

**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, June 17, 2010  
9:00 a.m. - 2:00 p.m.  
North Sister Room  
Seventh Mountain Resort  
Bend, Oregon 97301

**AGENDA**

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| 1. <b>Action Item:</b> Approval of the Minutes of PDSC's April 22, 2010 Meeting<br><i>(Attachment 1)</i>                  | Barnes Ellis                                  |
| 2. Presentations on Public Defense Delivery In Deschutes County <i>(Attachment 2)</i>                                     | Invited guests and others                     |
| 3. Commission Discussion of Service Delivery Plan for Clackamas County<br><i>(Attachment 3)</i>                           | Barnes Ellis<br>Commissioners                 |
| 4. Update on Service Delivery in Marion County <i>(Attachment 4)</i>  | Ingrid Swenson<br>Marion County providers     |
| 5. PDSC 2011-13 Budget Request Policy Option Packages; Contractor Recommendations <i>(Attachment 5)</i>                   | Kathryn Aylward<br>Contractor representatives |
| 6. OPDS Monthly Report<br><i>(Attachment 6)</i><br>-Emergency Board<br>-Delinquency representation<br>-Appellate Division | OPDS Management<br>Team                       |

***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 August 5, 2010 from 10am to 2pm at a location to be announced.***



# Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

Official Minutes

Thursday, April 22, 2010  
10:00 a.m. – 3:00 p.m.  
Oregon State Bar  
16037 SW Upper Boones Ferry Road  
Tigard, Oregon 97281-1935

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
John Potter  
Janet Stevens  
Hon. Elizabeth Welch

STAFF PRESENT: Ingrid Swenson  
Kathryn Aylward  
Peter Gartlan  
Paul Levy  
Billy Strehlow

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The meeting was called to order at 10:10

**Agenda Item No. 1 Approval of the Minutes of PDSC's March 4, 2010 Meeting**

**MOTION:** Shaun McCrea moved to approve the minutes as amended; Janet Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

**Agenda Item No. 2 Contract Approval**

Kathryn Aylward described a proposed contract with attorney Frank Stoeller to continue his representation of a client in two death penalty cases. The contract provides for an hourly rate under of \$97 and funding for file storage and legal research technology. The commission was asked to approve the contract for a two year period beginning March 1, 2010.

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

**Agenda Item No. 3 Boards of Directors for Public Defense Contractors – Review of Draft Policies**

Paul Levy reported that he had corresponded with general counsel at the Oregon State Bar regarding the potential application of the "firm unit rule" to consortia if PDSC were to require them to have boards of directors. They concurred in his

opinion that the rule would not apply because consortia are not organized to practice law but only to administer a contract.

Chair Ellis questioned whether PDSC should be contracting with groups that are not legally cognizable entities. He noted that a group that identifies itself as a joint venture might be determined to be a partnership for purposes of the firm unit rule. In addition, as a steward of public funds, PDSC should not contract with any group that lacks the legal capacity to contract on behalf of the group.

Paul Levy noted that there is resistance by some PDSC contractors to being required to alter their legal status. Incorporation, for example, can be an expensive and difficult process.

With regard to the risk that a contract administrator might appropriate contract funds for personal use, Kathryn Aylward said that it would be the members of the group, rather than PDSC who would be affected since PDSC does not pay contractors until the end of the month in which the services are performed. She said that there is at least one contractor with whom she would probably not be able to reach agreement if that contractor were required to become another type of entity.

Chair Ellis said that OPDS should resolve this issue in the next contract cycle by contracting only with appropriate entities.

Commissioners then discussed whether at least some categories of PDSC contractors should be required to have boards of directors and, if so, whether they should include independent members. Chair Ellis proposed that law firms be exempt from the board requirement since they have structure and centralized control. The one missing component is community involvement. Other commissioners agreed that law firms should not be required to have boards.

Commissioner Stevens questioned whether boards should be required of all contractors regardless of their performance and said that it had not been established that having a board would necessarily result in better financial safeguards or improved quality. She also questioned the proposed threshold for the board requirement of 10 attorneys or a million dollars in contract funds. Chair Ellis responded that the concern is with consortia and the danger that they can become “good old boy networks” which only look out for their own interests. A board with at least two independent members would be a check on that tendency. Commissioner Welch noted that most consortia do not have administrators with any real authority.

Commissioner Stevens asked whether the independent members would have to be non-lawyers and Chair Ellis said no, that some of the best board members are lawyers who are not part of the consortium.

Commissioner Stevens asked if there could be an alternative to a board - if contractors could offer a plan in lieu of a board. Commissioner Potter said that he had worked with boards for 35 years and that even though having a board does not guarantee quality, it would increase the chances that quality would be discussed. Having a board is not a large burden. Commissioners then discussed the relative merits of having only one or more than one independent member. Commissioner McCrea proposed that there be an alternative to the board requirement for contractors who could demonstrate that they had developed and implemented effective financial safeguards and quality assurance mechanisms. Commissioner Stevens said that such safeguards and mechanisms should be

applied to even the smaller contractors. Commissioner Welch said she supported a board requirement but that the Commission could start with an option and see how contractors responded.

After further discussion Commissioners directed OPDS to negotiate contracts beginning in January of 2012 only with contractors that either are governed by a board of directors with at least two independent members or have in place effective and appropriate financial safeguards and quality assurance mechanisms.

**MOTION:** John Potter moved to approve the language of the resolution; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

#### **Agenda Item No. 4**

#### **Appellate Division Review**

Peter Gartlan described the structure and philosophy of the Appellate Division. The division's management philosophy is to put attorneys in a position to be successful. Managers see themselves as being in support positions. There are three chief deputies and the office uses a team structure. All positions are currently filled, with five additional attorneys due to arrive in the next several months. With regard to turnover among the attorneys, Peter Gartlan said that the rate has been about right. The division invests a lot of energy and resources into training new employees. He or one of the chief deputies trains and closely oversees the work of the new attorney for the first three months. The attorney is then assigned to another senior attorney for an additional three month period. At the end of the six month probationary period it is usually clear whether the attorney is a good fit for the division.

Teams are lead by a senior deputy and meet weekly to discuss cases and issues. Senior deputies not only lead the team discussions but they also edit meritorious briefs that attorneys expect to argue. Although newer attorneys are assigned only misdemeanor and simple felony cases, case assignments are not specialized, except for death penalty cases. Experience has shown that having a single attorney handling a death penalty appeal can be an isolating experience. and the division has now moved to a death penalty team approach.

All briefs are edited. If an attorney does not expect to argue a case, then the brief is edited by an editing buddy - another member of the team.

Chair Ellis said that since only one attorney reviews the transcript it would be difficult to determine whether an issue had been overlooked. Mr. Gartlan responded that new attorneys are required to discuss with their supervisor every objection that appears in the transcript. In addition, the decision by any attorney to file a *Balfour* brief must be approved by a senior attorney after a review of all of the objections appearing in the transcript. Senior attorneys also observe oral argument by newer attorneys and provide feedback. Attorneys with cases accepted for review by the Supreme Court receive case relief to allow them to prepare. Mr. Gartlan personally edits most Supreme Court briefs, which typically go through several drafts. There are generally two moot courts for each Supreme Court case, one informal and another formal with five or six moot court judges.

Attorney performance is reviewed both formally and informally. Constant feedback is provided in the briefing and editing processes as well as after oral argument. Performance criteria have been established for Deputy I and Deputy

II attorneys as well as for senior deputies. There are annual evaluations of each attorney that include a self-evaluation. The team leader prepares a written evaluation which is reviewed by the chief deputy on that team. The chief deputy then prepares a final evaluation which is given to the attorney being evaluated. The attorney then meets with the chief deputy and the Chief Defender.

As a result of recent technological improvements, all Appellate Division attorneys are now e-filing in the appellate courts. There is also a brief bank which allows briefs to be pooled and made available to all the attorneys in the office, but not to those outside the office. The brief bank allows attorneys to be more efficient and has resulted in greater uniformity and consistency in the documents prepared by the division. The office is transitioning into a paperless environment. Many of the division's attorneys commute to Salem from long distances and electronic files make it easier for them to work from home. Attorneys are permitted to telecommute one day a week and, with permission, an additional day under certain circumstances. It is important, however, to maintain an office environment that encourages the exchange of ideas.

The division's workload has grown over the last several years. Merit briefs have increased significantly. After the division added new attorneys there was a reduction in backlog. Those cases then went to the Department of Justice resulting in a back log there until they obtained more positions. Currently the backlog is in the Court of Appeals. While the delay in filing an opening brief has been decreased over the last several years, it is still unacceptable. In approximately 10% of the cases, the division is able to obtain a benefit for a client in an appellate case.

In terms of serving as a resource to trial attorneys a chief deputy is now assigned responsibility for outreach. Appellate Division members serve on boards and committees. They also make presentations at continuing legal education programs and sponsor two annual in-house CLE sessions. The division has an attorney of the day to answer questions from the trial bar. Trial attorneys receive a copy of any briefs filed in their cases. They are free to call and discuss issues in the case. Appellate attorneys do not feel that they can second guess the strategic decisions made by trial attorneys but could submit a complaint about a trial attorney's performance to the Contract and Business Services Division if they felt it was warranted.

Commissioner Potter said that Appellate Division attorneys now participate in many OCDLA seminars and submit well written articles to the monthly publication. There have been major improvements in the division's contributions to the trial bar.

In terms of communication between appellate attorneys and clients, Mr. Gartlan said that there are approximately 12 to 15 standard letters to clients regarding the status of their cases. Drafts of briefs are not provided to clients but client input is received regarding the contents of the brief. Incarcerated clients can place toll free calls two days a month and un-incarcerated clients can contact their attorneys at any time.

## **Agenda Item No. 5**

### **Attorney Evaluation Models**

Paul Levy introduced Lane Borg and Mark McKechnie to discuss their offices' practices regarding attorney evaluation. Although both of them manage non-profit public defender offices, other types of contractors have also implemented attorney evaluation processes.

Mark McKechnie said that the Juvenile Rights Project has had an employee evaluation process for many years. The process has changed over the years. Although the process is very time consuming they have continued to do it on an annual basis. There is a more extensive evaluation used for newer attorneys and an abbreviated one for more senior attorneys. The process for senior attorneys focuses on self-evaluation. Mr. McKechnie as the executive director gets useful information from this process that helps him institute changes that make things work better for them. They try to do all of their evaluations in a single time frame so that information can be solicited from outside the organization about all employees at the same time.

With newer attorneys, a more extensive evaluation is performed that includes review of written documents and observation of court hearings and informal meetings. Feedback from evaluations sometimes informs attorneys that they are doing better than they think they are. Evaluations have helped some attorneys to improve their practice, they have helped others decide that they may not be well suited to the work. The Juvenile Rights Project evaluation process is continuing to evolve.

Lane Borg said that his office, the Metropolitan Public Defender Office (MPD), like the Juvenile Rights Project, evaluates all employees, not just the attorneys. The evaluation process is not just about correcting deficiencies or looking for problems, it can also be for professional growth. His goal in the past has been to help people. But that is difficult to do, especially when you are unable to provide any financial reward for good performance. MPD is currently in a no-growth period and instead of moving attorneys into more challenging caseloads, the office has needed to rotate senior attorneys into less challenging caseloads. The collective bargaining agreement at MPD also limits his ability to reward good performance. Another issue regarding performance appraisals is that defense offices don't like to be judgmental. People would prefer an objective measure of performance but it is a subjective, process. There is also a risk for the evaluator in that he may expose his own lack of understanding of the work of some employees such as internet technology experts. At MDP even supervisors handle cases and this puts them in a better position to see the work of their lawyers in the courtroom. It is important to the person being evaluated that they be observed doing their work. MPD performs exit interviews when attorneys leave the office. They often say that they would have appreciated more feedback on their work. If the Commission believes that attorney evaluation is important, it should recognize evaluation as a built-in component of an administrator's time.

Commissioner Welch said that the responsibilities of an administrator to evaluate employees is a separate issue from obtaining information from persons outside the office such as the court and the Department of Human Services since these are people who know what attorneys are doing in court and outside the courtroom.

Lane Borg responded that in his experience judges won't ordinarily provide feedback on attorney performance unless there is a major issue. The important thing is for the administrator to develop good relationships with the judges in order to open lines of communication.

Mark McKechnie said that senior attorneys in his office are in court regularly and receive regular feedback from the judges. The office receives unsolicited feedback, sometimes for minor criticisms and sometimes praising the work of

the lawyers. His office is particularly interested in obtaining feedback on how effectively attorneys represent the expressed wishes of their clients. It is not sufficient for them to simply articulate those wishes, they must also provide supportive legal and factual arguments and must do the groundwork to make the plan they are advocating for feasible.

Chair Ellis said that evaluations also provide an opportunity to give attorneys positive feedback, which they may not be getting from clients or others. Both Mark McKechnie and Lane Borg agreed. Lane Borg suggested that a future PDSC/OCDLA management conference should include a presentation by attorneys who have been evaluated about the feedback they received and whether it was valuable.

Commissioner Welch inquired what the next step would be regarding the attorney evaluation process. Ingrid Swenson said that Commission had previously discussed an evaluation requirement for contractors and suggested that the Quality Assurance Task Force might be the appropriate group to take the next step of preparing model processes. Chair Ellis said that attorney evaluation is a best practice but should not be mandated at this time. John Potter said that there is a need to develop a culture that allows for both formal and informal communication about quality issues with the courts and others. The issue can be developed at management conferences and model forms provided. Paul Levy said that conferring with system people as part of the evaluation process has the added benefit of making it clear that the contractor is interested in quality. The Quality Assurance Task Force can prepare model forms.

#### **Agenda Item No. 6**

#### **OPDS Management Team**

Kathryn Aylward provided a report on an audit performed by contract analysts in her division of a sample of 300 bills paid by the accounts payable staff. Each of the accounts payable employees process about 7000 such bills each year. There were a few instances in which they had to locate backup documentation but identified only two errors. In one case an investigator was paid for traveling only 513 miles even though he reported driving 516 and one person was paid \$.07 cents per copy for two copies but should have received only \$.05. As a result of the audit, the division has installed another safeguard that alerts staff when a provider bills more than once for services on overlapping dates. The division will perform this type of audit annually. Overall the performance of the accounts payable staff was impressive.

Ms. Alyward also reported that she had obtained information from some of the court's eligibility verification staff regarding potential changes to the public defense eligibility standards. They strongly supported simplifying the qualification process and doubted that there would be an increase in caseload if the standards were changed. At the suggestion of the State Court Administrator she will be preparing a memo to the judges requesting feedback from them as well. She asked that the Commission permit her to seek support from the judges and others before proceeding with changes.

