony (DVIO)**

An Assault IV case which is elevated to a Class C felony under ORS 163.160(3).

**10.1.4.7 Unclassified Felony (UFEL)**

A felony crime that the statute(s) do not expressly designate as a Class A, B, or C Felony.

**10.1.5 DUII (DUIIS)**

A DUII case is any appointment to represent a person charged with driving under the influence of intoxicants, other than DUII felony (DFEL).

**10.1.6 Misdemeanor Case (MISS)**

A misdemeanor case is any appointment to represent a person charged with one or more crimes described by ORS 161.545 or by local ordinance as a misdemeanor, excluding DUII, misdemeanor contempt and the misdemeanor traffic cases defined below.

**10.1.7 Misdemeanor Traffic Case**

A misdemeanor traffic case is any appointment to represent a person on a misdemeanor traffic charge for which a convicted defendant may be incarcerated as an original sentence under the Oregon Vehicle Code, other than a traffic offense charged as a felony or DUII. For statistical purposes, report cases in the following categories:

- (a) Misdemeanor Driving While Suspended (DWSS).
- (b) Other Traffic Misdemeanor (OTMS).

**10.1.8 Extradition Case (EXTR)**

An extradition case is any appointment to represent a person in a proceeding under the Uniform Criminal Extradition Act, ORS 133.743 - 133.857. It includes representation on a writ of habeas corpus filed in a pending extradition proceeding.

**10.2 PROBATION VIOLATIONS**

**10.2.1 Probation Violation**

A probation violation is any appointment or reappointment to represent a person in a proceeding concerning an order of probation, including but not limited to the revoking thereof, arising out of a criminal or civil contempt conviction(s) and sentencing(s), under Section 1.5.5. For reporting purposes, Contractor shall report each type of probation violation case by the following subcategories:

**10.2.1.1 Felony Probation Violation (FPV)**

A felony probation violation case is any appointment to represent a person in a probation proceeding arising out of a felony conviction.

**10.2.1.2 Misdemeanor Probation Violation (MPV)**

A misdemeanor probation violation case is any appointment to represent a person in a probation proceeding arising out of a contempt case, or a misdemeanor conviction, except DUII.

**10.2.1.3 DUII Probation Violation (DPV)**

A DUII probation violation is any appointment to represent a person in a DUII probation proceeding arising out of a DUII conviction.

**10.3 CONTEMPT CASES**

**10.3.1 Contempt Case**

A contempt case is any appointment to represent a person charged with contempt of court. For statistical purposes, report cases in the following three categories:

**10.3.1.1 Family Abuse Prevention Act (FAPA)**

Contempt for violating a Family Abuse Prevention Act (ORS 107.700 - 107.735) restraining order.

**10.3.1.2 Support (SUPP)**

Contempt for failure to comply with an order or judgment in domestic relations or juvenile court proceeding for the payment of suit money, attorney's fees, spousal support, child support, maintenance, nurture, or education.

**10.3.1.3 Contempt (CONT)**

Misdemeanor contempt or any other contempt that is not a FAPA or SUPP contempt.

**10.4 CIVIL COMMITMENT CASES**

**10.4.1 Civil Commitment Case (MHMI)**

A civil commitment case is any appointment to represent a person in a proceeding brought under ORS Chapter 426 or 427.

**10.5 JUVENILE CASES**

**10.5.1 Juvenile Case**

A juvenile case is any appointment or a reappointment to represent a person(s) in a proceeding brought under ORS Chapter 419B or 419C. For statistical purposes, report juvenile cases in the following categories:

**10.5.1.1 Juvenile Felony (JUDF)**

If committed by an adult, alleged act would constitute a felony.

**10.5.1.2 Juvenile Misdemeanor (JUDM)**

If committed by an adult, alleged act would constitute a misdemeanor.

**10.5.1.3 Juvenile Other (JUDO)**

- (a) if committed by an adult, alleged act would constitute a violation or infraction;

## SEC. 7 OBLIGATIONS OF CONTRACTOR

- (b) alleged act is a status offense;
- (c) an emancipation case (any appointment to represent a child in a proceeding under ORS 419B.550 - 419B.558);
- (d) a waiver case (any appointment to represent a child in a proceeding to waive the child to adult court for further proceedings under ORS 419C.340);
- (e) appointments under ORS 420A.203 (Eligibility for second look; report to sentencing court; hearing; disposition);
- (f) appointments under ORS 181.823(12) (Relief from reporting requirement; juvenile offenders); and
- (g) appointment to a juvenile case for which no other juvenile case type applies.

### **10.5.1.4 Probation Violation or Motion to Modify (JPV)**

Proceeding based on allegation(s) that the child has violated the terms of probation or a proceeding based on a motion to modify a disposition.

### **10.5.1.5 Juvenile Dependency Case**

A juvenile dependency case is any appointment to represent a person based on a new petition alleging that a child is within the jurisdiction of the juvenile court under ORS 419B.100(1)(a) - (h).

- (a) Parent (JDEP): Appointment to represent parent(s) or guardian(s).
- (b) Child (JDEC): Appointment to represent child(ren).

### **10.5.1.6 Postdispositional Proceeding**

A postdispositional proceeding is any appointment in a juvenile court proceeding to represent a person at a court or CRB review hearing and shelter care hearings held after the original disposition. It does not include probation violation proceedings or family unity meetings. Probation violation proceedings are a separate category under delinquency.

- (a) Parent (JPDP): Appointment to represent parent(s) or guardian(s).
- (b) Child (JPDC): Appointment to represent child(ren).

### **10.5.1.7 Termination of Parental Rights Case**

A termination of parental rights case is any appointment to represent the parent or child in a proceeding under ORS 419B.498 - 419B.530 OR in a contested adoption matter (Zockert v. Fanning) OR in a contested permanent guardianship proceeding under ORS 419B.365. Guardianship proceedings under ORS Chapter 125 are excluded.

- (a) Parent (JUTP): Appointment to represent parent(s) or guardian(s), including contested adoption proceedings.
- (b) Child (JUTC): Appointment to represent child(ren), including contested adoption proceedings.

## **10.6 OTHER CIVIL CASES**

### **10.6.1 Habeas Corpus Case (CVHC)**

A habeas corpus case is any appointment to represent a person in a proceeding for a writ of habeas corpus under ORS 34.355, excluding:

- (a) habeas corpus petitions filed in a pending extradition proceeding; and
- (b) habeas corpus petitions filed for a client whom Contractor represents on a related matter (not a separate appointment under the contract).

### **10.6.2 Post-Conviction Relief Case (CVPC)**

A post-conviction relief case is any appointment to represent a person under ORS 138.510 - 138.686.

### **10.6.3 Psychiatric Security Review Board Case (PSRB)**

A Psychiatric Security Review Board case is any appointment by the PSRB to represent a person under ORS 161.346(11).

## **10.7 OTHER CASES (OTHR)**

An other case is: a complex case from which Contractor withdraws; an appointment under ORS 136.611 (Material Witness Order); an appointment under ORS 137.771(2) (Sexually Violent Dangerous Offenders); an appointment under ORS 138.694 (DNA testing); a criminal forfeiture credit; or an appointment to a case for which no other case type applies.