Commissioner Welch noted that the next issue with respect to eligibility is the varying interpretations applied in juvenile courts around the state. Many courts disregard the standards since the statute has inconsistent provisions and application of the standards in some circumstances is inappropriate.

Ms. Aylward said that a legislative concept had been proposed by one of the judges suggesting that the Judicial Department seek an amendment to the

wording of the statute. She does not believe that is necessary. With respect to juveniles, policies related to the eligibility determination already provide that questions about who is responsible for the legal representation costs for juveniles should not prevent the timely appointment of counsel.

Kathryn Aylward reported that the process used at OPDS to process requests for non-routine expenses has now become a paperless process. Staff made the transition very quickly. This has been a major step forward.

Ingrid Swenson said that she and Commissioner Welch had met with the board of directors for the Juvenile Department Directors' Association to discuss the information received from juvenile departments regarding waiver of counsel by youth in delinquency cases. As a result of the meeting, she will prepare a letter to all of the directors providing them with the information previously presented to the Commission and requesting their input on how waiver works in their counties and whether there are obstacles to the appointment of counsel that need to be addressed. A similar letter will also be provided to juvenile court judges. Both groups will be advised of some of the collateral consequences for juveniles involved in the juvenile justice system.

Commissioner Welch said that Marion County representatives were angry about the number of waivers reported in their county and said that when contacted for this information they had simply provided their best guess at the time. Finding accurate data is difficult. No one has it in a form that is retrievable. Some of the larger counties appoint in virtually all cases. If reliable data is not available the solution may be to just let judges in smaller counties know that their colleagues in the more populous counties are routinely appointing.

Ingrid Swenson said that it is hoped that if juvenile departments are concerned about the data in the report that they will collect more accurate data and report it. Whether or not the numbers are accurate the high waiver rates reported statewide by the Judicial Department are sufficient cause for concern. With respect to the eligibility of youth for court appointed counsel, it appears that the legislature intended to free the court from the need to make an eligibility determination in juvenile cases if the court felt appointment was appropriate regardless of the eligibility of the parents or the youth.

Ingrid Swenson reviewed the statutory obligations of PDSC Commissioners and noted what the Commission had done to meet those requirements, some of which are ongoing. Establishing eligibility standards for the appointment of counsel is one of those obligations and OPDS staff had determined that this was an issue that was currently in need of Commission review. The approval of contracts is another area of Commission responsibility that has received recent attention from the Commission and a new process will be utilized in the next contracting cycle that will include a review of Commission policies incorporated into the request for proposals and the model contract, and the addition of a second executive session prior to the final approval of contracts negotiated by OPDS. Policies and procedures relating to other Commission responsibilities are in place and will be reviewed periodically at future Commission meetings.

Kathryn Aylward said that there had been a budget kick-off session for state agencies. The process will be accelerated for most agencies this biennium. She described the process by which an agency must prepare its budget request and said that she would like to have direction regarding which policy option packages the Commission would like her to prepare for its review at the next Commission meeting before they must be submitted to the legislature. Although

PDSC has not had much success with its policy option packages in the past, it is appropriate to tell the legislature what the agency's needs actually are. Chair Ellis said that the only proposal that involves personnel is the post-conviction relief proposal. Ingrid Swenson said that some progress had been made in that category of representation and that the work had been concentrated with a single provider. She said that the Commission might want to consider the level of quality being provided by that group before deciding whether to pursue funding for an in-house unit. While he is not wedded to an in-house unit, Chair Ellis directed that such a package be prepared for consideration at the June meeting. John Potter recommended going forward with increases in the hourly rates for attorneys and investigators as well as parity for public defenders and an increase for representation in juvenile dependency cases.

Legislative Fiscal Office Analyst John Borden was asked about the current budget deficit projection. He said that it is approximately \$ 2.6 million. In the judicial branch alone the cost of funding at current service levels would be 22% greater than in the current biennium. The revenue from HB 2287 could provide up to \$14 million for public defense.

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

Meeting adjourned.

PUBLIC DEFENSE SERVICES COMMISSION  
UNOFFICIAL EDITED TRANSCRIPT

Thursday, April 22, 2010  
10:00 a.m. – 3:00 p.m.  
Oregon State Bar  
16037 SW Upper Boones Ferry Road  
Tigard, Oregon 97281-1935

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
John Potter  
Janet Stevens  
Hon. Elizabeth Welch

STAFF PRESENT: Ingrid Swenson  
Kathryn Aylward  
Peter Gartlan  
Paul Levy  
Billy Strehlow

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The meeting was called to order at 10:10

0:22 Chair Ellis I think we are ready to start. Welcome everyone.

**Agenda Item No. 1 Approval of the Minutes of PDSC's March 4, 2010 Meeting**

0:27 Chair Ellis The first item is the minutes of March 4 meeting. I understand, Kathryn, it accurately transcribed what you said on a point but you want to clarify the substance of the point.

0:42 K. Aylward Yes. I misspoke. On page 30 of the minutes it talks about when the privately hired attorney fee schedule survey was last done.

0:53 Chair Ellis So this is the transcript?

0:56 K. Aylward Yes, and I said it was 1991. That is not correct. It was 1994 when the survey was done.

1:10 Chair Ellis So we will make that note on page 30. Since we don't actually officially approve the transcript we are fine. Are there additions or corrections to the minutes?

1:33 J. Stevens I found a typo but I can't remember where it is because it was on the web. I haven't translated it to paper yet.

1:43 I. Swenson Mr. Chair, I do have one. It is on page 8 of the official minutes. It is the second to the last page which is page nine. In Agenda Item 6 the second paragraph starts with "Kathryn Aylward." The end of the second sentence says, "an increase in appellate level increases." It should say "cases."

2:17 Chair Ellis Okay. Everybody okay with that changing "increases" to "cases?"

2:20 S. McCrea Yes.

2:21 Chair Ellis With that correction is there a motion to approve the minutes?

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

**Agenda Item No. 2**

**Contract Approval**

- 2:41 Chair Ellis Kathryn, there is a contract approval, Attachment 2. Do you want to comment on that?
- 2:46 K. Aylward Yes. It is behind the pink divider. This is a straggler. This is a death penalty contract with Frank Stoeller. He had a contract before that expired December 31. He informed us that he didn't wish to have a contract again so we left it at that. Then after some discussion he changed his mind. He is representing one client in a direct appeal of a death sentence, and in a trial level PCR with the death sentence. It is one client, two cases. This contract is \$97 an hour. There is additional funding in there due to the fact that he has a huge amount of storage on this case. This case is 20 years old and there must be hundreds of banker boxes. We are providing funds for storing that.
- 3:42 Chair Ellis Just so I understand, if it is an old case how is he able to be doing a direct appeal at this stage?
- 3:50 K. Aylward It is not that it is necessarily an old case. He said to me, "I have been working with Langley for 20 years." I don't know. It goes back.
- 4:02 I. Swenson Paul, what phase is it in?
- 4:04 P. Levy There are two cases. There is a case in which he received a life sentence. I believe that may be the PCR case. Then there is a separate murder case in which he received the death sentence again, and that is the case that is now on direct appeal of the death sentence.
- 4:29 Chair Ellis Okay. We are comfortable that Mr. Stoeller is qualified to be handling both? Direct appeal death penalty is a pretty complicated subject. He is qualified?
- 4:45 K. Aylward He is definitely qualified and at this point he has already filed the opening brief.
- 4:54 Chair Ellis Is this essentially a single contract, one lawyer, one client, both cases?
- 5:01 K. Aylward Yes.
- 5:03 Chair Ellis But it looks like it is essentially a full-time job for at least the one year?
- 5:14 K. Aylward This is a two year contract but we started it – we are hoping, if you approve it, to make the effective date March 1. It is two years minus January and February.
- 5:26 J.Potter Kathryn, I assume he was working on this case previously. This is a continuation of that work. What would happen if the contract were not approved?
- 5:35 K. Aylward We would have difficulty finding an attorney who hasn't previously represented this client and now has a conflict.
- 5:54 I. Swenson M. Chair and Commissioner Potter, I think, while preserving privileges and confidentiality in the case with respect to the client and the attorney, it is a matter that has been under discussion in our office. Mr. Stoeller receives a lot more money than we can pay him in private retained cases. He has expressed a concern about continuing to work at the rates that we pay, and we have had ongoing discussions. We wanted to retain him on these cases because he started them and yet his contract was expiring. So we actually all met and talked about this matter. We are very pleased that Kathryn was able to persuade him to continue representation at this rate. That is kind of why it is late in the process. It was a very involved set of discussions.

6:51 J. Potter                   It strikes me that it would be even more expensive if you were to start with somebody else, even at a lower rate.

6:57 I. Swenson                 Much more.

6:57 K. Aylward                We have a new verb in the office. It is called getting Stoellered.

7:06 Chair Ellis                I don't pretend to be good at math but it is about a \$100 an hour rate without overhead.

7:14 K. Aylward                It is \$97 an hour for the hours that he works. Then there is an additional monthly line item amount for storage and he has some special Westlaw service that he can share with others.

7:28 Chair Ellis                So my math wasn't too far off?

7:30 K. Aylward                No, it is \$97.

7:31 Chair Ellis                Is there a motion to approve?

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

**Agenda Item No. 3               Boards of Directors for Public Defense Contractors – Review of Draft Policies**

7:47 Chair Ellis                Paul, I think you are sort of the point person on our next subject.

7:58 P. Levy                    I will be happy to serve as that. We provided you with what we hope is a roadmap to thinking about this issue, but I wanted to also report on a couple of questions that you posed at the last meeting. Mr. Chair asked specifically about the possible ethical implications of asking consortia to have greater structure, asking them to have boards of directors and boards that may be more active than the ones we have now are. I posed and answered these questions in a detailed letter to the general counsel at the Oregon State Bar, the ethics expert there, and specifically described to her the Commission's consideration of possibly requiring boards of directors for public defense providers.

9:10 Chair Ellis                Is this Jane Angus we are talking about?

9:11 P. Levy                    No, this is Sylvia Stevens. Jane Angus is retired and she was a board prosecutor.

9:19 Chair Ellis                You see I knew where the old building was and the old people.

9:22 P. Levy                    All the old people are gone. I posed a number of considerations that the Commission might be interested in, that those entities would be required to have boards of directors, that those boards would have non-lawyer members, that some boards might simply oversee the hiring of an executive director or administrator. Other boards might undertake greater quality assurance duties. Then I posed and answered the question of whether we were somehow endangering the consortia's immunity to this firm unit rule, that they might be considered de facto law firms. Sylvia Stevens and her primary assistant on ethics matters, Helen Hirschbiel, both agreed that this would not ordinarily be a problem. Consortia are not organized to practice law, they are organized to administer a contract with the Commission and to work with the courts and agency in seeing that lawyers are available to accept appointments for eligible persons. "Ordinarily," because consortia administrators don't either have access to confidential information, case specific confidential information, or interfere with the independent judgment of attorneys in a particular case. They are not practicing law. They are not de facto law firms. There wouldn't be a problem with the firm unit rule. There is also an Oregon rule of professional conduct that says that

lawyers may not practice law with or in a for profit organization that is governed by a board that includes a non-lawyer member. So public defender offices are not governed by this rule because they are non-profit organizations. For the same reasons we are not running into the firm unit rule this doesn't affect consortia either. Again, they are not organized to practice law but to manage it and administer a contract for public defense services.

- 12:14 Chair Ellis But that would need to be a point that we need to keep in mind if people suggest that our possible requirement apply to law firms?
- 12:26 P. Levy Yes. I was pleased that they agreed with the analysis that I set out in the letter. I think I described in this letter in fair detail what the board was considering. There were some questions also at the last meeting about the structure of some of the organizations that didn't appear to have any legally cognizable "entity-ship." I think that is the term that some of the Commissioners were using. There were just a few organizations that we didn't know what they were if they were anything. I am afraid I have to report that we still aren't sure what they are.
- 13:24 Chair Ellis What does the contract say?
- 13:24 P. Levy Well, the contract would be with, for instance, the Madras Consortium.
- 13:36 Chair Ellis Usually it says the contract "by and between." We know who we are and then it says, "Madras Consortium, a" what?
- 13:45 P. Levy I think there is nothing after the comma. The Madras Consortium, for instance, if you were to ask them, would tell you they are a joint venture.
- 14:05 Chair Ellis Well they ought to be careful because if they are a partnership that puts them right back in the soup on the unit rule. A joint venture is just a partnership for a single purpose. That is a terrible description.
- 14:19 P. Levy They are choosing a word that they thought meant this is a way for us to make money with the state. They call that a joint venture. They have no documents, no bylaws, and no agreement among themselves. There is nothing other than some informal agreement among these firms in Madras.
- 14:52 Chair Ellis Most of the consortia have organized as a non-profit corporations.
- 14:58 P. Levy Most of them are.
- 14:56 Chair Ellis That is a model that seems to work pretty well.
- 15:04 P. Levy Yes.
- 15:09 Chair Ellis I will let you finish your introduction, but this seems to me a topic we may have a pretty quick view on.
- 15:17 P. Levy This is not addressed in the proposal outline that you have because I think that we concluded after the last meeting in a straw vote that the Commission took, that the Commission had decided that it wanted us to be contracting with entities that had some legally cognizable structure. I think we understood that as a directive after the last meeting. I can think of another consortium that calls itself a consortium where the members all enter into an agreement and they have bylaws, but they have done everything but incorporate and would be called a voluntary association.
- 16:13 Chair Ellis Unincorporated association.
- 16:17 P. Levy Which is, I think, legally cognizable. It is just not a corporation. The real question is, if something goes wrong with the contract, how do we enforce the contract?

16:45 Chair Ellis Do we send checks and then someone else breaks them up and distributes them?

16:52 P. Levy Yes. If we send that check to somebody and he gets on a plane and goes to Mexico what do we do is the question. We ought to be able to do something about that.

17:11 Chair Ellis Do you see any reason, practical, political, or whatever, that would make it difficult if we said, "All contracts must be with a legally cognizable entity." That could be a non-profit corp. That can be a law firm which is partnership, but we will not entertain response to a RFP from a loose association.