**CONTRACT BETWEEN PDSC AND CONTRACTOR  
PAYMENT SCHEDULE**

End of Month (Unless noted)	Monthly Payment
January 2012	
February 2012	
March 2012	
April 2012	
May 2012	
June 2012	
July 2012	
August 2012	
September 2012	
October 2012	
November 2012	
December 2012	
<i>First-Year Subtotal</i>	\$0
January 2013	
February 2013	
March 2013	
April 2013	
May 2013	
June 2013	
July 10, 2013	
July 2013	
August 2013	
September 2013	
October 2013	
November 2013	
December 2013	
<i>Second-Year Subtotal</i>	\$0
<b><i>Total Payments</i></b>	<b>\$0</b>

**CONTRACT BETWEEN PDSC AND CONTRACTOR  
CASELOAD AND CASE VALUE MATRIX**

Case Types	Value	Number of Cases	Total Value
1/1/12 - 12/31/12			
MURD			\$0
AM11/BM11/JM11			\$0
AFEL			\$0
BFEL			\$0
CFEL/DFEL/DVIO			\$0
DUIS/MISS/DWSS/OTMS/SCDV/CONT/ FAPA/SUPP/EXTR/MHMI/OTHR			\$0
DPV/FPV/MPV/JPV			\$0
CVHC/CVPC			\$0
JDEC/JDEP			\$0
JDPC/JPDP			\$0
JUDF			\$0
JUDM/JUDO			\$0
JUTC/JUTP			\$0
First-Year Total		0	\$0
1/1/13 - 12/31/13			
MURD			\$0
AM11/BM11/JM11			\$0
AFEL			\$0
BFEL			\$0
CFEL/DFEL/DVIO			\$0
DUIS/MISS/DWSS/OTMS/SCDV/CONT/ FAPA/SUPP/EXTR/MHMI/OTHR			\$0
DPV/FPV/MPV/JPV			\$0
CVHC/CVPC			\$0
JDEC/JDEP			\$0
JDPC/JPDP			\$0
JUDF			\$0
JUDM/JUDO			\$0
JUTC/JUTP			\$0
Second-Year Total		0	\$0
Contract Total		0	\$0

# Attachment 4

PUBLIC DEFENSE SERVICES COMMISSION

REQUEST FOR PROPOSALS

FOR

TRIAL-LEVEL AGGRAVATED MURDER, MURDER & DEATH  
SENTENCE POST-CONVICTION RELIEF  
PUBLIC DEFENSE MITIGATION INVESTIGATIVE SERVICES  
CONTRACTS

BEGINNING JANUARY 2012

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## PART I – GENERAL INFORMATION

### **1.1 Request For Proposals (RFP) Description**

The Public Defense Services Commission (PDSC) is seeking contract proposals to provide mitigation investigative services to persons determined by the state courts to be financially eligible and entitled to court-appointed counsel at state expense. **PDSC is accepting proposals for trial-level aggravated murder, murder and death sentence post-conviction relief cases. Preference will be given to applicants who currently provide this service on an hourly-paid basis. The contracts awarded may have a one- or two-year term beginning January 1, 2012, or other such length of term and beginning date as determined by PDSC.** The basic services required are mitigation investigative services as necessary to provide adequate and effective legal representation that meets established professional standards of practice.

This RFP contains the applicable procedure, instructions and requirements for proposals. It is organized in four parts:

- Part I     General Information
- Part II    Proposal Application Instructions and Requirements
- Part III   Proposal Application Summary and Proposal Outline
- Part IV    Contract Terms

### **1.2 Applicable Contracting Procedure**

ORS 151.216 authorizes the PDSC to adopt policies and procedures for the contracting of public defense services. As part of the Judicial Branch, PDSC is not subject to the Department of Administrative Services administrative rules and procedures that govern contracting for personal services contracts. The PDSC adopts the policies, procedures, instructions, requirements and other provisions of this RFP as the PDSC procedures for contracting for personal services. The model rules of the Oregon Attorney General do not apply to PDSC contracting but will be reviewed each time the Attorney General modifies them to determine whether PDSC should modify the policies and procedures contained herein.

### **1.3 Authority**

ORS 151.219 authorizes the PDSC executive director to contract for legal services for financially eligible persons in proceedings in which:

- 1) a state court or magistrate has the authority to appoint counsel to represent the financially eligible person, and
- 2) PDSC is required to pay compensation for that representation and the related expenses.

PDSC may contract with individual mitigation investigators for these services.

Awarding these contracts is a proprietary function of PDSC. All such contracts are:

- 1) subject to PDSC's express approval under ORS 151.216(1)(d), and
- 2) contracts with independent contractors for personal services.

PDSC reserves the right to reject any or all proposals received by reason of this RFP or to negotiate separately in any manner necessary to serve the best interests of the PDSC and the state. PDSC reserves the right to seek clarifications of proposals and to award a contract(s) without further discussion of the proposals submitted. PDSC reserves the right to amend or cancel this RFP without liability if it is in the best interest of the state and public to do so.

#### **1.4 Funding Source**

Under ORS 151.225, the Public Defense Services Account in the General Fund is continuously appropriated to PDSC to pay attorney compensation and other expenses related to the legal representation of financially eligible persons for which PDSC is responsible, including contract payments under ORS 151.219.

#### **1.5 Minorities, Women and Emerging Small Businesses**

Pursuant to ORS 200.035, PDSC shall provide timely notice of RFPs and contract awards to the Advocate for Minorities, Women and Emerging Small Businesses if the estimated value of the contract exceeds \$5,000.

Responses to RFPs shall include a certification, on a form provided by PDSC, that the applicant has not and will not discriminate against a subcontractor in the awarding of any subcontract because the subcontractor is a minority, woman or emerging small business enterprise certified under ORS 200.055 or against a business enterprise that is owned or controlled by or that employs a disabled veteran as defined in ORS 408.225.

#### **1.6 Schedule of Events**

Release of RFP	May 6, 2011
Proposal Submission <u>Deadline</u> (Received via email by 11:59pm)	June 13, 2011
Commission review of statewide plan	July 28, 2011
Notice of intent to award contracts	September 8, 2011
Commission review of proposals and award of contracts	September 15, 2011

PDSC presently intends to award public defense legal services contracts according to the above time schedule. By publishing this schedule, PDSC does not represent, agree, or promise that any contract will be awarded on a specified date or any other time in any particular county or judicial district. PDSC intends, however, to adhere to these time frames as closely as possible.

PDSC will provide notice of its intent to award contracts to all applicants at least seven (7) days before the award of contracts, unless exigent circumstances require a shorter period of notice.

## 1.7 General Proposal Review Procedures

The instructions and information necessary to prepare and submit proposals are found in Part II of this RFP. PDSC will evaluate proposals based on the contents of the applications and any other information available to PDSC. Applicants must submit a completed application using the forms and format provided. Applications **MUST** be received by PDSC by 11:59 p.m. on the submission deadline date. The following events will then occur.

### A. Inadequate Proposals

PDSC may immediately reject proposals that do not meet the minimum RFP requirements. If a proposal is unclear or appears inadequate, PDSC may give the applicant an opportunity to further explain or provide additional information. If PDSC finds the explanation or additional information inadequate, PDSC's decision to reject the proposal will be final and not subject to appeal.