17:44 I. Swenson Could I add a comment? The state contracting code defines with whom a state agency may contract as "any person." Then it lists as persons a whole group of entities and non-entities. It includes one or more persons having a joint or common economic interest which would seem to describe the people we are dealing with if we had them all sign that contract. I think there are some options we should look at in conjunction with the next contracting cycle, but maybe the issue for us right now is to go through our existing contracts and make certain that we have an agreement in every case with someone who has the capacity to enter into a contract on behalf of the group.

18:36 Chair Ellis I am comforted that what we have done is not in violation of state law. From the standpoint of a steward of public money I want the recipient of our checks and a contracting party that is defined much better than what I think we are hearing.

18:53 P. Levy I think there would be difficulties if we were to say that a group such as, for instance, the Coos County Consortium had to take further steps in order to contract with us. This is a group that has an agreement amongst themselves to be bound by bylaws which for all intents and purposes looks like a non-profit corporation. The bylaws are pretty good. They have a process for quality assurance. They describe how they operate but they haven't, for whatever reason, taken that next step and incorporated. They don't have a board but they have all the members governing their business. I don't know what would happen if we were to require them to take that step and incorporate, for instance. We didn't hear from Karen Stenard on the board issue but I reported her comments to you. Their group incorporated largely because she knew that was the wish of the Commission. It was an expensive and difficult process to change their structure.

20:37 Chair Ellis Which group?

20:37 P. Levy This is the juvenile consortium in Lane County. Ultimately I think she is happy that they made that step but it wasn't one that was easy or inexpensive for them to do. I think they probably were questioning, "Other than satisfying a desire of the Commission, why are we doing this? We seem to be operating okay. We have an advisory board now so why do we need to do this?" There will be some groups where there will be just outright resistance to taking that next step.

21:26 Chair Ellis Are there some that are organized as LLCs?

21:31 P. Levy Yes there are.

21:35 Chair Ellis I don't know how the rest of you react but I am very uncomfortable with this looseness that I am hearing. We may be getting along and nothing bad has happened so far but I feel uncomfortable.

21:55 P. Levy I understand that and I appreciate it and I think I share it too. I think what we need to do, as Ingrid has indicated, is examine the structure of these organizations where we have questions whether there is any structure, and make sure that there is a person or persons...

- 22:20 Chair Ellis           The worst case from my perspective is you have something called a consortium and it is really nothing more than a privately administered list. That just doesn't seem to me to be what we are trying to get to at all.
- 22:41 S. McCrea            I am not sure I share that, Mr. Chair. I understand what you are saying. I agree in the sense that I would like to know how many of our contractors would come within the purview of the concerns that you are expressing, and then take a look to see if there are particular issues of concern.
- 23:05 P. Levy             If I could comment, Mr. Chair, I think we share very much the concern you have just identified. It is not one of whether this entity has a particular legal structure but what do we know about how they operate? How do they handle the work? How do you they supervise or administer their contract? Is there a meaningful organization there? Are there quality assurance guarantees in place there that we can look at? In fact, some groups that have the bylaws or processes described may perform their functions quite well as a public defense provider but aren't legally cognizable other than perhaps as a voluntary association.
- 25:06 I. Swenson         I'm assuming, Mr. Chair, that financial accountability is at the top of the list of concerns. That, I think, is the main issue that we need to determine with respect to each of those contracts. What is the ramification of contracting with a given set of individuals or an individual, and are our contract funds properly administered?
- 24:30 Chair Ellis         I think if I were a lawyer in one of these loose associations and the check is sent from OPDS to one of them who goes south to Mexico as you hypothesized, legally there is probably a pretty good argument that all those lawyers are responsible. They might be better off with an entity than where they are right now.
- 25:06 J. Stevens         Wouldn't the state be better off without it if they are all legally responsible?
- 25:09 Chair Ellis         Well, they are either all or none as they stand right now. Well, I am uncomfortable and I don't want to be the bull in the china shop and step on things when I don't know where we stand, but between now and the next contracting cycle, I would really like to have a very good reason why we don't say we need an entity we can identify with on the other end of these group contracts.
- 25:47 P. Levy             I think it would be helpful because as I said we had assumed after the last meeting that that is what the Commission wants. Knowing what the Commission means, or perhaps we should explore this before the next meeting, by a "legally cognizable entity" because there are certainly corporations, there are limited liability companies, voluntary associations, a partnerships ...
- 26:20 Chair Ellis         A voluntary association is pretty amorphous. That is like dealing with the tea party. Who is it? Who are we talking about?
- 26:32 P. Levy             I'll tell you who we are talking about.
- 26:33 I. Swenson         Mr. Chair, I would like before the next meeting of this Commission to at least advise you with whom we are contracting in each case, what is the nature of the group or individual that we are contracting with? We can certainly do that. To the extent it is not a lawful entity we can contract with all the members if that is the appropriate response. I understand what Paul is saying. Maybe the structure is less important than our making sure that something is in place that makes these groups accountable to us.
- 27:12 Chair Ellis         You know our nightmare. That check goes south and someone, probably a legislative committee, calls before them the members of this Commission. They say, "Now who was that contract with?" And we say, "We don't know." I just don't want to be in that position.

27:32 I. Swenson No, of course you don't.

27:35 K. Aylward Can I just say one thing in case anyone gets confused about checks going south. We don't pay them until the end of the month and this isn't just a "what if, this happened?" The monthly check goes to one member of this association. It goes at the end of the month. We got all of the work done for the month. The person got the check, flew south and didn't share the money with his members. That is the problem of the members. We were never at risk for having paid for work that wasn't done because we are paying at the end. I just want to make sure that that is clear.

28:07 J. Potter Could you also clarify for me how many of these contracts we are talking about? You have mentioned Madras and Coos.

28:18 K. Aylward I would say that I could probably reach agreement with almost any group, given whatever requirements you set, with the exception of the Madras Consortium. We went six rounds over the fact that I wanted them to use email. I would have had to have thrown money at this contract to get them to meet that really low threshold. I don't know. I would have trouble reaching agreement with at least one group but it is always negotiable.

28:53 Chair Ellis How many are in the group?

28:59 K. Aylward There is a firm that is a sort of a member and then there are two other attorneys.

29:04 P. Levy Three others I think.

29:07 K. Aylward It is small and it is in a location where there are no other potential providers.

29:19 I. Swenson On the other hand, if the purpose were to ensure the members that they would be paid, even if the administrator left with all the money, they might be willing to...

29:32 K. Aylward If you can get through the administrator to the members. That is the problem.

29:36 P. Levy But overall there are only about five entities that don't have a structure, at least not one that we could figure out, and in some instances they could not figure it out either.

29:54 Chair Ellis In your thoughtful way you are going to work with each of them and hopefully this will resolve itself by the next cycle. Now, Paul, I interrupted you.

30:13 P. Levy I think I have answered the questions about the possible ethical implications of the considerations that were before the Commission. I didn't answer the question about the entity structure. I think those were the introductory comments. The outline of the proposals was both for the benefit, and I hope it benefits the Commission, but also again for the provider community to know what the Commission is considering.

31:12 Chair Ellis Why don't we go through Paul's list and see if we have consensus or a majority on some of these points. In addressing the first bullet under one let's assume that we are talking about some cut off point. Whatever the dollars or the numbers may be it is the larger entities. The first issue he cites is shall we require, whatever the cutoff point is and above, a board of directors? I actually found myself making a list with a slightly different order. Let's start on the law firm exclusion issue. That is one we addressed last time when we talked. Does anyone have a initial view on carving out law firms from this requirement?

32:38 S. McCrea You mean should we exclude law firms from having to have boards of directors?

32:40 Chair Ellis Correct.

32:40 S. McCrea Yeah. I think we should.

32:44 J. Potter I agree. We had that discussion a little bit at the last meeting. I think I came away from that meeting thinking that was the consensus.

32:55 Chair Ellis That is my view. Let me just state for the record my grounds for it. One is I think law firms do have structure. I happen to be a partner and know a little about it. I think they have a centralized control. I think they have accountability and all of those things so I think we have an ample substitute for most of the concerns we may have for the more loosely structured groups having a board. What you don't get with a law firm structure is community involvement. At least for this purpose I am supportive of law firms not being required to have a board. Is that a consensus with the Commission? I think I am sensing that. Alright. Let's take a consortium that is 10 members and a million dollars as a hypothetical. What is the view of the Commission as to whether we should condition our willingness to entertain an RFP, from an entity of that size, on its having a board. I am going to just jump ahead and state a board that includes some level of independent membership. Is there a view on that?

34:56 J. Potter This is 10 people and a million dollars?

35:00 Chair Ellis Right.

35:00 J. Potter I would support that.

35:09 Chair Ellis Any other thoughts on that?

35:13 J. Stevens I am still uncomfortable with the idea that we are going to, in effect, meddle in the way they do their business. If they are doing it well, that is one thing. If they are not doing it well we should find somebody else to do it. I am just uncomfortable with, in effect, the State of Oregon coming along and saying, "You are going to have the structure we want irrespective of what kind of a job you were doing before we started all this discussion."

35:55 Chair Ellis Any comment or reaction to Janet?

36:00 J. Potter I don't consider it meddling if we are contracting with someone to provide a service and we want the standard of service to be at a certain level. We want to safeguard the state's money.

36:17 J. Stevens Two questions. Someone has not yet shown me how this safeguards the state's money more than the current system does. As Kathryn said we pay after the work is done. I am not sure that is an issue for me. The other thing is I don't see how this necessarily improves the quality of service. No one has really told me how it improves the quality of service. I am not terribly opposed to it, it just seems like an exercise with no real end.

36:56 S. McCrea I tend to agree with Janet. It is more like I am not sure we need a rule that says if there are 10 attorneys and a million dollars than they have to have an advisory board.

37:08 Chair Ellis Not advisory, we are talking about a board with some teeth.

37:17 J. Stevens Is it the 10 attorneys that makes you want the board, or the million dollars that makes you want the board? You can see situations in which you have one number or the other number but not both numbers and then what do you do?

37:31 Chair Ellis I think the two numbers are very interrelated. We will find out what the right line is. Here is my concern. I am very leery of the good old boy consortium where it really amounts to providers in a community being the dominant law group. They have a lot of bargaining leverage. They look out for each other and what you don't get, or you may not get, on a lot of those is any real concern about quality at the point of

admission, but particularly the quality at the point that there is a provider who is a problem. It is just too likely, if you have that good old boy group, that they will protect each other and say, "There but for the grace of God go I," and not have concern about protection of our clients and protection of the public funds. I have felt that having a group like that and just letting them run themselves and tell us, "Lob the contract over the wall." and they take the money that comes back. They tell us, "Don't bother us." I am very uncomfortable with that. I think it is not wrong at all for us to say that what we want, in groups of the magnitude we are talking about, is a board that includes, I would say, at least two independent directors. An independent means someone who is not a provider and someone whose appointing source is not the providers. There are ways you can do it. I think my own preference is the county bar because I want to keep things as community based as possible. I just think that is such a good check on the good old boy syndrome that I would like to see it. That is where I am. I don't feel this is the authoritarian state telling somebody how to do something. They are taking public funds. That is all they are taking and we have a real responsibility to make sure we don't end in the trap that the only people that we are able to contract with are ones who are self-contained and looking out for each other, not looking out for the public.

40:28 Hon. Elizabeth  
Welch

Isn't one way of looking at this that the, particularly for thinking about the good old days when there weren't consortia and there was just a nice big long list that people got appointed off of, the attraction from a lawyer's standpoint of the consortium, in my direct observation, is they get paid better and they get coverage when they are individual practitioners. There is just some real fundamental ease of doing business, but nobody is anybody else's boss. Unless there is something in the contracts that I don't know about everybody is an equal. There may be somebody who is the administrator and they may have some authority. You know when I think about calling Ann Christian and complaining about lawyers, what do you do when there is a legitimate concern from somebody who knows what is going on that there is a problem and there is no one in charge that can say, "Hey, we need a real answer." We have seen some of that recently in the field. The issues about what are our expectations when there is a concern, a complaint, a serious complaint, about performance. Who is accountable? Who is going to deal with it?

42:01 Chair Ellis

I think what happens now is probably the complaints go to the court. A lot of what we have been trying to do is get the defense function independent of courts. I have told you where I think I would like us to go is to independent directors in these larger groups. It does serve a quality function where you take complaints and someone has got some control, and it serves a community involvement function when it is not just a cluster of lawyers banding together to facilitate administration but people really concerned about the quality of the defense function.

42:57 J. Stevens

The two independents would there be any requirement that they not be lawyers?

43:02 Chair Ellis

No, no. I don't have a problem. I actually think some of the best ones that I know of are lawyers who are not current, paid providers under that consortium. Steve Houze would be an example. He is a lawyer and a board member. He performs a great function. The one we met from Marion County whose name escapes me, the business lawyer that was on the Marion PD board, she was obviously a very competent, able person. So no, I wouldn't preclude lawyers. I would make the two criteria what I have said that they not be paid providers in the consortium group and they not be appointed by the paid providers in the consortium group.

43:56 P. Levy

Mr. Chair, I think a clarification of what happens when complaints are made about consortium attorneys would be helpful. There is a quite a diversity now among the consortia as to how that is handled. Some groups are actually quite good about the administrator inquiring about complaints. In some instances taking it to the group's board and undertaking an investigation, getting responses, and implementing action plans or some effective response to the complaint, and some groups are not good at

all about responding to complaints. I don't think that whether the groups are good or not good necessarily corresponds with the structure of their board. I have very recent experience with one entity. It is a non-profit corporation with no independent board members. They really responded quite responsibly and diligently to a complaint and put one of its members on probation with a work plan to address the concerns. The groups now are moving in the direction that we would like to see them go, which is taking greater responsibility for quality assurance.