### B. Facially Adequate Proposals

PDSC will evaluate proposals that meet the administrative and contractual minimum requirements as set forth in Part II of the RFP. PDSC will evaluate each proposal based on its total characteristics and any other information available to PDSC. During the evaluation period, PDSC may:

- 1) request additional information from applicants to clarify information or material in the proposal; and
- 2) consult with public defense attorneys and others who have knowledge of the applicant to aid in the review of the proposal's merits; and

### C. Negotiations

PDSC must ensure that each contract is compatible with:

- 1) the needs of the public defense legal services providers for the types of cases covered by the contract; and
- 2) budget allocations.

During negotiations, PDSC may discuss adjustments to proposed costs, case types, coverage, level of services, or service providers necessary to meet these objectives.

### D. Contract Awards

**Award of any contract will be final only when the applicant and the PDSC have properly completed and executed the contract documents.**

### E. Contract Terms

PDSC will offer all applicants the same standard contract provisions. Successful applicants will enter into a contract substantively similar to the contract document in Part IV of this RFP, unless otherwise specifically agreed by PDSC.

An applicant may request in the proposal to amend standard terms of the contract. PDSC must approve any change. Applicants who do not otherwise accept the standard contract terms in Part IV may be disqualified.

## **1.8 Proposal Evaluation Criteria**

PDSC shall evaluate proposals based on the criteria listed below. PDSC reserves the right to reject any proposals that do not comply with the RFP requirements. PDSC shall be the sole determiner of the relative weight given any criterion. Although price is an important criterion, the intent is to provide financially eligible persons with effective mitigation investigation. The applicant with the lowest cost proposed will not necessarily be awarded a contract. PDSC reserves the sole right to make this determination.

### **CRITERIA:**

- 1) The proposal and any modification is complete and timely, in conformance with the RFP.
- 2) The proposed plan for delivery of services is adequate to ensure effective mitigation investigation. Among the factors PDSC may consider are the quality of services and the experience of the applicant.
- 3) The applicant has the ability to perform the contract effectively and efficiently and to provide services in the types of cases proposed. PDSC may consider the applicant's qualifications and experience providing public defense mitigation investigative services.
- 4) The cost for services is reasonable.
- 5) The proposal is consistent with the needs and best interests of the legal services providers involved. Among the factors PDSC may consider are the other service methods and service providers available and the applicant's ability to work with public defense legal services providers and other providers.
- 6) The proposal is consistent with the needs and best interests of the state as a whole. Among the factors PDSC may consider are the other service methods and mix of service providers available, and the applicant's ability to work with other groups affected by the contract, legislative mandates, or other directives that affect the entire statewide contracting patterns or terms.

In addition to the criteria listed above, PDSC will evaluate the available workload, the current number of contractors or hourly-paid providers, and the relative cost of administering current contracts and/or new contract proposals. PDSC has the sole discretion to apportion or not to apportion workloads between applicants AND to award or not to award contracts.

## **1.9 Proposal Records**

Materials submitted by applicants will not be available for public review until all contracts awarded pursuant to this RFP have been fully executed.

Written inquiries on preparing applications may be directed to Kathryn Aylward, Director of the Contract and Business Services Division at:

kathryn.aylward@opds.state.or.us

## **PART II -- PROPOSAL APPLICATION INSTRUCTIONS AND REQUIREMENTS**

This part of the RFP contains the instructions and requirements for preparing and submitting proposals for public defense mitigation investigative services contracts.

### **2.1 Submitting Proposals**

The applicant is responsible for any costs incurred in preparing or delivering the proposal. The applicant is responsible for ensuring that the proposal is received timely by the Public Defense Services Commission.

There is no implied promise to award a contract to any applicant based upon the submission of a proposal.

#### A. Form of Submission

**Proposals MUST be submitted as an email attachment in a searchable Portable Document Format (PDF). The PDF must not be password protected nor copy protected.**

Any text in the body of the transmitting email will not be reviewed and will not be considered to be part of the proposal.

The email should be sent to: mail@opds.state.or.us

#### B. Deadline

Proposals MUST BE RECEIVED by PDSC no later than 11:59 p.m. on the submission deadline date.

**The submission deadline for proposals is June 13, 2011.**

If the applicant fails to submit the proposal(s) in accordance with the deadline to PDSC, PDSC will disqualify the proposal(s), unless authorization for late submission is granted in writing by PDSC.

### **2.2 Application Format**

Applicants must use the attached application format for submission of all proposals and must answer all questions or state the reason why a specific question is not relevant to the particular proposal. PDSC may disqualify any proposal that is not in the required format or is incomplete.

### **2.3 Acceptance of RFP and Contract Terms**

A. Applicants are responsible for reviewing the terms and conditions of the RFP and the standard terms of the contract.

- B. By signing and returning the application form, the applicant acknowledges that the applicant accepts and intends to abide by the terms and conditions of the RFP. Further, the applicant accepts the standard terms and conditions of the contract contained in Part IV, unless and only to the extent that the applicant proposes exceptions as described below.
- C. The applicant must clearly state in the proposal any proposed exceptions to the general terms of the contract, including reasons to support the exceptions and estimated efficiencies and/or cost savings. PDSC reserves the right to accept, reject, or negotiate exceptions to the contract terms.
- D. Any changes to the standard terms of the contract proposed by PDSC will be provided, in writing, to each applicant.

## **2.4 Multiple Proposals**

An applicant may submit more than one proposal. Each proposal must be complete in itself. The proposal must state whether it is in addition to or an alternative to other proposals submitted by the applicant.

## **2.5 Modification of Proposals**

### **A. When Permitted**

Applicants may not modify proposals after the submission deadline, unless PDSC agrees thereto, upon written request by applicant. Until that date, an applicant may modify its proposal(s) in writing. Modifications must be:

- 1) prepared on the applicant's letterhead;
- 2) signed by an authorized representative(s); and
- 3) must state whether the new document supersedes or modifies the prior proposal.

### **B. Delivery**

Applicants must deliver any modifications in the same manner as required by Section 2.1.A for original proposals.

### **C. Included in Proposal File**

All documents relating to the modification of proposals will be made part of the proposal file.

## **2.6 Mistakes in Submitted Proposals**

### **A. When Corrections Permitted**

PDSC will permit applicants to correct mistakes on a proposal only to the extent correction is not contrary to PDSC's interest or to the fair treatment of other applicants.

PDSC has sole discretion to allow an applicant to correct a mistake. PDSC will notify the applicant if and when PDSC allows corrections to proposals.

B. Procedure When PDSC or Applicant Discovers Mistake

If PDSC or the applicant discovers a mistake before the proposal deadline, the applicant may amend the error using the procedures for proposal modification in Section 2.5 above.

PDSC will proceed as follows when PDSC discovers or is notified of mistakes in proposals after the submission deadline but before contract awards are made:

1) Minor Inaccuracies

PDSC may waive or correct minor inaccuracies or insignificant mistakes. Minor inaccuracies are:

- a) matters of form rather than substance that are evident from the proposal documents; or
- b) insignificant mistakes that do not prejudice other applicants; e.g., the inaccuracy or mistake does not affect price, quantity, quality, delivery, or contractual conditions.

2) Mistakes Where Intended Correct Proposal is Evident

If the mistake and the intended correct proposal are clearly evident on the face of the proposal or can be determined from accompanying documents, PDSC may consider the proposal. Examples of mistakes that may be clearly evident on the face of the proposal are typographical errors, transposition errors, and mathematical errors.