- 45:30 Chair Ellis Well...
- 45:33 J. Stevens Let me ask you another question. If you had a group that didn't want to create a board would you accept in lieu of a board some plan for quality assurance? Would that satisfy you?
- 45:50 Chair Ellis That is in Paul's outline.
- 45:48 P. Levy The outline sort of goes backwards. The real question for some Commissioners may be do we want this requirement at all? That is sort of at the end of the outline. It sort of works its way incrementally up to that question. Perhaps it should have gone the other direction.
- 46:09 Chair Ellis I think in answer to your question, if the price I have to pay to get what I want is this mollifier, than I would probably be open to that.
- 46:24 J. Potter I am not sure if the burden is significant. Maybe it is just my perspective, having for the last 35 years of my professional career worked around or with or under boards. While Janet is correct there may not be anything that we can point to that guarantees that quality would be improved with board, and I have certainly seen good boards and bad boards, but it increases the chances that there will be discussion among people that could lead to higher quality. With that in mind it really isn't a big burden. It doesn't take a lot to have a board and to have a meeting once in awhile to discuss things of mutual interest. I don't think there is any downside to it. If I am running a group of 10 lawyers and have a million dollars coming in from the state and am asked to have a board that helps direct that activity, I would think I would want that. I would want that personally.
- 47:35 J. Stevens That is because you live west of Cascades.
- 47:41 J. Potter There may be something to that.
- 47:41 J. Stevens I am sure there is, actually.
- 47:48 Chair Ellis I am concerned - if you make it as I have proposed, at least two - the logic of that is they can talk to each other. They will kind of go to each other. That almost drives you to a five person board with two independent members on it. I think a board larger than that gets very cumbersome. A board smaller than that and you would probably have trouble.
- 48:26 J. Stevens Does it seem odd to you to have a governing body half the size of the entity?
- 48:30 Chair Ellis No.
- 48:30 J. Stevens Does to me. Seems really bureaucratic just the physical picture of it.
- 48:43 Chair Ellis The smallest number that we are contemplating this would apply to is a 10 person group.
- 48:49 J. Stevens And if you have a five member board, half the entity.
- 48:54 Chair Ellis You could have a three or four person board if you wanted.

- 49:01 J. Potter But possibly two of those five are going to be independents, so three would be of the entity. Having three and two independent folks it forces three people to get together of the 10 to discuss things in somewhat of a controlled environment. Then you have two outside people who provide you with a little bit of perspective.
- 49:23 S. McCrea Well, maybe yes and maybe no, because the two so called “independent” people know less about the organization than everyone else and there could also be the tendency for them to just defer or to be overwhelmed by the others. I just come back to Janet’s point. I am not sure that this is going to improve quality and while I could support encouraging or having boards of directors with the option of an exemption in certain cases, I just can’t bring myself to support No. 1 in toto, “that the Commission should direct OPDS to negotiate contracts only with contractors who are governed by a board of directors.” In terms of 10 attorneys and a million dollars, I just don’t feel good about it. It bothers me.
- 50:16 J. Potter If you don’t have a board, Shaun, what would you have in place to help ...
- 50:28 S. McCrea Well, John, we go to the next page of Paul’s outline with the “option, in lieu of meeting a requirement for a board of directors with independent members,” then each contract would have “to demonstrate to OPDS staff and the Commission, in response to an RFP, that the contractor has developed and implemented effective financial safeguards and quality assurance mechanisms.” I think it is a case-by-case basis. My feeling is we want to encourage providers. We don’t want to have a good old boy network. We want to encourage the best providers who can provide the best quality service to our clients, the defendants in these cases. I don’t want us to get into a box where you have to meet these strict requirements or we are not going to deal with you.
- 51:23 Chair Ellis So we are bargaining now. Would you support a motion that would say either at least two independent, as I have defined it, board or, use Paul’s language of the demonstration of a meaningful plan to cover these two points?
- 51:52 S. McCrea Are we still dealing with 10 lawyers and a million dollars?
- 52:00 Chair Ellis That has been my number. I am flexible on that but I think based on last time that seemed like a reasonable cutoff point.
- 52:07 J. Stevens On the appropriate financial safeguards and quality assurance mechanisms, I can see wanting that at a much lower lever of contract, much smaller contract, much smaller group of people. But as to 10 lawyers and a million dollars if it said “or” that would be fine with me. If they have the option. This is probably going to be more work for them.
- 52:52 Chair Ellis I think most of them will opt, if they haven’t already, to go with the independent board members.
- 52:42 J. Stevens But just giving them the option of finding another way to do is really, I think, a much fairer way to go.
- 52:54 J. Potter I don’t think I would have any problem with that. I would be interested to see what it would be. What is the “or” here? For somebody who has a million dollars and 10 lawyers, what is the “or” that would be acceptable to us and meet the standard.
- 53:16 Hon. Elizabeth Welch Who is going to decide whether it is acceptable?
- 53:16 Chair Ellis Staff is going to review it and either they recommend the contract or they don’t.
- 53:21 Hon. Elizabeth



57:02 I. Swenson Well, I suppose you could in that they would have to use the non-board option.

57:08 S. McCrea So it is more work regardless.

57:13 Chair Ellis Maybe this is rephrasing it but we are saying we want a plan on financial integrity and quality control and there is per se acceptability that if your plan involves at least two independent directors of the kind we have talked about that will meet at our approval.

57:38 S. McCrea If your plan involves a board?

57:43 Chair Ellis If your plan involves a board with two independent members.

57:43 J. Stevens Can I make a suggestion? Given that the physical construction of this language is going to take some time, why don't we let Paul go back and write busily while we move on and come back later?

57:58 Chair Ellis I think that is a good idea because we want it to be literate.

58:02 J. Stevens And it isn't right now.

58:03 Chair Ellis But I think we do have consensus and at the next meeting it is a five minute max discussion if Paul's language is what we think it is going to be.

58:19 S. McCrea I would suggest that we try to revisit it today in terms of the language.

58:21 Chair Ellis If Paul can do it.

58:28 S. McCrea I have total faith in Paul. That way we don't have the possibility of slippage.

58:36 J. Potter Does that sound fair, Paul?

58:37 P. Levy Yeah. I think there is a point on which I need clarification. Perhaps the Commission has already clarified this because Mr. Chair you talk about a board with clout. That means you are talking about an entity that is required to have a board of directors which is a corporation. Otherwise you are not going to satisfied with an advisory board.

59:11 Chair Ellis I am not. That is true.

59:13 P. Levy Which is, for instance, what an LLC or ....

59:21 Chair Ellis I could see an LLC form. Oh, I see where you are headed. They are either member managed or manager managed.

59:38 P. Levy I was educated by you at the last meeting that LLCs could not have boards.

59:44 Chair Ellis I think that is true. They don't.

59:50 J. Stevens Why, if they are barred from having that structure, why could they not have an advisory board?

59:57 Chair Ellis I could see an LLC that could be a manager managed LLC and at least two of the managers would be independent. That could be done.

1:00:22 P. Levy So the language will be governed by a board or manager?

1:00:33 Chair Ellis Part of what I want is that independent person whether it is a manager and an LLC or it is a director and a corporation. I want the burden of the law that says you have a

fiduciary obligation. You have real responsibility. That is more than just an advisory.

1:00:55 P. Levy I will work on the drafting process.

1:01:04 Chair Ellis Thanks. We will work on this a little bit later.

1:01:04 S. McCrea Do you want a break?

1:01:07 Chair Ellis Why don't we take five minutes and we will come back.

(Break)

**Agenda Item No. 4 Appellate Division Review**

1:12:00 Chair Ellis Can we call the meeting back to order? Peter, the next item is your report on the Appellate Division.

1:12:20 P. Gartlan Thank you, Mr. Chair.

1:12:27 Chair Ellis This is called the post-Duncan era I believe.

1:12:41 P. Gartlan I sent some materials yesterday. I apologize for the lateness of the materials. I can march through this. The first section is about the division structure. It describes or gives numbers as to the number of attorney personnel in the office. I think the highlight is really in the third paragraph. The management philosophy is to put the attorneys in a position to be successful.

1:13:18 J. Stevens That is the teacher part.

1:13:17 P. Gartlan Well, it just seems to make sense to us. If the attorneys are doing well and they feel they are doing a good job and improving, the client will benefit, the court will benefit, the system benefits, and our office benefits. That is really how management perceives itself. We really perceive ourselves as being in a support position. As to the structure of the division you can see we have three chief deputies with specific duties assigned to each chief deputy. We have operations, personnel, and outreach. Ms. Duncan had been in the outreach position when she was with the office. Currently Shawn Wiley is in that position. In personnel is Josh Crowther. You met Josh Crowther at the last Commission meeting. In operations is Ernie Lannet. You met Ernie, as well, at the last meeting. Next is the AD organization. This gives you a pictorial of how the office is set up in terms of the team structure. I will get to the teams a little bit later. This is the visual. This material is pretty much picked up out of our attorney manual.

1:14:45 Chair Ellis Do you still have open positions?

1:14:59 P. Gartlan We have filled all of them. Not all of the attorneys are yet in. We have attorneys coming in on a staggered basis. One just came in this month, two next month and three more in August and September.

1:15:18 Chair Ellis I assume it continues to be a buyer's market?

1:15:18 P. Gartlan Yes. We have had excellent applicants.

1:15:21 Chair Ellis And a lot of applicants?

1:15:24 P. Gartlan A lot of applicants and excellent applicants. We have been fortunate.

1:15:32 Chair Ellis Where are you on the turnover ratios? Do you have people that stay for just two or three years and move on, or a lot of long-term?

1:15:42 P. Gartlan We have long-term. I am guessing now but I would say about six or seven, six to eight attorneys, who have been with us for 15 years or longer. After that the experience really drops off. I would say that most of the attorneys have been with us for less than 10 years. The Deputy I, the entry level position, seems to turn over pretty quickly. We lose by attrition probably about one and a half to two attorneys per year.

1:16:27 Chair Ellis Within that group.

1:16:27 P. Gartlan Sorry, not within that group. What happens is we tend to promote from within. The entry level position tends to be open because we promote. When Becky was appointed to the bench, somebody from the senior deputy position took her position and then it was necessary to move somebody up from the Deputy I and the senior deputy, and then from Deputy I into the Deputy II. Our outside entry, people from the outside coming into the office, as a rule tend to go into the Deputy I position. We tend to fill from within.

1:17:12 Chair Ellis It is always a challenge. You don't want no turnover because people kind of get set in their ways and you don't have the revitalization. You don't want a ton of turnover because then you are constantly spending your time trying to retrain. Do you feel like the turnover is at a point where it is healthy?

1:17:37 P. Gartlan I do. I prefer not to lose people like Becky and Bronson James, excellent attorneys, but what I am comforted by is we have good people to fill those positions. Am I comfortable with the rate? Yes I am. I think about one or two a year is about the right rate of attrition. You might ask how come you are filling six all at once. The reason is because we weren't able to fill them. We were doing it for budget purposes - not hiring immediately and trying to put it off for later in the fiscal cycle.

1:18:19 Chair Ellis How long have you been in the division?

1:18:21 P. Gartlan In this position?

1:18:23 Chair Ellis Right.

1:18:23 P. Gartlan Since 2003.

1:18:25 Chair Ellis But you were with the predecessor agency before that.

1:18:29 P. Gartlan Correct.

1:18:32 Chair Ellis For how long?

1:18:35 P. Gartlan I started with the office as a contract attorney in 1988. Then I became an employee in 1990. I have been the office for 22 years.

1:18:52 Chair Ellis I don't mean to get too personal but what is your age?

1:18:57 J. Stevens And how much do you weigh?

1:18:59 J. Potter Could you post that on the internet for us.

1:19:01 P. Gartlan I was born in 1952. I am 57.

1:19:13 Chair Ellis How long to you expect to continue active practice.

1:19:19 P. Gartlan Active practice? Several years probably.

1:19:21 Chair Ellis So indefinite. Could be quite awhile.

1:19:24 P. Gartlan            Yeah.

1:19:28 J. Stevens            I don't think legally you are allowed to ask those questions.

1:19:33 Chair Ellis            I didn't ask his gender. I'm alright.

1:19:34 J. Stevens            I don't think you can ask his age, though.

1:19:36 Chair Ellis            Sure you can.

1:19:41 J. Stevens            No you can't.

1:19:41 Chair Ellis            Senior manager. Of course I can.

1:19:43 J. Stevens            You may be able to but the rest of us common folks can't.

1:19:47 P. Gartlan            My playing weight was 196. I'm way over that. The next is the new employee training. Peter Ozanne was very surprised when he joined our organization because he thought that we invested a lot of energy and resources into training the new employees. I think we do. I don't think it is a typical model, but we have found that, again, the purpose is to put people in a position where they will be successful. Our model is we devote a lot of energy to training new attorneys. Every attorney who comes in, either I or somebody else will be with them for at least the first three months. They do not make a decision unless I am involved. I want them to know what they are doing, why they are doing it, what our process is, and what our procedures are. I want them to understand and think things through completely so that they know what they are doing. We do spend a lot of time with the initial training. After my training period is up, which is about three months or so, then that attorney gets handed off to a chief deputy. Then there is another three month period with that chief deputy. The idea is we want two people to kind of get a close look at the employee because we have to make a decision about people after six months. It is a six month trial service period. We want to have input from several directions as to whether or not this person is going to be a good fit for our office.

1:21:42 J. Stevens            What percentage shakes out at this point?

1:21:49 P. Gartlan            Let's see. Within the last four or five years, I think we have told three or four people that this is not a good fit. I am trying to figure out what would be the grand total. I have to guess, but I am going to guess probably between 12 to 16 people.

1:22:22 J. Stevens            So maybe a third at most?

1:22:22 P. Gartlan            At most and those people were really in a unique situation. I don't know if the Commission would remember. It was about four or five years ago and we were inundated with cases. We went out and hired people temporarily in anticipation of getting new positions from the legislature. That particular group was not as promising as the groups we are getting now. I think most of the people that we have had to tell, "Maybe this isn't a good fit," were really from that one group. Even though there is one-on-one training - this moves into Item No. 3, which is the team concept - every attorney, even the attorneys who are being trained initially, is assigned to a team. So every attorney in the office is on a team and the teams have a varying range of experience. There are about six or seven members on each team. Each team is lead by a senior deputy and there is also a chief deputy on that team. The teams meet at least once a week and discuss the cases and issues they are working on and have moot courts for upcoming cases that are scheduled to be argued. I think it is the probably the highlight of the week for the attorneys. The attorneys really like to talk law. There is a group setting and there is an exchange of ideas. The group can talk about really interesting, fascinating issues. I hesitate to tell the Commission about yesterday's issue in a team meeting, but since I have put it

out there I might as well. We had a discussion about whether, and I apologize and don't mean to offend anybody, but whether or not a person, a man, who ejaculates onto a sleeping person, has committed sex abuse in the third degree.

1:24:41 J. Stevens

What did you decide?

1:24:41 P. Gartlan

Fascinating issue. Well, we represent defendant so, no, that was not sex abuse in the third degree, it was harassment. Like I said I think Wednesdays are devoted to team meeting days. All the teams meet on the same day, Wednesday, and I think the attorneys look forward to that. I think it is the highlight of the week for most of the attorneys. Part of the team concept and I think part of the strength of the office, perhaps the most significant part of the office that gives us strength, is the team leaders. The team leaders are senior deputies. They lead the team discussions, but more importantly they edit the meritorious briefs that the attorneys expect to argue. There is going to be a drafting process and the senior deputies are doing a lot of teaching during the drafting process. They are resources for all the team members outside the team setting. We have a solid, solid core of senior deputies who have a lot of experience and are excellent appellate attorneys. They teach and instruct the newer members or all the members on their team. They do a terrific job and I am very, very proud of them.

1:26:06 Chair Ellis

Do you break it out by subject matter specialization?

1:26:10 P. Gartlan

No. We try to keep it generalized. We are into case assignments. The teams are not set up just to take certain types of cases. It is generalized. Now having said that we do have a death penalty team. We are starting a team approach to death penalty cases. This is going to be a special team that people volunteer for, people who want to work on a death penalty case. They will come together and discuss death penalty issues. We have a death penalty case coming into the office right now. Discreet issues in a death penalty case will be assigned to members of the death penalty team, so we are going to have a team approach to the next penalty case. Our experience has shown in the past when we had one attorney doing a death penalty case we kind of lost that attorney for six months. Not only that but it was like they were going into a cave and they weren't really communicating with other people. They were having internal dialogues, and I am being overly dramatic, but it is a difficult, difficult job to be a death penalty attorney. We found that we want to give the lead attorney support and the support comes in the form of other people being aware of the case, working on the case, talking to that lead attorney, doing certain issues, and talking about the case. That person is not alone. We have found and I've seen people doing several death penalty cases and after awhile they get burned out. It is a very, very challenging and emotionally difficult position to be in. So we are having a slightly different approach. We are going to have a little bit more group involvement in the death penalty cases. As to routine case assignments, non-death penalty assignments, we distribute them. Entry level people will get misdemeanor cases and simple felony cases which tend to be the C felonies, the drug offenses, and then the more complex cases we assign to Deputy II and senior deputy attorneys. Next is editing. We went to editing probably about 15 years ago. We have made a lot of advances. As I mentioned before, if an attorney believes that they are working on a case that they expect to argue in the Court of Appeals, that brief is edited by the senior deputy team leader. If it is not a case or brief that the attorney anticipates arguing then an editing buddy - we have teams of three and four attorneys and everybody is on an editing team. That brief is going to be edited by somebody else on the team. Now this might not sound all that interesting or exciting but we have found that editing other people's work has incredible benefits not only for the person who is being edited but for the editor. When you see somebody else's work you get an idea of, this works or this doesn't work. This is how it can be made better. So, again, this is all geared toward not only improving the product but improving the attorneys. Both attorneys benefit from the editing process.

- 1:30:09 Chair Ellis      So what happens if you have a high energy lawyer who has a wild and crazy idea that that lawyer wants to put in the brief and argue, and you or the senior deputies really don't think it is a good argument and don't like it. How is that kind of issue worked out?
- 1:30:33 P. Gartlan      We have been really fortunate. People have to defend their position and their argument. It will go through a vetting process and if we think that it might not be as crazy as it first appears then that argument will go in. It is that person's brief and they have to defend it and we want people feeling comfortable that their work is going to be respected. If you are talking about like a hair brained idea that completely has no legs, well, fortunately we haven't been in that position yet but I will tell you that my name is on the brief and if it crazy it is not going in. Ultimately, somebody has to be responsible, and since my name is on the brief, I am ultimately responsible. Like I said, we haven't been in that position. We have good attorneys who are well grounded and haven't come up with hair-brained ideas.
- 1:31:39 Chair Ellis      Well, only one lawyer will have really read the record. The challenge is did that lawyer see all the issues that were there? Other than just asking lawyer to lawyer and trying to talk about what issues might be in various transcripts, there is no way, probably, to be sure all issues that could have or should have been raised get raised, other than the competence of the individual.
- 1:32:16 P. Gartlan      Ultimately no, but I will tell you the checks we have in place for new attorneys and *Balfour* decisions. For new attorneys the new attorney reads a transcript and comes and talks to the trainer. They have to tell the trainer every objection that was made in the transcript. Not just what the new attorney thinks is important but every objection. For the new attorneys it is really a joint effort for every brief that is produced by a new attorney. The supervising attorney will have reviewed every objection that is in the transcript. For the *Balfour* cases, and *Balfour* is when the appellate attorney decides there are no meritorious, no colorable, issues at all in a case, no attorney has the authority to make that decision by him or herself. That decision has to be made in conjunction with a senior deputy, chief deputy, or me. That attorney has to obtain *Balfour* approval. *Balfour* approval looks a lot like the training that a new attorney undergoes. The attorney comes to a more senior person and goes through the case and the transcript objection by objection. Then if the senior attorney approves there is a *Balfour* submission for that case. But as to other cases that is the problem. There are only one set of eyes looking at the other transcripts that are not *Balfour*.
- 1:34:05 Chair Ellis      In oral argument is there always someone from the senior side listening when a younger attorney makes an argument?
- 1:34:11 P. Gartlan      Yes. You are jumping ahead, Mr. Chair. There is always what we call a "managing attorney." So myself or one of the chief deputies plus a team leader if they can make it. There will always be feedback after an oral argument. Whoever is arguing – for instance if I am the person I will take notes and I will talk to every person who has argued within a couple of days and give them feedback on how the oral argument went. No. 6 is Supreme Court practice. We take all our practice seriously and we take Supreme Court practice especially seriously. We are averaging a lot of cases in the Supreme Court the last few years. It has been about 20 cases a year. After a case is taken by the Supreme Court, the attorney will contact the operations chief deputy and get some immediate case relief. We will typically take two cases off that person's docket. Then that person will come to me. I edit just about all of the Supreme Court briefs. We will set up a schedule and it will be an outline schedule and a discussion schedule and then drafting. Typically the briefs go through three, four, sometimes even more drafts until we think we have a product that is worthy of being in the highest court in the state. Then we have moot courts for the attorney who is arguing. We have two moot courts. That is the general rule. At the first moot court we sit around and discuss it informally. The attorney kind of represents how that attorney thinks the outline of the oral argument will be. We discuss it and

then the second moot court will be the formal moot court. This is where the attorney stands up and gives a presentation in front of typically five or six moot court judges.

Performance review is on one of the handouts, excuse me, one of the pieces of material that is attached. It starts at page 15. This is kind of a comprehensive chapter. I think we can break down the performance reviews into really two broad categories and that is informal and formal. As you have already heard with respect to the briefing, there is feedback for every brief that gets filed. If it is a brief that is going to be argued there is going to be feedback from the senior deputy who is editing the brief. If it is a brief that the attorney does not intend to argue, there is going to be feedback from the editing buddy. There is feedback with respect to every written brief that will be filed in the Court of Appeals. There is also informal feedback after every oral argument. As I discussed before, either I or a chief deputy and/or a team leader will give feedback to every attorney who argues a case. Now with respect to the formal review most of this material lays out not just the procedure or the process but what the expectations are, what the roles of our attorneys are. There are performance criteria for Deputy I and Deputy II beginning at page 18. Then there are performance criteria for the senior deputies a little bit later in the chapter at page 21. Those are the criteria that every attorney is measured against, or at least is used as a guidepost. Our formal process is that individual attorneys will write a self-evaluation using these criteria. Essentially we ask them three questions. For the past evaluation period what went well? What did not go well and what are your goals for the upcoming year. That written information is then given to the team leader. The team leader writes an evaluation. After that team leader has written the evaluation they hand it back to the team member and then there is a meeting between the team leader and the team member. After that it goes to the chief deputy on that team. That chief deputy will write the final evaluation, the management evaluation, and then that will be given to the individual attorney. There will be a meeting between the chief deputy, myself, and the attorney. We do that annually. It is laborious, but ultimately fruitful. It is a good way to be in contact and to give people positive criticism, typically, but also, if necessary, there is negative criticism and people hear that. The written evaluation that we give is not a check the box. We have typically a two page narrative and it is broken up into four categories; briefing and oral argument; production and opinions; intra-office and external office resources and goals - what management's goals are for that individual for the upcoming year.

No. 8 is a dramatic improvement to the office and largely, predominately attributable to Kathryn. Kathryn has done a terrific job. What I am really pleased about is the strides we have taken over the last few years with respect to coming into the electronic age. Every attorney in the office is now e-filing in the state appellate courts. We have a brief bank. The brief bank was just developed and implemented late last year. Now there is a central place to go to find briefs based on the issues that you are writing. Typically it was kind of hit or miss. Now we have one place where the briefs are pooled and available. What I am really happy and excited about is the last paragraph. I won't skip the paragraph because that is critical too but I have been living with it for years. Kathryn has created forms in the database. If you are working on a client and you want to file a brief or you want to draft a letter or motion, there is now a word merge feature. A form will come with a lot of the basic information that is needed on that form. What it does is our documents now appear more uniform and consistent. It is much more efficient. There is no cutting and pasting. It saves a lot of time. It makes document production much, much, much more efficient and accurate. Now, finally, that last paragraph - we are poised to go paperless. This is a dramatic shift in practice because I know perhaps most of the firms in the state, I'm not sure, but we have always considered the file to be the paper file. Now the file will be an electronic file and the paper file is just going to be like an adjunct or a partial parallel file to what is in the database. This is a significant step. It is a wonderful step thanks to Kathryn. If you practice in our office you would appreciate the benefits of having a database like this. If somebody calls, a client calls, you can just bring up the file and everything is there. Entries are

there and it is easy to have an intelligent discussion about the case without having to run off and get a physical file.

- 1:44:14 Chair Ellis      So with all of that do you find some of your lawyers urging that they could work from home, offsite, and how do you handle that?
- 1:44:21 P. Gartlan      That has been a perennial issue for us. A lot of our attorneys commute and the Portland to Salem commute is a difficult one. It is two hours a day and if you have to commute five days a week that is 10 hours in a week and when you do it for four weeks that is a work week, it is 40 hours, so, yeah, the attorneys always want to telecommute more. We have a telecommute policy of one day per week not in the office. If you have a particularly difficult challenging case, like a transcript or something that just requires reading or research, just tons of research like a very complex Supreme Court case, then we allow people to take a second telecommuting day. We try to be flexible but we recognize the value of an office, and particularly our office, is the exchange of ideas. Ideas and concepts get better when they are discussed. If you just have an internal dialogue there is a limitation to that, but when you have to articulate exactly what you think your rule of law is, or you think the rule of law is, you find out there are the defects and holes. We think the strength of the office is being able to have this kind of cross-pollination, this exchange. We adhere to having people have to come to the office. That is important for us, and yes, it is a difficult drive, difficult commute, but so far people really like working in the office and so they have been willing to accept the price of commuting.
- 1:46:26 J. Potter      If you are on a telecommute day and you get a phone call are those phone calls forwarded to whatever number the person may be at?
- 1:46:35 P. Gartlan      No, typically not, but we have rules. On your telecommuting day you have to check into the office. We have VPN so you can access your computer. You have to contact your secretary at least twice a day. You have to check your voice mail so we have rules in place for that.
- 1:46:56 J. Potter      The brief bank that you now have is it, 1) searchable, and 2) available outside of your office? Is it on the website? Will it be?
- 1:47:09 P. Gartlan      It is searchable. We developed it thanks to Bronson James and Kathryn and they developed it with Westlaw. It is a Westlaw product, so it is searchable as is Westlaw, but it is not available to the outside world. I think the concerns are if we make it available to the outside world then ITD would have concerns about corruption or the judicial system being hacked into. No, it is not available to the outside world.
- 1:47:45 Chair Ellis      Do you have access to work of your counterparts in other states?
- 1:47:50 P. Gartlan      I'm not sure I understand.
- 1:47:51 Chair Ellis      Well, a lot of these issues are occurring in other states. I am interested in how you communicate with your parallel agency.
- 1:48:00 P. Gartlan      We typically don't have much communication with parallel agencies. We rely on Westlaw searches for case law. You are talking about specific issues?
- 1:48:19 Chair Ellis      I assume we are not the only state that has a group of defense appellate specialists. I am just curious if there is a network among the counterparts on issues of current common interest?
- 1:48:34 P. Gartlan      There are national groups for appellate chief defenders but I am not a member of that. There isn't a regular routine communication among the offices. No.
- 1:49:02 Chair Ellis      Okay.

1:49:07 P. Gartlan           Next is the outreach. We have a chief deputy assigned for outreach. As I mentioned before, outreach and service to the defense bar is one of the criteria for evaluating an attorney. We take that seriously. We have AD members on different boards and committees. We take our outreach responsibilities seriously and they are coordinated through a chief deputy for outreach, production and filing. To illustrate the growth of the office you will see there in 2001, 2002, and 2003, we filed 445, 398, and 441 merit briefs in the Court of Appeals. In the last three years you can see that merit briefs have significantly increased. I can tell you historically what has happened is after Measure 11 was enacted in 1995, I think it was in the mid-90s, our office was inundated with work. A backlog was created and the backlog was addressed in the early 2000s, thanks to the help of the Commission. Now we have more attorneys and we are filing more merit briefs. What that caused is it caused the Attorney General to have a backlog, and the Attorney General got more attorneys, and now that backlog has moved on to the Court of Appeals. I think the Court of Appeals is going to be asking for another panel of judges, probably next legislative session.

1:51:23 Chair Ellis           What is the percentage of your cases where the defendant's position is improved? I am trying to define winning.

1:51:33 P. Gartlan            I know. I don't have an accurate number. I can give you a guesstimate.

1:51:39 Chair Ellis           That would be fine.

1:51:40 P. Gartlan            I think it is about 10 percent.

1:51:44 Chair Ellis           That is about what I thought it would be. One subject that I am interested in, and it didn't quite seem to get picked up in your document, is communications you have with the trial bar. Can you comment on that?

1:52:03 P. Gartlan            Sure. We have an attorney of the day in the office. That attorney is the liaison between our office and outside world for that day. If attorneys, and it happens often, have questions, trial attorneys, they will call up and they will talk to that attorney of the day. If the attorney of the day cannot answer the question, the attorney of the day will send an email out to our office and ask, "Does anybody know anything about this? Joe Smith, attorney in Madras, would like to know." That is one method of communication.

1:52:44 Chair Ellis           That would include being able to tap into the brief bank?

1:52:53 P. Gartlan            Yes. Another is we now, and we've been doing this for the past several years, every time that we file a brief we send a copy of that brief electronically to the trial attorney. The trial attorney can see what we have done with the case. They can read the brief and if they have any questions they can call.