3) Mistakes Where Intended Correct Proposal is Not Evident

PDSC may not consider a proposal in which a mistake is clearly evident on the face of the proposal but the intended correct proposal is not evident or cannot be determined from accompanying documents, including requests for correction or modification under Sections 2.5 and 2.6.

C. Included in Proposal File

All documents relating to correcting a mistake will be made part of the proposal file.

## **2.7 Withdrawal of Proposals**

A. Request to Withdraw

An applicant may withdraw a proposal at any time by written request. Requests to withdraw a proposal from consideration must be:

- 1) on the applicant's letterhead;
- 2) signed by an authorized representative(s); and

- 3) submitted to PDSC in the same manner as required by Section 2.1.A for original proposals.

B. Included in Proposal File

All documents relating to the withdrawal of proposals will be made a part of the proposal file.

## **2.8 Evaluation of Proposals**

PDSC will begin to evaluate proposals upon receipt, subject to the procedures and criteria described in Part I.

## **2.9 Categories of Cases Available for Contract**

A proposal for public defense mitigation investigative services may include coverage of all, some, or any of the following categories of cases for which financially eligible persons have a right to appointed counsel in state court at state expense:

- Aggravated Murder
- Murder
- Death Sentence Post-Conviction Relief

## **2.10 Cost of Services**

A. Expenses Included in Contract Price

Public defense contractors are responsible for all reasonable and necessary expenses that are considered overhead.

PDSC bears the costs outside of any public defense contract for:

- 1) copies;
- 2) long distance telephone expenses;
- 3) in-state mileage;
- 4) non-routine case expenses that are preauthorized such as out-of-state travel.

Applicants should not include these case-related expenses in calculating the cost of providing contract services.

B. Reasonable Expenses

Applicants should project the cost of contract expenses at rates no greater than customary for the community and the type of service or expense. PDSC will not pay premium rates. PDSC expects contractors to provide facilities reasonably adequate to ensure an environment conducive to providing effective and efficient services.

## **2.11 Proposal Application Format (Part III of RFP)**

The application format consists of:

- 1) Application Summary;
- 2) Certification Form; and
- 3) Proposal Outline divided in the following sections:
  - a) Service Delivery Plan
  - b) Proposed Contractor Certificate of Compliance with Applicable Oregon Tax Laws
  - c) Proposed Contractor Independent Contractor Certification Statement

**THE FOLLOWING PAGES APPL. 1 THROUGH APPL. 5 ARE THE RFP APPLICATION AND PROPOSAL OUTLINE.**

PUBLIC DEFENSE SERVICES COMMISSION  
REQUEST FOR PROPOSALS  
FOR  
PUBLIC DEFENSE MITIGATION INVESTIGATIVE SERVICES CONTRACTS

PART III

PROPOSAL APPLICATION SUMMARY AND PROPOSAL OUTLINE

**(TO BE COMPLETED AND SUBMITTED TO PDSC)**

**PART III  
PROPOSAL APPLICATION SUMMARY AND PROPOSAL OUTLINE**

**3.1 APPLICATION SUMMARY**

<b>APPLICANT INFORMATION</b>	
County or Counties to be served: _____	
Formal Name of Applicant: _____	
Contact Person for Proposal: _____	
Address: _____ _____	
Telephone: _____	Fax: _____
Email (required): _____	
Fed. I.D. No.: _____ <b>or</b> S.S.N.: _____	
DPSST P.I. License No.: _____	
Type of Organization ( <i>check one</i> ):	
<input type="checkbox"/> Sole Practitioner	<input type="checkbox"/> Partnership or P.C.
<input type="checkbox"/> Other ( <i>describe</i> ) _____	

**CASE TYPE AND WORKLOAD INFORMATION**

- A. List all case types for which services will be provided:  
\_\_\_\_\_  
\_\_\_\_\_
- B. Identify the percentage of FTE hours (1800/year) being proposed (e.g. 100%, 50%): \_\_\_\_\_  
\_\_\_\_\_

**3.2 CERTIFICATION FORM**

I hereby certify that I have the authority to submit this proposal on behalf of the applicant and that I have read and understand the standard terms and conditions of the contract.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Typed or Printed Name of Authorized Representative

\_\_\_\_\_  
Title or Representative Capacity

\_\_\_\_\_  
Applicant Name

### **3.3 PROPOSAL OUTLINE**

**The following is an outline of the information each applicant MUST provide.** ALL questions must be answered and all requested information must be completed. If a certain question or requested information is "Not Applicable" to the applicant's proposal, please note "NA."

#### **A. SERVICE DELIVERY PLAN**

The purpose of a public defense mitigation investigative services contract is to provide cost-effective delivery of services that will allow counsel to meet constitutional, statutory, and other legally mandated standards of representation. Please describe, in detail, applicant's service delivery plan and how it will ensure effective and efficient service. Include information on the following:

1. Case Services. Describe the workload and case types to be covered. Include any limitations in coverage by case type, county or region.
2. Service Delivery. Describe how applicant will provide timely, effective, and efficient case-related services. Include how applicant will comply with ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, June 2008 (available at [www.oregon.gov/opds](http://www.oregon.gov/opds));
3. Equipment. Describe equipment or information systems applicant has or will obtain to improve the provision of services under the proposal. If applicant uses or will use a computer system, please specify hardware and software to be used.
4. Professional Development Plan. Describe plans for professional development and training methods to maintain current awareness of new developments regarding mitigation services in capital murder and murder cases.
5. Readiness Status. Describe what applicant needs to do to be ready and able to begin services on the proposed contract effective date. If more time is needed, explain why and when applicant will be available.
6. Other Information. Include any other information you believe is important or relevant to PDSC's review of the service delivery plan.
7. Contract Terms. Include any requests to modify the standard terms of the contract. Explain the purpose of and need for modification and how it will affect the service delivery plan and cost. Again, PDSC has sole discretion to allow modification of any contract term.

**B. PROPOSED CONTRACTOR CERTIFICATE OF COMPLIANCE WITH APPLICABLE OREGON TAX LAWS**

Must be provided for a consortium (corporation) as well as for each consortium member.

I, the undersigned, being first duly sworn,

Mark only one: ( X )

\_\_\_\_\_ hereby certify under penalty of perjury that I am not in violation of any Oregon tax laws.

\_\_\_\_\_ authorized to act in behalf of \_\_\_\_\_,  
*(name and address of firm, corporation, or partnership [Please type])*

\_\_\_\_\_ hereby certify under penalty of perjury that \_\_\_\_\_  
*(name of firm, corporation, or partnership [Please type])*

is, to the best of my knowledge, not in violation of any Oregon tax laws.

For purposes of this certificate, "Oregon tax laws" are ORS chapters 118, 119, and 305 through 324; and any local tax laws administered by the Oregon Department of Revenue under ORS 305.620.