1:53:15 Chair Ellis           What happens if your lawyer is reading a transcript and is wincing about the failure to preserve error, something like that, how is that handled? In other words, how does the appellate division help the trial lawyers do their job better?

1:53:42 P. Gartlan            I want to back up and say it is difficult to say that a trial attorney did not do their job appropriately. I am not being defensive but we don't walk in their shoes. Typically you don't know what people are confronting unless you are in their position. We don't want to be presumptuous and say, "Oh you should have done this. You made a misstep over here," because, again, it is very difficult to understand what was going through that person's mind at the time. For instance, there are a lot of dynamics in the courtroom between the attorneys and the judge and the jury. They have to exercise their own professional judgment. Now having said that, if we think that something has risen to the level of this is just blatant kind of inadequate

representation then there is a process. We contact Paul. I don't know how often that happens, but Paul is available to take a complaint about an attorney.

- 1:55:00 Chair Ellis Is there ever a kind of systematic debriefing between the appellate lawyer and the trial lawyer?
- 1:55:06 P. Gartlan Not systematic but attorneys do call us. I spoke with an attorney yesterday who had a case in the Supreme Court. She wanted to talk about the case and we had a nice discussion for about 15 minutes or so, but there is no kind of systematic communicate with every attorney, every trial attorney's case that we do. There isn't one. That would run into the several hundreds every year.
- 1:55:43 Chair Ellis But if it happens, a serious trial level deficiency, your method is that goes to Paul and he then takes it?
- 1:55:59 P. Gartlan It if rose to that level it would be a complaint because it would be a complaint about an attorney so Paul would receive the complaint. I think that is how OPDS is set up. Again, I do want to reiterate that I think I understand how difficult it is for, maybe I don't, for trial attorneys but I think that trial attorneys have a lot going on in their head and I don't necessarily think that we are always going to be in a position, without appearing condescending, to offer advice. If attorneys call us up and ask how to preserve this issue, we will tell them how to preserve a particular issue. But even having said that, I know that preservation tends to be, for the most part, does the attorney know what the law is? If you know what the law is you will make the right sounds at the correct time, tell the judge, "Judge, that is not correct. Here is the argument." I don't know if I am answering your question and I apologize.
- 1:57:40 Chair Ellis You are doing fine. I know this is not an easy thing, but I also know from our point of view, we want the trial lawyers to get the benefit of what the appellate lawyers see and the interaction is something we are very interested in.
- 1:58:04 P. Gartlan I guess sending the brief is kind of an invitation to communicate and discuss.
- 1:58:18 Chair Ellis I know at some of the OCDLA meetings your people present as educators in the CLE piece. Are there other channels where that happens?
- 1:58:33 P. Gartlan Through OCDLA and through the bar. We have two in-house CLEs or OPDS CLEs and we invite the appellate panel and the local bar to our CLEs. We get people from the outside coming to our CLEs. We have two a year. One in May and one is December.
- 1:59:00 Chair Ellis Okay. The backlog data looks better. I remember the dark days not too many years ago.
- 1:59:14 P. Gartlan The system was broken.
- 1:59:14 Chair Ellis But you feel like it is under pretty good control know?
- 1:59:21 P. Gartlan Philosophically, what is acceptable? I think that is the ultimate question. Several years ago - I think it is in the material - the NFE date, the no further extension date that the Court of Appeals would say you have to have a brief in within X number of days of the transcript settling date, was 400 days. Now it is 250 days - much, much better, but if you were starting fresh, if you were just looking at this without history what would you say is an appropriate time to have the opening brief in? I think it is like two or three months. Even though the trend is going down, going in the right direction, I don't think that 232 days is acceptable.
- 2:00:15 Chair Ellis Other questions for Peter? I have actually enjoyed this in the sense I like to get a feel for how the different pieces of the puzzle are actually working. This is helpful.

2:00:38 P. Gartlan Thank you. I hear the Chair's concern about more dialogue with trial counsel and I am certainly open to that. You are right; I suppose there should be a more systemized process.

2:00:59 J. Potter From my perspective at OCDLA it has clearly improved. That is the trial lawyers talking to me are not complaining as they used to. As the Chair noted, your office participates in many OCDLA seminars. You have a regular presence in the Oregon Defense Attorney with well written articles. I think people feel more comfortable with the quality of lawyers that you have in your office. I think there has been a possibly not measurable, but anecdotally major improvement.

2:01:38 S. McCrea I agree completely.

2:01:40 Chair Ellis The one piece you haven't covered, and I think that is because it is not a problem, but do we ever miss getting a notice of appeal filed? Whose responsibility is that?

2:01:55 P. Gartlan It does happen but it is rare. Ultimately it is the responsibility of the attorney. Typically it is because of an administrative function.

2:02:08 Chair Ellis The attorney meaning your attorney or the trial attorney?

2:02:10 P. Gartlan I am assuming a case has come in in a timely manner.

2:02:14 Chair Ellis How does that happen. How do you know that you have a new case and the notice of appeal has to be filed?

2:02:17 P. Gartlan Through the website. We try to funnel all the referrals to come through our website. There is a form on our website and you fill it out.

2:02:34 Chair Ellis So it requires a trial attorney to take that initiative? You don't have some way of knowing when a final judgment in a criminal case is entered?

2:02:44 P. Gartlan The attorney will notify us at sentencing. Typically within a week or so of the sentencing and then a judgment typically enters within several days of the sentence depending on the county. So once the referral comes in we start tracking the entry of judgment for that case. The entry of judgment triggers the 30 days to file a notice of appeal. So typically we will be notified after sentencing and often before the entry of judgment - not necessarily always but when the attorney gets around to notifying us. Do attorneys notify us after 30 days? Typically not. Trial attorneys tend to be appropriate and they give us notice in a timely fashion. Once they give us that notice we can set up the case and file a notice of appeal. Off we go.

2:03:42 Chair Ellis And occasionally it is missed but not very often?

2:03:47 P. Gartlan By the trial attorney?

2:03:48 Chair Ellis By the system.

2:03:51 P. Gartlan It is occasional. We have incorrectly calendared the notice of appeal and have missed it for that reason. Typically we are able to file a late notice of appeal. The criminal system, unlike the civil system, has a provision to allow a late notice of appeal up to 90 days after the entry of judgment. What we have to do in those instances, if and when it occurs, is file a motion and memo explaining it was not the individual client's fault that the notice of appeal was missed. It was an attorney's fault or a problem in the system, but it wasn't the individual client's fault and we have to identify a colorable claim of error in the proceeding below.

2:04:38 Chair Ellis How much communication happens between your lawyers and the client?

2:04:45 P. Gartlan I don't know how many standard letters we have. I am going to guess around 12 or 15 standard letters that go out at discreet points in the process of the life of the appeal. There is going to be standard written communication. There is also going to be letters tailored specifically in response to client inquiries. We have contact by telephone. We have two days a month that are dedicated to client collect call days. Clients who are not in custody can call us whenever they want. There is a lot of communication through different forms.

2:05:34 Chair Ellis Do client's see a draft of the brief?

2:05:37 P. Gartlan Typically no. It depends on the client.

2:05:42 Chair Ellis Do client's know what issues are being raised and what issues are not?

2:05:47 P. Gartlan One of our standard letters invites the client to tell us what is of particular concern to the client. After we get that information, the attorney is to write the brief and then with a copy of the brief inform the client as to why particular issues that the client thought were important were not raised.

2:06:20 Chair Ellis Okay. Any other questions? One other thing is I think you now do probation revocation appeals?

2:06:32 P. Gartlan Oh yeah.

2:06:33 Chair Ellis How does that work. Does that again require the trial lawyer to let you know this is out there?

2:06:46 P. Gartlan Right.

2:06:46 Chair Ellis Is that going smoothly?

2:06:47 P. Gartlan We do probation revocation, guilty plea, trial, stipulated facts, conditional pleas, and it all comes through the same kind of process. The decision to appeal is always going to be up to the individual client. The client tells the trial attorney that they want to appeal this. Or if the trial attorney thinks there is a good issue in here and should be appealed. Then the trial attorney will contact us. That is typically the kind of communication and process down at the trial level before we are notified.

2:07:23 Chair Ellis If a client says, "Oh, I don't want to appeal." Is there push back? Is there some way if there really was an appealable issue someone talks with that client to talk it through? What happens there?

2:07:41 P. Gartlan If the client doesn't want to appeal then if the trial attorney is satisfied that that is the client's wishes, the trial attorney probably won't contact us but that is going to be up to the trial attorney. If the trial attorney does contact us and we start the appeal process and the client says, "I don't want an appeal," depending upon where we are will effect the communication. If we haven't received the transcript we don't ....

2:08:14 Chair Ellis Very hard. Okay. Thanks.

2:08:22 P. Gartlan Thank you.

**Agenda Item No. 5 Attorney Evaluation Models**

2:08:24 Chair Ellis Paul, Attachment 4 is evaluation models. Shall we just eat and talk simultaneously?

2:08:42 I. Swenson It is certainly up to you. You have time, I think, today to take a break for lunch if you would like to.

2:08:53 P. Levy We have two people here today who will be speaking, Mark McKechnie and Lane Borg who were invited to speak on this item. I don't know if they have any special scheduling.

2:09:06 Chair Ellis Why don't we take 10 or 15 minutes and eat and then finish up. [Break]

2:09:34 P. Levy This would be the Commission's motion - that every contractor offering public defense legal services, which would distinguish the very few contracts we have that are not for legal services, shall be governed by a board of directors that includes at least two independent members, or in lieu of a board of directors, demonstrates to OPDS staff and the Commission, in response to an RFP, that the contractor has developed and implemented effective and appropriate financial safeguards and quality assurance mechanisms. An independent board member is a person who does not provide services under the entity's contract and is not selected by those who do.

2:10:41 J. Potter The very last part was that tied into after the or?

2:10:45 P. Levy It is a separate sentence.

2:10:46 J. Potter So qualifies the first part.

2:10:46 P. Levy It defines an independent.

2:11:02 J. Stevens After your first part about needing the board, do a comma, semi-colon or something, then add the independent contractor. Start a new sentence. "In the alternative, blah, blah, blah." Does that work?

2:11:17 Chair Ellis Read it again because we have an editor here.

2:11:21 P. Levy So every contractor for public defense legal services 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 selected by those who do. In lieu a board of directors, a contractor shall demonstrate to OPDS staff and the Commission...

2:12:18 Chair Ellis So, Mr. Potter, did I heard you ...

**MOTION:** John Potter moved to approve the language; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

2:12:41 S. McCrea Thank you, Paul.

2:12:42 Chair Ellis Do you want to talk about the performance appraisal?

2:12:54 P. Levy Yes. As with boards of directors, the subject of the evaluation of lawyers providing public defense services has been a subject of Commission focus and discussion for some time. It is also a regular inquiry in service delivery reviews, how providers are conducting the supervision and management of attorneys providing public defense services. The peer reviews look at whether performance reviews of attorneys providing public defense services are occurring or not, and how they are being conducted. The subject of attorney evaluations is on the agenda at virtually all public defense management seminars in one form or another. It is a focus in the quality assurance recommendation and the new revised best practices. Generally, conducting regular, meaningful performance appraisals is viewed as an essential component of assuring quality legal services. All of that said, what we have found through the site review process and other avenues is that it is not being done uniformly through the state. Public Defender offices are the entities where one is most likely to find provision for some regular performance appraisal process, and even there some organizations struggle to do it routinely. Some struggle to do it at all. This was the subject of a survey that we provided you along with information

about the board of directors perhaps in January if not earlier. We provided you here with some examples of how entities are doing performance appraisals. We have Mark McKechnie from Juvenile Rights Project and Lane Borg from the Metropolitan Public Defender to talk about how they implement these performance appraisals. They are both from public defender offices. What we are finding is that increasingly consortia are finding ways to perform performance appraisals of consortia members. We don't have anybody here today to talk to you about this. I spoke on the phone with Karen Stenard in preparation for our January meeting. Karen Stenard could not attend today's meeting. I spoke with her about her experience with her consortium's performance reviews. I also talked with Jennifer Kimble who is part of a small group of lawyers in a consortium. They are the Twenty-Second Circuit Defenders. There are four or five lawyers providing services in Crook and Jefferson Counties. They wanted me to relate what their experience has been and then I will have these folks talk to you. Karen said that doing the performance review - you see some of the outlines of how she conducted it in the materials - was extraordinarily time consuming and the next time she does it she will use an online instrument such as Survey Monkey that we use a lot. She said the members of her group embraced it and appreciated getting feedback about their performance. They participated in the process willingly and she thought it was good that it would cause some members to reflect on areas where they might improve. I think she would say that it may have caused some improvement in areas where there were concerns. That is a consortium that liked the process and would like to see it continue. The experience with this small group, the Twenty-Second Circuit Defenders, is they did a survey of justice system participants in this small community. They met a little bit of resistance from the justice system folks in doing that survey because it was such a small community and, in fact, the trial court administrator confiscated the surveys that were provided to court staff, but other than that glitch in the process they got some good feedback and as a result of that one member was eliminated from their group, and another member was directed to deal with some significant problems. That person left the group as well. They had another problem and so shortly after the performance appraisal their consortium was reduced to two members. It wasn't caused by the evaluation process but it all kind of tumbled along. They are now up to strength and thought to be a very strong group. Those were some generally positive experiences. Of course you heard from Ron Gray that his group has recently done an evaluation of its members and MCAD does. There are other consortia that are doing this. Of course most public defenders, though not all, have a provision, or at least attempt to conduct performance appraisals. We asked Lane and Mark to talk to you about their experience and what benefits they find from the process and what barriers or difficulties they find implementing it.

2:20:16 Chair Ellis

Do you guys want to come up? Have you talked to each other about this?

2:20:28 L. Borg

No.

2:20:41 M. McKechnie

Good afternoon. I have been at JRP since 1991, although I have only been executive director for the last two years. I am generally familiar with how our evaluation process has evolved over that time since 1999. We had a process well established when I joined JRP. I don't know how far back it goes exactly. I usually think of it in terms of employee evaluations because we do them across the organization. Not just for attorneys but obviously the attorney evaluations are very important and have evolved over time. I wouldn't say that we have settled on a particular method yet. I think each year or two we find ways to tweak the pieces that we weren't satisfied with the last time around. I would say that it is very challenging to get evaluations done on all of our attorneys in a timely manner on an annual basis, although we come close. Our supervisors have a lot of duties on top of this responsibility. They are carrying cases to a greater or lesser degree. There is a lot of daily supervision of both less experienced and more experienced attorneys, so when the time comes around to do evaluations they have to try to fit that in on top of everything else they are doing. I would say it is quite a chore but usually by the end it is worth it. I certainly see the value and I review all of the evaluations before they are finalized

and placed in the attorney's personnel files. I don't know if you all have our templates in front of you. We sort of split the formats. We have a more extensive evaluation for newer attorneys when they are in their first five years with us. Then there is a briefer version for longer term attorneys. This is largely out of necessity. We have found we can't do as thorough evaluations, nor is it as necessary or meaningful to essentially say the same things year after year for people who have worked with us for a long time and are maintaining or continuing to develop as attorneys. We would essentially be saying "yes" you are doing a great job and now you are doing that much better because you have another year of experience under your belt. That would sort of be the gist of many of those. We actually focus a lot more on self-evaluations for the more experienced attorneys. How they are performing? What do they see as their strengths, areas that they would like to develop and needs? I think as the administrator of the organization I get a lot of useful information in terms of how people are doing, how they feel about their work, how overworked they feel, the resources that they would like to have, the policies and procedures and how those might be changed in ways that they would see as working better for them. We take those things into consideration and I will say that a lot of organizational changes we have made over time actually started through the evaluation process. Then of course the supervisors provide feedback to the more experienced attorneys as well and still solicit information from the court and other attorneys, the DAs, and DHS.

We try to do our evaluations at one time of year so that we can solicit information on our attorneys as a group. It minimizes the amount of time that the supervisors have to spend soliciting feedback on individual attorneys. For the more extensive evaluation you can see that the supervisors spend a lot of time reviewing both the written documents in the file, motions, memos, and other kinds of work product of the attorneys. They observe them usually at least twice in hearings and trials. A lot of juvenile work involves other types of meetings, so they may observe them in family decision meetings or treatment reviews. They try to get a broad sense of all the aspects of the work they do in juvenile cases. Also they ask for self-evaluation of newer attorneys as well. I think it is often very telling for newer and more experienced attorneys how well they evaluate their own practice and where they see their strengths and weaknesses. I would say, to a large degree, our attorneys tend to underestimate their skills and their accomplishments. You talked previously about sort of a win/loss ratio in cases and certainly our attorneys can't judge their performance by how many cases they win. We need other ways to provide feedback on their performance. There is quite an in depth look at files, cases, talking to judges, talking to other attorneys and observing these attorneys in those first years, providing a lot of feedback and that is done year round with newer attorneys and on an ongoing basis. This is a more formalized way to make sure we are looking at all aspects of their work and that we are documenting how they are doing. We are providing feedback, many times telling them they are doing better than they think they may be doing given the challenges that they face in their cases. In some cases the evaluation does lead to uncovering problems that we hadn't been aware of and it is clearly an opportunity to address them. Some evaluations have resulted in adding an additional piece, a corrective action or plan that becomes part of the evaluation and the plan to follow up on that work plan. Fortunately, we don't only find out about problems through this process. We certainly hear from the court and others at various other times. We have addressed issues outside of the evaluation process as well. We have issued written letters, warnings, and developed work plans at any time during the year and certainly the timelier the better. There are times when the evaluation process itself uncovers problems that weren't apparent before because there is a judge or someone, or by looking at several of attorney's files you start to see problems. The supervisors don't often have time to sit down and actually review attorney files on a regular basis. That process does help uncover some of those hidden problems. I would say that we have been, whether it is result of the formal evaluation or in response to other complaints or observation of difficulties that attorneys have had, over the last several years we have had several attorneys who have needed some kind of improvement plan. I would say that generally leads to the

desired result. I would say in many cases the attorney recognizes where they need to improve and make the effort to make those improvements and perform much more to our expectations. Then in a few cases it helped attorneys realize that they perhaps didn't want to put in all of the effort it would take to meet the expectations and whether they came to it on their own or through a counseling process they then realized they were not a good fit to do the particular kind of work that we do that is very demanding and often emotionally difficult work given the subject matter. That has been our experience in general. Again, I think these are templates that represent our evaluations. As of now they are organic and ever evolving. We are often trying to improve the process. I think we are typically able to at least initiate evaluations for our attorneys on roughly an annual basis. For the more in depth evaluations it can take quite a bit of time to complete all of those pieces and to end up with the final document that is signed, sealed, and delivered. Sometimes the sense is when the next annual evaluation comes around you feel like you just did it. It took a few months to complete the process and the next thing you know it is time for another one. We try to be a little bit fluid with the dates in terms of what is annual, but we are mostly able to complete them on an annual basis.

2:31:02 Chair Ellis

Okay.

2:31:06 L. Borg

Okay - a couple of things that I want to comment on. When I was thinking about this I know the topic was about attorneys. We do evaluations of all staff. The policy within in the office is that all staff are evaluated and subject to that same process. It varies, obviously, because the skill sets are different and what you are evaluating them on is different. In thinking about, since I came back as executive director almost 18 months ago, and in talking about performance appraisals it is a really broad topic. You have to find out what you are talking about when you say performance appraisals. Many times at the Commission meetings Commissioner Ozanne has said that it really isn't about correcting discipline. You shouldn't wait for a year and then say, "That person really screwed up, next summer I am going to talk to them about it". You can't do that. Yet that is what a lot of people think quality assurance is about - correcting deficiencies, discipline, looking for problems, and I don't disagree with Mark saying that in that process things come out and you try to deal with them, but you really shouldn't be waiting, in my opinion, waiting for a performance appraisal to do that. But in the alternative is it for professional growth and development? Are you helping people? Certainly that was my goal when I first starting doing them on a regular basis at MDI as the assistant director in the late '80s. I was really looking at it as, "How can I make you better? I'll tell you what you are doing right and maybe a few corrective things on what you could do better." The problem with that and what I keep struggling with is why is it so hard to do? One of the things that I have noticed getting older is that my brothers and I end up, no matter what we do professionally, we are doing the same thing now which is managing people. I have a brother who is a senior manager at Raytheon Missiles. We were talking about this last year. He is in a for-profit business and yet we do similar things - evaluate professionals. It occurred to me that one of the big differences between us is that he has skin in the game. He's got something to give. There is profit to distribute based upon his evaluations.

2:33:49 Chair Ellis

That may distinguish him from you.

2:33:49 L. Borg

Right. I could talk about this and what I ought to be able to do, but because of a number things - the economy - I got nowhere. We have an unusual situation where our newest attorneys are in minor felonies and our experienced attorneys are in misdemeanors. We have to recycle. We are getting no growth. I don't have profit I can share with them. This is not unique to Metro, but I think Metro is different than most of the contractors. I have union restrictions under my collective bargaining agreement that mean that I can't do what you might otherwise do with performance appraisals in terms of that notion of putting skin in the game, putting something in there so that the evaluator has something to give, something more than that esoteric idea that I am making you a better person, and the person being evaluated really gets

the message that, "I really need to perform to this and this is what I need to do." There is an issue there that I recognize. Then I look at what are some of the other difficulties with evaluations. I think it is the nature of a lot of people who work in defense offices not to be judgmental. We don't like to judge other people. Part of doing a performance appraisal is judging other people, looking at what they are doing and making some kind of comment on what they do. It is subjective but we would like it to be objective. We would like to look at Survey Monkeys and quantify it all but you can't. You can't quantify it. It usually comes down to knowing it when you see it. You have an idea of what the goal is, but you have to be willing apply that subjective, aesthetic, almost artistic evaluation of the person and be confident in what you are saying. Then the next difficulty you encounter is that it involves risk. It is a risk for the evaluator because it will expose your deficiencies and your vulnerabilities. I went through this recently. It was good for me. I was doing my evaluations of those who report directly to me and I realized with my IT person I can only evaluate him on results - it works or it doesn't work. I don't understand the technology. I am not a certified Microsoft person so I can't sit there and say, "You know enough," or, "You don't know enough." It either works or it doesn't. It might be unfair to criticize him if it doesn't work because it might have been a resource issue beyond his control. That is the difficulty. It requires you to know the person you are evaluating. I mention that because it is not just attorneys evaluating attorneys. We are evaluating support staff and other professionals that we work with and it is risky. It is risky because you have to opine on something and risk having that person say, "Well, you are an idiot. You don't know what I do." People don't like to do that.

As Mark mentioned it is also very time consuming because to do it effectively you have to invest in it and there has been a change in culture. I think it is a good thing, but there has been a change in culture. In my office there is not a single attorney in the office, including myself and my trainer who does not have clients. Everybody does the work. I am not saying I do anywhere near the work that a line attorney does. That is part of a management philosophy that has come about in the last 10 or 15 years that we don't like this idea of pure managers who never really do the work and are just completely hands off. There is a trade off there. I have got to do the work. I have a PCR trial coming up in six weeks and fortunately Paul gave me some money so it is okay. I have work to do in addition to that as do all of my supervisors. Yet you can't really do an effective evaluation unless you take the time to do that. I remember my MDI days. Judge Ochoa in Marion County and I were talking about this recently. He was saying that he appreciated my evaluations of him because I was only one of two bosses in his career that ever watched him work, that ever sat and watched him work. One was me and one was a principal he had when he was a teacher. It is important to the person being evaluated that it is not just someone gathering some anecdotal information and coming in to talk to me, it is that you have come in and watched what I do and comment on what you saw, but it is time consuming to do that. I think it is important and we are committed to it. We do exit interviews and the number one thing I hear from attorneys when I ask what we could do better is, and this is particular to attorneys because it doesn't seem to affect the support staff in the same way, is, "I wish I would have gotten more feedback. I wish people would have come and watched me and talked to me about what I do." They do want to do a good job. Aside from the notion I started out with - that skin in the game would make it easier, having the ability to either give people promotions or benefits, You do get something from a good review. Ultimately people want to do a good job. They want to be better at it. It occurs to me that if Commissioner Stevens struggles with interfering with contractors on having a board, that is nothing compared to trying to develop standards for performance reviews. To do them right you have to watch the person. You have to look at their files. You have to be willing to make these artistic, subjective judgments on them and have that kind of interaction with them. It is hard work and ultimately if it is something that the Commission values, it is something that needs to be paid for and recognized as part of an organization. "We expect you to do that. We know it is going to take time so

we want to see that as part of your built-in time for administrative staff.” That is the only way you are really going to get it.

2:40:52 Chair Ellis

Questions or comments?

2:40:52 Hon. Elizabeth Welch

I have a lot of things to say but I have a question before I do that. I don't mean that we shouldn't be, but why are we talking about this? What is the purpose?

2:41:04 L. Borg

I will give you my answer not as part ...

2:41:08 P. Levy

I think it has come – it was on the agenda originally in January. It was prompted by regular expressions of interest or concern on the Commission on whether, as with boards of directors, the Commission might need to establish some expectation that public defense providers conduct appraisals of the attorneys providing services. As a part of that there has been a thought that perhaps the Commission or staff could develop a model appraisal. It is part of the overall concern about the quality of services.

2:42:01 Hon. Elizabeth Welch

Okay. Good. Thank you. One of the most satisfying moments for me since I have been on this Commission is when we were in Eugene. It was the first meeting on whether the system needed to change, and the judges from Lane County came in and were quite outspoken in their criticism of the level of practice in that court with some of the members of the list. What you two have talked about is your responsibilities and your organizations' responsibilities to mentor and bring along. It is almost a separate issue from what the rest of the world thinks about the people who work for you. Because of my history, neither one of you having been directors of your organizations at the time when I was working, the amount of contact with judges is, I will be nice in saying “modest” on this. We talked about that a little bit in Eugene in the sense of a judge will call, most judges I assume, but judges will call when there is a bonfire, not when there is sort of (inaudible) issues. Presumably if some lawyer is just awful you are going to hear about that, but if there are more low grade chronic problems, the way you have to get that information is you have to go get it. On juvenile representation the perspective of Department of Human Services is, I think, really critical in evaluating employee performance. As with all lawyers, the most important things that you do are not in the courtroom. Those are the folks who really know whether a lawyer is doing anything on a case. That is not exactly in the form of a question. I would kind of like to hear a little bit more about the efforts at external communication and what they are or what you think they ought to be.

2:44:50 P. Levy

Could I make a comment on this before you respond? Mark talked a little bit about this and I am glad you raised it in these terms. What we find on these peer reviews, these site visits, is people telling us about the problems that they see with individual lawyers, and we say, “we are really here to look at the entity itself. Have you told the administrator or the executive director about these concerns?” and the answer is usually “no” because nobody has asked. The administrator of a consortium is just as able as a supervisor in a public defender office to ask on a regular basis.

2:45:46 L. Borg

A couple of things. I think you were unique, not unique, but you were not the norm of judges in terms of willingness to apply what I was talking about, the ascetic, and the subjective. “I think this and this is what is going on and you should be aware of it.” People usually wait until there's a fire or the bomb blows up. In a previous professional life I worked for OJD and I was in Multnomah County and Phil Abraham gave me the task of dealing with – and this was before there was a Commission, even before the other Commission - we dealt with indigent defense issues a lot in the county and I was concerned about that. I developed a complaint form that went to the judges. It went from the judges to me within the administration. It didn't have to be a terrible thing, it was just, “Who is doing a bad job? Let me know.” These were people that Ann Christian was contracting with and

paying money. In the 10 months that I had that responsibility I got two comments back. In my experience the way that you overcome that is you can't just wait for the fire and you can't just show up once a year or send an email and ask what someone thinks. The real information is going to come through relationships. You have got to have a relationship so that the judge feels comfortable telling you about an attorney in your office, and trusting that that will be dealt with in a way that is appropriate without a big confrontation. "Well, this judge thinks this," and next thing you know there are a bunch of affidavits. That kind of communication can go badly. I believe in order for the judges to trust me with that information, I have to have a relationship with them that is based on just dropping in occasionally and they know they can call me up. I think that is important. We do that. I tell the chiefs within our office that that is part of their responsibility, not just with the judges, but the DAs and their counterparts in the DAs office. There is an informal relationship that allows the DAs to call up and say, "Is this person having a bad day? They just went in and did something bad." We had a situation recently where a judge believed that there were misrepresentations made and that was very serious. We did an investigation and went through that. Ultimately the judge – I think he was too generous, frankly - the judge withdrew the accusation. I think that would have been a much bigger deal if that hadn't been the kind of relationship where he could make a serious allegation but also chat about it, talk about it, and feel like he could have some confidence that you weren't just going to either react inappropriately, overreact, blow it off or something like that. I think the trick is that there has to be a relationship before there is going to be enough trust for you to tell me that this person is screwing up.