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Federal ID # or  
Social Security #: \_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

**C. PROPOSED CONTRACTOR INDEPENDENT CONTRACTOR CERTIFICATION STATEMENT**

You can qualify as an independent contractor by certifying that you meet the following standards as required by ORS chapters 316, 656, 657 and 670:

1. You provide labor and services free from direction and control, subject only to the accomplishment of specified results.
2. You are responsible for obtaining all assumed business registrations or professional occupation licenses required by state or local law.
3. You furnish the tools or equipment necessary to do the work.
4. You have the authority to hire and fire employees to perform the work.
5. You are paid on completion of the project or on the basis of a periodic retainer.
6. You filed federal and state income tax returns for the business for the previous year, if you performed labor or services as an independent contractor in the previous year.
7. You represent to the public that you are an independently established business, as follows:

YOU MUST MEET FOUR (4) OR MORE OF THE FOLLOWING:

- A. You work primarily at a location separate from your residence.
- B. You have purchased commercial advertising, business cards, or have a trade association membership.
- C. You use a telephone listing and service separate from your personal residence listing and service.
- D. You perform labor or services only pursuant to written contracts.
- E. You perform labor or services for two or more different persons within a period of one year.
- F. You assume financial responsibility for defective workmanship and breach of contract, as evidenced by performance bonds or liability insurance coverage.

I hereby certify that the above information is correct.

Signature \_\_\_\_\_

Date \_\_\_\_\_

Entity \_\_\_\_\_

**PUBLIC DEFENSE MITIGATION INVESTIGATION CONTRACT  
BETWEEN PUBLIC DEFENSE SERVICES COMMISSION AND**

**CONTRACTOR NAME**

**GENERAL TERMS  
AND  
SPECIFIC TERMS**

**AGGRAVATED MURDER/MURDER CASES**

**JANUARY 1, 2012 TO DECEMBER 31, 2013**

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# GENERAL TERMS

## 1 DEFINITIONS

### 1.1 Interpretation of Terms

Words, terms, and phrases not specifically defined in this contract shall have the ordinary meaning ascribed to them unless the context clearly indicates otherwise. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. The word "shall" is mandatory and not merely directive.

### 1.2 Construction and Jurisdiction

This contract shall be construed in accordance with the laws of the State of Oregon. A party shall bring any action or suit involving any question of construction arising under this contract in an appropriate court in the State of Oregon.

### 1.3 Severability

If a court of competent jurisdiction declares or the parties agree that any term or provision of this contract is illegal or in conflict with any law:

- (a) the remaining terms and provisions shall remain valid; and
- (b) the rights and obligations of the parties shall be construed and enforced as if the contract did not contain the particular term or provision held to be invalid.

### 1.4 Public Defense Services Commission

Public Defense Services Commission (PDSC) and "State of Oregon" includes the respective agents, employees, members, officers, representatives, and successors of PDSC and State of Oregon.

### 1.5 Contractor

"Contractor" includes Contractor's agents, employees, members, officers, representatives, successors, and subcontractors.

### 1.6 Client

A "client" is a person whom a state court has determined to be eligible for and entitled to court-appointed counsel at state expense.

### 1.7 Case

A "case" is any action in this state in which court-appointed counsel has been appointed to represent a client.

## 2 MUTUAL RIGHTS

### 2.1 Waiver

Either party's failure to enforce any provision of this contract shall not constitute a waiver by the party of that or any other provision.

### 2.2 Attorney Fees

If a party brings any action, suit, or proceeding to enforce

this contract or to assert any claim arising from this contract, the prevailing party shall be entitled to such additional sums as the court may award for reasonable attorney fees and costs incurred as a result of the action, suit, or proceeding, including any appeal.

### 2.3 Termination

The parties may agree in writing to terminate this contract at any time. Unless otherwise agreed in writing, termination or expiration of this contract does not affect any existing obligation or liability of either party. In lieu of terminating the contract, PDSC may agree in writing to alternative measures.

## 3 RIGHTS OF PDSC

### 3.1 Subcontracts

Contractor shall not subcontract for or delegate any of the services required under this contract without obtaining PDSC's prior written consent. PDSC shall not unreasonably withhold consent to subcontract. Under this contract, PDSC incurs no liability to third persons by making contract payments to Contractor.

### 3.2 Assignment of Contract

Contractor shall not assign Contractor's interest in this agreement without PDSC's prior written consent. PDSC shall not unreasonably withhold consent to assignment. Under this contract, PDSC incurs no liability to third parties, including subcontractors, for making contract payments to Contractor.

### 3.3 PDSC Powers for Failure to Obtain Workers Compensation

If Contractor fails to secure and maintain workers' compensation coverage or to provide PDSC with a certificate of exemption, PDSC may:

- (a) withhold payment of any amount due Contractor until such coverage or certification is provided;
- (b) suspend this agreement until Contractor complies; and
- (c) terminate this contract:
  - (i) for willful or habitual failure to comply; or
  - (ii) for failure to comply within 30 days after PDSC suspends this contract.

### 3.4 De Minimis Changes in Contractor Reports/Documents

At any time and by written instructions, PDSC may make de minimis changes to the terms and conditions of this contract regarding any one or more of the following:

- (a) format or content of any report or other document to be submitted by Contractor;

- (b) number of copies of any report or other document that Contractor must submit; and
- (c) time in which, or place at which, Contractor must submit any required report or other document. (See Section 6.2)

### **3.5 Termination by PDSC for Cause**

#### **3.5.1 Reasons for Contract Termination**

PDSC may terminate this contract for cause, for the following reasons:

- (a) Contractor's material breach of this contract including material misuse of contract funds;
- (b) Contractor's willful or habitual disregard of the procedures required by the courts in which Contractor provides services;
- (c) Contractor's demonstrated continued inability to serve adequately the interests of its contract clients;
- (d) Contractor's willful failure to abide by minimum standards of performance and rules of professional ethics; or
- (e) some other cause which has substantially impaired Contractor's ability to provide adequate mitigation investigation under this contract or fulfill the obligations of this contract.

#### **3.5.2 No Acceptance of Cases After Notice**

When Contractor receives PDSC's notice of termination for cause, Contractor shall not accept any further cases under the contract unless PDSC otherwise agrees in writing.

### **3.6 Funding Modification, Suspension, or Termination**

At the time this contract is executed, sufficient funds either are available within PDSC's current appropriation or are expected to become available to finance the costs of this contract. However, payments under this contract are subject to the availability of funds. PDSC may propose to modify, suspend, or terminate this contract if PDSC reasonably believes that funds will not be sufficient to pay anticipated costs of public defense services and PDSC has complied with the procedures set out below in Section 6.3 (State Funding Shortfall).

### **3.7 Increasing Workload: Renegotiation at PDSC Option**

The parties may renegotiate this contract to increase the total work to be performed by Contractor under this contract at additional cost to the state, if:

- (a) the workload will increase substantially due to the number of available cases; and
- (b) PDSC determines that renegotiation is in the state's interest.

PDSC will not pay Contractor for hours in excess of the maximum value agreed to under the original contract, unless renegotiation and agreement occurs prior to Contractor performing the work.

### **3.8 Review, Verification and Inspection of Records**

#### **3.8.1 Request**

PDSC may review or verify Contractor's records that relate to the performance of this contract:

- (a) on reasonable written notice; and
- (b) as often as PDSC reasonably may deem necessary during the contract term.

#### **3.8.2 Access to Facilities and Provision of Records**

PDSC may conduct fiscal or performance audits to monitor and evaluate the services provided under this contract. PDSC will give reasonable written notice to Contractor before any evaluation. On PDSC's proper request, Contractor shall provide access to its facilities and make records available to PDSC or PDSC's designee or agent at all reasonable times. PDSC will not remove Contractor's original office records or other property of Contractor from Contractor's premises without Contractor's approval.

Contractor shall keep such data and records in an accessible location and condition. Notwithstanding any other provisions of this section, no constitutional, statutory, or common law right or privilege of any client or Contractor employee are waived by Contractor.

#### **3.8.3 Other Information**

Upon the PDSC's determination that a significant question exists of Contractor's ability to perform this contract and subject to client confidentiality, personnel confidentiality and de minimis limits (Sections 4.3, 4.4 and 6.2), Contractor shall provide any other information that PDSC reasonably identifies and requests as needed to ensure proper disbursement of state funds.

#### **3.8.4 Timely Reports by PDSC**

When PDSC undertakes a review of Contractor, PDSC shall provide Contractor a draft review report for comment, clarification or rebuttal information. PDSC shall issue a final report to Contractor. Draft and final reports shall be provided in a timely manner.

### **3.9 Use of Equipment Purchased with Contract Funds**

Contractor may purchase in whole or in part from contract funds equipment required to perform services under this contract. Any equipment Contractor acquires with funds expressly provided by this contract shall be used for these purposes.

### **3.10 Return of Equipment Purchased with Contract Funds**

Any equipment purchased with expressly identified contract funds shall accrue to PDSC when this contract is terminated or expires and no new contract is agreed upon within 60 days of termination, expiration, or completion of a negotiated wind-down, whichever occurs last, if:

- (a) Contractor purchased the equipment with separately identified funds from this contract or public defense services contracts with similar provisions or with

insurance proceeds to replace equipment that Contractor had purchased with funds from this contract;

- (b) had an original dollar value of \$500 or more; and
- (c) whose useful life exceeds the term of this contract.

**3.11 Limit on Return of Equipment to PDSC**

Section 3.10 does not apply to any Contractor that is a nonprofit, tax-exempt corporation whose articles of incorporation require the transfer or distribution of equipment to another nonprofit, tax-exempt corporation that provides public defense services in the event of full or partial wind-down.

**4 RIGHTS OF CONTRACTOR**

**4.1 Termination By Contractor For Cause**

Contractor may terminate this contract for cause should PDSC materially breach any duty or obligation under this contract.

**4.2 Public Defense Cases Outside Contract**

Contractor may accept additional public defense cases in excess of contract coverage or excluded from contract coverage, but only to the extent that the additional cases do not interfere with Contractor's ability to fulfill this contract. PDSC shall not pay Contractor outside the contract for any services falling within the definition of "mitigation investigation", set forth in Section 7.1, for cases accepted under this contract.

**4.3 Client Records**

Contractor grants no right to PDSC or designee of PDSC to observe mitigation investigator/client or mitigation investigator/attorney consultations or to review information in case files that is:

- (a) privileged because of the mitigation investigator/client or mitigation investigator/attorney relationship; or
- (b) work product identifiable to a particular case or client unless the client expressly, knowingly, and voluntarily agrees in writing. Contractor shall keep records, including time records, in such a manner as to allow PDSC or PDSC's designee reasonable access to other information for review purposes. Notwithstanding other provisions of this section, Contractor does not waive any client's constitutional, statutory, or common law right or privilege.

**4.4 Personnel Records**

Contractor grants no right to PDSC or designee of PDSC to review information in any personnel file unless the Contractor's employee expressly, knowingly, and voluntarily agrees in writing. Contractor shall keep records in such a manner as to allow PDSC or PDSC's designee reasonable access to other information, including specific compensation of individual staff members, for review purposes. Notwithstanding any other provisions of this contract, Contractor does not waive any of its employees' constitutional, statutory, or common law rights or privileges to the confidentiality of personnel records.

**5 MUTUAL OBLIGATIONS**

**5.1 Successors in Interest**

This contract shall bind and shall inure to the benefit of the parties and their respective successors and assigns.

**5.2 Compliance with Applicable Law**

**5.2.1 In General**

The parties shall comply with all federal, state, and local laws, regulations, and ordinances applicable to the work to be done under this contract. Such laws include, but are not limited to, those pertaining to tax liability and independent contractor status.

**5.2.2 Laws Incorporated by Reference**

The provisions of ORS 279.312, 279.314, 279.316, and 279.320 are incorporated herein by reference as conditions of this contract and shall govern performance of this contract.

**5.3 Notice of Contract Modification, Suspension, or Termination**

A notice to modify, suspend, or terminate this contract shall:

- (a) be in writing;
- (b) state the reasons therefor and may specify what may be done to avoid the modification, suspension, or termination;
- (c) become effective for willful breach not less than 14 days from delivery by certified mail or in person; and
- (d) become effective not less than 60 days from delivery by certified mail or in person for non-willful breach.

**5.4 Modification or Termination Due to Legislative Action or Court Interpretation**

PDSC and Contractor may renegotiate this contract if there is a significant change in workload or cost of doing business contemplated under this contract due to amendments to or court interpretations of federal or state laws. In addition, PDSC may modify, suspend, or terminate this contract as needed to comply with amendments to or court interpretations of federal or state statutes that make some or all contract services ineligible for state funding.

**5.5 Modification or Termination Due to Decreased Workload**

PDSC and Contractor may renegotiate this contract if there is a significant decrease in the probable number of cases available.

**6 OBLIGATIONS OF PDSC**

**6.1 Indemnity of Contractor by PDSC**

PDSC shall protect, indemnify, defend and hold harmless Contractor from all liability, obligations, damages, claims, suits, or actions of whatever nature that result from or arise out of the activities of PDSC or State of Oregon under this contract.

**6.2 De Minimis Changes in Contractor Reports/Documents**

PDSC shall not make any change that would cause more than a de minimis increase in cost or time required to perform the contract except by written agreement signed by both parties. (See Section 3.4)

**6.3 State Funding Shortfall**

**6.3.1 PDSC to Seek Additional Funding**

If PDSC reasonably believes that appropriated funds will not be sufficient, PDSC shall seek additional funds from the Legislative Emergency Board or legislature at the earliest opportunity and, if possible, before modifying, suspending, or terminating this contract.

**6.3.2 Negotiations**

If the Emergency Board or legislature does not appropriate sufficient funds, PDSC shall seek to apportion expenditure reductions equally and fairly among all public defense service providers. PDSC shall seek first to modify the contract through negotiation with Contractor. In negotiating any modification, the parties will consider both cost and the level of representation that meets minimum allowable professional standards. PDSC may suspend or terminate the contract if the parties cannot agree to modification.

**6.4 Payments in Addition to Contract Price**

PDSC shall pay for case expenses as described in the Public Defense Payment Policies and Procedures and this section of the contract from funds available for the purpose.

Contractor agrees to request reimbursement under this agreement for those types of expenses defined and enumerated herein;

- (a) such case-related expenses that are reasonable and necessary to provide an adequate defense that are defined as expenses under ORS 135.055 AND which are not related to office overhead, salaries, benefits, out-of-state travel, airfare, personal services (such as psychologists, interpreters, expert witnesses). Routine expenses, for the purpose of reimbursement, primarily include in-state travel expenses, audio and video tapes, records and copy services from outside sources;
- (b) such case-related expenses that there would be a significant risk of error in the proceedings if the service were not provided or the expense were not incurred; and
- (c) such case-related expenses that are reasonable. In instances where the policy establishes maximum allowable costs and unless otherwise specifically agreed herein, the presumed "reasonable amount" of an expense is the policy guideline rate. In other instances, a "reasonable amount" is presumed to be the market value of the service or expense or the amount necessary for the provider of the service or expense to recover only its actual cost of providing the service or item. For services or items where there is no opportunity for competitive services or production

of items (where the provider is a captive entity) (for example, cost of medical records), Contractor should notify the director of any costs that exceed what Contractor believes is reasonable.

**6.4.1 Types of Expenses Subject to Reimbursement**

**6.4.1.1 In-state Lodging**

Reimbursement for in-state lodging is limited to actual costs incurred when Contractor cannot reasonably avoid incurring this expense and the expense is necessary. Contractor shall seek commercial or government rates. The maximum allowable amount for lodging is the current rate for reimbursement according to the policy. Amounts exceeding the lodging expense maximums will be disallowed unless the higher rate has been preauthorized by the director of the Contract and Business Services Division (CBS) of the Office of Public Defense Services, or the director's designee.

**6.4.1.2 Meals in Conjunction with Overnight Travel**

Contractor is entitled to claim a meal allowance for meal expenses incurred in conjunction with overnight travel. Meal allowance amounts are those set forth in the policy. Receipts need not be submitted when requesting a meal allowance

**6.4.1.3 Meals for Day Trips**

If Contractor does not incur lodging costs but, due to departure or return times, could justify a lodging expense, Contractor is entitled to claim a meal allowance based upon the following travel times. The amounts allowed are those set forth in the policy for that meal.

- a. If Contractor leaves home before 5:00 a.m., Contractor is entitled to the breakfast allowance amount.
- b. If Contractor leaves home before 5:00 a.m. and does not return until after 2:00 p.m., Contractor is entitled to the breakfast and lunch meal allowance amounts.
- c. If Contractor does not return home until after 9:00 p.m., Contractor is entitled to the dinner allowance amount.

**6.4.1.4 Telephone Expenses While Traveling**

Contractor may be reimbursed for case-related telephone charges incurred while traveling.

Contractor may be reimbursed for one telephone call per day to Contractor's office to conduct business not related to a contract case when the travel requires an overnight stay. The amount of reimbursement shall be the actual cost of the telephone call not to exceed \$5.00.

Contractor may be reimbursed for one personal telephone call per day when the travel requires an overnight stay. The amount of reimbursement shall be the actual cost of the telephone call not to exceed \$5.00.

**6.4.1.5 Routine Expenses Not Related to Travel**

- (a) Discovery costs.
- (b) On-line computer research charges.
- (c) Photocopy and printing costs, not to exceed the maximum amounts listed in the policy.
- (d) Postage and delivery costs, if the cost of sending an individual item is \$1.00 or greater and is supported by a receipt.
- (e) Long-distance and collect telephone charges when the cost of an individual call is \$1.00 or greater.
- (f) Potentially relevant medical, mental health, school, corrections, child welfare, internal affairs, and arrest/conviction records;
- (g) Film and photograph processing;
- (h) Copies of audio or video recordings, logs and photographs, including but not limited to those obtained from law enforcement, prosecution and emergency communication services;
- (i) Service of process fees where counsel documents the necessity of incurring such expenses (rather than utilizing the sheriff's office(s) or case investigators) was outside counsel's reasonable control;
- (j) Materials other than ordinary office supplies for, or items that will serve as exhibits for court proceedings where the cost per item does not exceed \$25 and the total expense for the type of exhibit(s) does not exceed \$100; and
- (k) Other items similar to those described in this section with proper documentation that shows the expense to be both reasonable and necessary and properly payable from public defense funds. Provider should submit a written explanation with any request for payment of an out-of-pocket expense not listed in this section unless the OPDS has preauthorized the expense. An original receipt, invoice or copy of a cancelled check is required if item is obtained from an outside vendor.

**6.4.2 Types of Expenses Excluded From Payment Unless Preauthorized**

- (a) Expenses not specifically described in the contract that require preauthorization as non-routine expenses or that are presumed to be covered under the base contract as overhead expenses.
- (b) Airfare and vehicle maintenance.
- (c) Non-direct travel expenses, such as dry cleaning or laundry services.

- (d) Direct client expenses, such as haircuts, clothing or glasses.
- (e) Transcripts.
- (f) Expenses required to secure the attendance of an out-of-state witness.
- (g) Computer software programs.

**7 OBLIGATIONS OF CONTRACTOR**

**7.1 Standards of Mitigation Investigation**

Contractor shall provide mitigation investigation for the purpose of providing cost-effective delivery of services that will allow counsel to meet constitutional, statutory, and other legally mandated standards of representation. Contractor will provide timely, effective, and efficient case-related services in compliance with the ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (June 2008).

**7.2 Contractor Responsibilities - Financially Ineligible Clients**

Contractor shall notify the client's court-appointed counsel if Contractor learns that a client is ineligible for state-funded mitigation investigation under this contract.

**7.3 Special Obligations To State of Oregon**

**7.3.1 Indemnity of PDSC By Contractor**

Contractor shall protect, indemnify, defend and hold harmless PDSC and the State of Oregon from all liability, obligations, damages, losses, claims, suits, or actions of whatever nature that result from or arise out of Contractor's activities.

**7.3.2 Independent Status of Contractor**

For purposes of this contract, Contractor is an independent contractor and has so certified under Oregon laws. Neither Contractor nor any of its employees is an employee of the State of Oregon or a state aided institution or agency, by reason of this contract alone.

**7.3.2.1 Ineligibility for Public Employee Benefits**

Payment from contract funds does not entitle Contractor, its employees, officers, agents, members, and representatives, to any public employee benefits of federal social security, unemployment insurance, workers' compensation, the Public Employees Retirement System, leave benefits, or similar employment-related benefits.

**7.3.2.2 Wages and Taxes**

Contractor shall pay any compensation, wages, benefits, and federal, state, and local taxes to be paid under or as a result of the contract.

**7.3.2.3 Workers' Compensation**

As an independent contractor Contractor shall provide workers' compensation coverage for all subject workers performing work under this contract, including Contractor if self-employed or a business partner, to the extent required by all applicable workers' compensation laws and for the

entire contract term. Contractor, its subcontractors, if any, and all other employers working under this contract are "subject employers." As such, they shall provide coverage for workers' compensation benefits for any and all of their subject workers as required by ORS chapter 659A and for the entire contract term.

**7.3.3 State Tort Claims Act Not Applicable**

For purposes of this contract, Contractor is not an officer, employee, or agent of the State of Oregon as those terms are used in ORS 30.265. Contractor accepts responsibility for all actions of its members, officers, employees, parties, agents and subcontractors.

**7.3.4 Equal Rights of Contractor's Employees**

Contractor shall comply with Title VI of the Civil Rights Act of 1964, with Section V of the Rehabilitation Act of 1973, and with all applicable requirements of federal and state civil rights and rehabilitation statutes, rules, and regulations. Contractor also shall comply with the Americans with Disabilities Act of 1990, including Title II of that Act, ORS 659A.142, and all regulation and administrative rules established pursuant to those laws.

**7.3.5 Contractor Insurance To Protect State of Oregon**

Contractor shall secure and maintain insurance coverage as set out below. Contractor shall provide PDSC a copy of the certificate of insurance listing the coverage and additional insured information.

**7.3.5.1 General Liability Insurance**

At its expense, in whole or in part from contract funds, Contractor shall procure and keep in effect during the contract term comprehensive general liability insurance with an extended coverage endorsement from an insurance company authorized to do business in the State of Oregon. The limits shall not be less than five hundred thousand dollars (\$500,000) per occurrence for personal injury and property damage.

**7.3.5.2 Casualty Insurance**

At its expense in whole or in part from contract funds, Contractor shall procure and keep in effect during the term of this contract, sufficient casualty insurance to replace any and all property losses caused by theft, fire, flood, or other casualty.

**7.3.5.3 Additional Insured**

The liability and casualty insurance coverages required for performance of the contract shall include the State of Oregon, PDSC, and their divisions, officers, and employees as additional insureds but only with respect to the Contractor's activities to be performed under this contract.

**7.3.5.4 Cancellation or Change**

There shall be no cancellation, material change, potential exhaustion of aggregate limits, or intent not to renew insurance coverage without notice by Contractor to PDSC. Any failure to comply with the provisions of these insurance requirements, except for the potential exhaustion of

aggregate limits, shall not affect the coverage provided to the State of Oregon, PDSC, and their divisions, officers and employees.

**7.3.6 Internal Controls**

Contractor shall establish internal controls, such as segregation of duties with respect to financial accounting, to ensure that contract funds are properly received, expended, and accounted for.

**7.3.9 Protection of Consumer Personal Information**

Contractor shall develop and implement appropriate privacy safeguards to protect the security of any consumer personal information that it will possess in its performance of this contract pursuant to the Oregon Consumer Identity Theft Protection Act of 2007, ORS 646A.600 to 646A.628.

**7.4 Record Keeping**

**7.4.1 Service Records**

Contractor shall maintain current information on individual cases assigned pursuant to this contract showing services provided and hours of time expended. To the extent ethically possible, records shall be kept in a manner to be available on request for inspection of PDSC, or PDSC's designee or agent.

**7.4.2 Financial Records**

Contractor shall maintain financial records on an accrual basis. Contractor's records shall show that all disbursements or expenditures of contract funds were ordinary, reasonable and necessary, and related to providing direct services required under the contract or services necessary to performance of the contract.

**7.4.3 Retention Period**

For purposes of this contract only, Contractor agrees to preserve all service records and supporting documentation regarding contract work performed for a period of three (3) years after the expiration of this contract.

**7.5 Reports to PDSC**

**7.5.1 Time Records**

Within twenty (20) days of the end of each month, Contractor shall provide to PDSC, in a format specified by PDSC, a reasonably accurate monthly time report for the preceding month. Contractor may submit amended time reports, if necessary, at any time up to forty-five (45) days after completion of a periodic review that includes the monthly time report to be amended.

**7.5.2 Penalty for Late Reports**

Contractor shall submit timely and properly completed reports. If Contractor fails to submit a proper, reasonably accurate report within thirty (30) days of its due date, PDSC may withhold the next monthly payment and subsequent payments until PDSC receives the report and supporting documentation.

**7.5.3 Enforceability**

The reporting requirements set forth in this section are enforceable after the expiration of this contract.

**7.6 Costs and Expenses**

Contractor shall pay for:

- (a) all ordinary, reasonable and necessary costs, fees, and expenses incurred in providing contract services;
- (b) all other routine expenses related to case preparation and trial, except for those described in 6.4; and
- (c) staff services, unless specifically authorized by PDSC to be paid outside this contract.

Contractor shall not expend contract funds for out-of-state travel or other costs unrelated to a specific case without the express written authorization of PDSC.

**7.7 Special Notices**

Contractor shall provide PDSC written notice of any significant changes affecting this contract. Such changes include, but are not limited to:

- (a) Contractor's ability to carry out this contract, including changes in office location;
- (b) Contractor's ability to meet financial obligations; and
- (c) matters affecting Contractor's ability to provide services to clients.

**7.7.1 Time Requirement for Notices**

All notices shall be provided to PDSC within thirty (30) days of the occurrence requiring the notice, unless a shorter time is provided.

**7.7.2 Specific Notices Required**

**7.7.2.1 Insurance Cancellation or Change**

Contractor shall provide notice of any material changes to any insurance policy listed in Sections 7.3.5 and immediate notice of the cancellation of any such policies.

**7.7.2.2 Change in Contractor's Organization**

Contractor shall notify PDSC of any change in Contractor's organization that might affect staffing, payment, or tax reporting under the contract. Contractor shall assure PDSC of its continued ability to meet contract requirements or shall propose reductions in caseload and price if Contractor is unable to meet contract requirements because of such organizational change.

**7.7.2.3 Events Which Could Impair the Contract**

Contractor shall notify PDSC within fourteen (14) days of when Contractor learns that one of the following has occurred:

**(a) Criminal Charges**

A member of Contractor's staff has been charged with a crime.

**(b) Criminal Conviction**

A member of Contractor's staff has been convicted of a crime punishable by a term of incarceration of one or more years or involving moral turpitude.

**7.7.2.4 Early Quota**

Contractor shall notify PDSC immediately upon determining that Contractor will reach its total contract quota before the expiration of the contract.

**7.8 No Dual Payments for Contract Work**

Contractor shall not:

- (a) expend funds under this contract for work performed outside this contract;
- (b) accept funds from anyone other than PDSC for work performed under this contract, except for grants or funds for work study, job experience, internships, or other such grants or funds.

**8 MUTUAL RISKS**

**8.1 Impossibility of Performance**

Neither party shall be held responsible for delay or default caused by theft, fire, flood, or other casualty, if the delay or default was beyond the party's reasonable control. In the event of circumstances beyond a party's control that may render timely performance by that party impossible, either party may terminate this contract, or the affected part, by written notice.

**8.2 Tort Liability**

Each party shall be responsible for the torts only of its own officers, employees, and agents committed in the performance of this contract.

**9 RISKS OF CONTRACTOR - REFUND FOR SHORTAGE**

If Contractor's actual workload value, at the expiration or termination of the contract, is less than the workload value Contractor agrees to refund to PDSC the shortage, unless PDSC agrees in writing otherwise.



**CONTRACT BETWEEN PDSC AND CONTRACTOR  
PAYMENT SCHEDULE**

End of Month (Unless noted)	Monthly Payment
January 2012	
February 2012	
March 2012	
April 2012	
May 2012	
June 2012	
July 2012	
August 2012	
September 2012	
October 2012	
November 2012	
December 2012	
<i>First-Year Subtotal</i>	\$0
January 2013	
February 2013	
March 2013	
April 2013	
May 2013	
June 2013	
July 2013	
August 2013	
September 2013	
October 2013	
November 2013	
December 2013	
<i>Second-Year Subtotal</i>	\$0
<b><i>Total Payments</i></b>	<b>\$0</b>

**CONTRACT BETWEEN PDSC AND CONTRACTOR  
CASELOAD AND CASE VALUE MATRIX**

	Hourly Rate	Number of Hours	Total Value
1/1/12 - 12/31/12			
	\$0	0	\$0
			\$0
First-Year Total		0	\$0
1/1/13 - 12/31/13			
	\$0	0	\$0
			\$0
Second-Year Total		0	\$0
Contract Total		0	\$0