2:49:32 M. McKechnie

I think it is important in our organization that the managers who are lawyers are in court on a regular basis. I think that is where most of the feedback comes from - the incidental contact at court. Before or after a hearing a judge may call one of our supervisors to the bench or chambers to give feedback on our attorneys. I think that is very useful. Even though on one hand I struggle with the time that our supervisors have to spend doing cases - you know I wish they had more time to do some of their other supervisory responsibilities - there is a supervisory benefit to that as well and that is how we get a lot of the ongoing feedback from the bench. I will say that I have received a couple of calls from judges. I know our supervising attorneys receive unsolicited calls fairly regularly. It is not always that somebody is accused of doing a horrible job. Sometimes they are more minor criticisms and I think it is partly because the bench has a high expectation of our level of practice. When they feel like what they saw in their courtroom is uncharacteristic of our level of practice they let us know. On the other hand, we also received unsolicited praise about a couple of our newer attorneys and how well they were doing and how quickly they were developing into good lawyers.

The other thing that is very relevant for a juvenile dependency practice representing children is feedback from both the bench and DHS about representing our client's expressed wishes. It is the difference between a lawyer stating a child's wishes in court and that being the sum total of representing their expressed wishes, versus doing all of the work leading up to that point where you are making a legal argument in court that those wishes should be filled, that DHS has an obligation to fulfill what the client wishes and that the law entitles them to have those wishes fulfilled and that the groundwork has been done. I would say that is something that we have really focused on and hammered home. We have to represent those children's wishes in a meaningful way meaning we are doing the work with DHS, with foster families, with other providers to create the circumstances where it is easy, or easier, or basically impossible for the court to either refuse or for DHS to say they can't follow through. That is obviously a big goal but I think that piece is very important when it comes to getting feedback from both the court and DHS about whether our attorneys are just demanding things without providing the legal justification as well as talking about how it can actually be accomplished, rather than just saying, "This is what my client wants; you all need to do it or make it happen." They are actually doing the work to make it so that it is more likely that the client's wishes are fulfilled.

- 2:53:27 Chair Ellis Lane, you made the comment that this should be part of your job. I want to make a couple of comments. One is, I think the discussion has all been from a quality control point of view about finding problems, but I think there is just as much value in the encouragement aspects of these interviews. I am very mindful of how lonely a life a young defender has. They may or may not get any positive client feedback, but the client situation is obviously different than it may be in most civil cases. These are people who are used to being graded. Most of them did pretty well in school. If they have something they can kind of point to on how to measure progress, it is unlikely to be compensation issues, it is more likely to be the type of reward that, "Somebody cares what I do. Somebody is observing what I do and telling me I am actually doing a good job when I deserve that" I think that is as valuable as the criticism component. From my point of view, it is worth it for us to compensate you to have that kind of relationship with the lawyers in your office.
- 2:55:03 L. Borg As the economy gets better then these things somewhat take care of themselves within a public defender's office. What you are able to ideally say at those annual reviews with an attorney is, "This is what you have done here. Now you are getting started again in felonies. You are moving up and getting more experience." We are not able to do that. We are in a situation where we did a round of attorney hiring interviews, of putting people in our pool last September and since then we have hired one of those people. We have lost more to other jobs or having to leave the state than we have hired out of that pool. I think that will take care of itself as the economy gets better and we have that kind of movement up where people are getting professional growth. I think you are right. They are smart enough to figure out that we aren't compensating them on the same level that your firm is or private firms are as first year lawyers. There are other reasons that they are there. They are there for that kind of professional freedom and growth and development. It is going to be nice when we can actually provide that as the economy allows and they start getting those experiences and taking on new challenges. It is hearing that feedback.
- 2:56:36 Chair Ellis Having something to point to, some way of sensing they are not just on a treadmill. Any other comments or questions on this?
- 2:56:45 M. McKechnie I would like to add to that. You don't want to wait until the annual evaluation to deal with problems. You don't want to wait until the evaluation to provide praise either. Obviously it creates an opportunity, a milestone, to formally provide that positive feedback and to memorialize it in writing, but the other thing that we really try to do and could always do more of is recognizing successes every day and every week. We do that by sending emails that so and so won a trial. So and so won their motion. Whatever the challenge was or even it is not such a clear cut victory. Making an heroic effort even if the outcome wasn't what they were looking for and trying to recognize that. I also think that it is helpful to know that everyone is kind of struggling along and even recognition of someone else's success kind of buoys everyone.
- 2:57:58 L. Borg One comment I would add, appreciating Paul's comment about it being on the agenda. Now speaking to Commissioner Potter, I think there could be some more emphasis on this at the management conference. It is very difficult to model or show an example of it. I do agree with you, Chairman, that the people want it. Ultimately employees want feedback and want to get better. Maybe what we need is a panel of lawyers telling the managers at that conference that this is what I would like. I want this. I want to get feedback. This was an example of where I got a review and it was helpful to me. It was helpful to my growth. I think people need to be reinforced to get over that thing that I started out with about the difficulties imposing judgments on them is that if they hear that, in fact, the employees want this and they want to do better jobs.
- 2:58:58 Chair Ellis Thank you both.

**Agenda Item No. 6**

**OPDS Management Team**

- 2:59:02 Chair Ellis Ingrid, shall we start on the items under entry six? You have told me some of these may be somewhat time consuming.
- 2:59:17 I. Swenson At recent meetings we haven't spent a great deal of time on the monthly report. We happen to have a lot of substantive issues, so it may take a bit longer than usual. Kathryn, do you want to start with your audit report?
- 2:59:32 K. Aylward As we talked at the last meeting I thought, "Let's just do a sampling of the bills that we pay and take a look at them." Our files are all stored by a six-digit serial number. I used a random number generator to pull out a random sample of 300 files from a pool of 27,000. That gives us a little more than one percent as a sample size. I had the analysts look through them. It was about 75 per analyst to check everything. Who did we pay? How much did we pay? Did it need authorization? Did the math add up and all of those things. The first thing they came back and told me was the admiration they have for the accounts payable people who do about 7,000 of these each per year. The analysts did 75 and said that was plenty. It was good to get both ends of the office understanding how the other one works. In looking at these we did find a few, principally where they were insufficiently documented in the electronic file itself. We knew where to go and look for the backup, but an outside auditor would say, "Where is the backup for it?" Those are easy fixes especially with something I will tell you about later that we are doing in our office. We did find two out of the 300 that had financial impact. There was one where someone had billed us for two photocopies at seven cents a page, and our guideline rate is only five cents a page. We have should have disallowed those four cents. Collection efforts have begun. The second one that had an error in it was an investigator time log that included mileage on each day. The person billing had added up the mileage incorrectly. We paid them for 513 miles because that is what they said it was. In fact it was 516. If we had re-added it and realized it was 516, we would have paid them for three more miles. So we really owe them a \$1.60.
- 3:01:52 Chair Ellis So we got the four cents back?
- 3:05:51 K. Aylward Yes. We are up by \$1.60 after hundreds of hours of effort, but what was interesting to me is we came up with some different ways of doing things. There was an example - and I don't think it is wrong but we are pursuing it to find out - occasionally with hourly billers where they are either interim billing or it is a dependency case where the work goes on, you will get a bill that says, "I worked on these four dates." You pay that bill. Three months or six months later you get another bill that says you worked on these dates. We found one where a date here and a date here were overlapping, but it was for different activities. I still want to know because the activities were kind of similar. We have now devised a way where we can record in our database first date of service and the last date of service, and if we try to enter something with an overlapping date of service it will give you an error message to say, "You need to find out why this has happened." I love the ability to build things in to check. We are going to do this annually because maybe in this batch we didn't find any mistakes but we've got to stay on our toes. Overall I was amazed and impressed by the quality of the work that the accounts payable folks do. It is just a huge volume with lots of detail and data entry. To find so few mistakes was really reassuring.
- 3:03:28 Chair Ellis That is great. Commissioner Ozanne is not here, but I know he was sort of the instigator for this, and on his behalf, I want to say that is really good to hear.
- 3:03:44 K. Aylward As far as the eligibility standards, I sent an email to - they call them "verifiers," the people who actually do the worksheets and determine eligibility and make a recommendation to the judge. The feedback that I got from them was that they were thrilled. They said, "It is wonderful, please simplify it, I think this is great." Most of them said that they don't think we will see much of an increase in caseload if we

change this. People either have money or they don't. The chances of them having in their bank account just exactly enough to get an attorney or not, is unusual. That was reassuring. I also sent an email to Kingsley Click, the State Court Administrator, asking her a good method for getting feedback from the judges. She suggested a memo to either the PJs, or the PJs and a criminal judge subset, or she said all the judges. She is open to that. I have not done that yet but I will. The other thing is I was talking to John Borden about this because he was at the last Commission meeting where this had come up. I felt like an idiot because I have been sitting in these meetings where we are talking about the judicial justice system revenue and all the fees and how it is funded. I was sitting there thinking well, "application contribution," somebody suggested that that \$20 application fee should maybe be \$25. That is a fee. That should have been pulled into the discussion with this other bigger group that is going on. My feeling is I don't want to tumble forward too quickly on this. I want to make sure that LFO and this interim committee, if they need to have any understanding of how these revenues fit in with the rest, I want to make sure I have a lot of buy in and support from the judges. I am going to go a little slower on this if you don't mind. I know it has been 15 years, but 15 years and three months would maybe be okay.

3:06:03 Chair Ellis

Any observations?

3:06:08 Hon. Elizabeth Welch

I am certainly not interested in second-guessing Kathryn about the process. With the next issue on the list, this eligibility issue, a big part of the problem is the extent to which varying interpretations and the unique nature of the eligibility determination in juvenile court are affecting the process of providing children lawyers. It is extremely complicated and my understanding from talking to the court administrator in Portland is that there are many, many courts, it appears, that absolutely ignore the eligibility standards, including Multnomah County. One of the reasons, and I am not sure if Ingrid was planning on explaining this to the Commission is that the statute is inconsistent in terms of what the court's responsibilities are, and the eligibility standards simply are not appropriate when applied to parents of children who are charged with a law violation. I am not sure that the eligibility standards are even being used, or ever were used in Portland in delinquency cases. I think they were just used in dependency cases. I am hoping maybe you will carve out an exception for this discussion.

3:08:14 K. Aylward

The other thing that comes up, and I don't know if I mentioned this at the last meeting, but there is a legislative concept that has been brought forward within the judicial department to amend the wording of the statute. I am not a lawyer. I personally read the statute and think it doesn't need amending and we can just use it as is. Judicial is now, their committee that reviews legislative suggestions is now looking at whether this is something that they want to pursue or whether it is even necessary to change the wording of the statute. That other component of it is going on as well. Most of the verifiers, as far as criminal courts go, have said it is not going to make a difference anyway because if they are cutting it close the court will appoint somebody anyway. I don't think this will make that much change. I agree with you in juvenile court what is important is that the policy, which maybe isn't being followed regularly, but the policy says that even if a parent refuses to pay or won't fill out the paperwork or anything, an attorney should be appointed anyway. You can always order it at recoupment, you can order them to pay at the end of it, but get an attorney on there. Over and over in the policy it says that refusal to fill out the forms, or to pay the application or contribution amount, should never result in delay or denial of counsel. You should never have counsel delayed because of any of this process. Maybe it is partly a judicial conference issue just to say, "Whenever requested to do so the court shall."

3:09:58 Hon. Elizabeth Welch

I think it is an education issue at least in Portland.

3:10:25 K. Aylward

I want to talk about something just because I think it is the most important thing that has happened in CBS since July 1, 2003. We talk about a paperless office and this kind of stuff. What we have done in the past with the non-routine expense requests and the bills that we get, when something is processed and resolved we scan it for our file and our file is electronic and we shred it, but throughout this whole process of approval it is very paper intensive. We have a fax machine that spits out paper. Somebody looks at it and writes some notes on it and passes it on to somebody else with a printed cover sheet and they mark some notes on it. We are generating paper all throughout this process and then scanning it and shredding it, so it is really not paperless. In the last couple of weeks we did switch over to a system where we are not producing any paper for this review process. We are talking about 16,000 non-routine expense requests a year. As we have gone through this process you start out thinking you will save a couple of reams of paper - good for the environment, but one of the staff members said that we had to check and make sure that it was properly scanned. She said, "Every night I was going home from work and my shoulder was killing me." There is much to this and the more you think about it the more excited everybody was getting. We pay somebody to shred our confidential stuff that we printed, so why are we printing it? I have to give a compliment to my staff. I think it is like when you are going swimming and the water is cold and you put a toe in and you don't like it, and then you go in slowly. It doesn't matter that the people in there and saying, "Come on. Get in. You will get used to." You have to go in slowly and you hate if it somebody pushes you in. What I have in Lorrie Railey and Kelly Ashton, who are the two that handle this process, are people who jumped right in that icy water and it is a completely different mindset when you can't write on a piece of paper, when you can't have a stack and say, "This is my stuff to do." When you can't see it it completely changes how you work. One other thing that is excellent is what we used to do with these documents after they were scanned is that they were saved as that six digit serial number. It is really easy to transpose some numbers when you save it and you will never find it. That folder has 180,000 files in it and you will never find it. Now we have two applications talking to each other. The database is actually commanding Adobe Acrobat on how to operate and it is assigning the file number, inserting the materials, and putting it in the right place. No human hands are involved. We are so excited about it. It has only been two weeks. The next step is then to expand it to the accounts payable section which is much, much larger. That is three times the volume of paper going through the office. Every time we turn around we realize, well, wait a minute I don't need this big table where I used to spread my paper out, which is good because we are moving to smaller premises and we don't have the square footage for this big table to spread your paper out. We are very excited. It is the most rewarding thing that has happened in a long, long time.

3:14:05 Chair Ellis

Good.

3:14:10 I. Swenson

The next thing is the delinquency representation update. It seems like it has only been two weeks since your last meeting. I know that is not true. It is a lot more than that, but in the meantime we have been trying to follow up as quickly as possible on this issue. You asked Commissioner Welch to pull together a work group to do this. She has been busily engaged in this effort. It takes different turns as we proceed, which is kind of interesting. We had some initial meetings. I met with Commissioner Welch and we talked about how to go forward. She had some interviews with district attorneys and judges and juvenile court directors and I did the same with different people within our system to explore what would be the best ways of going forward. Parallel to that process - and this arose out of your March meeting because there were Marion County representatives there who quickly went back and reported the information that they heard at the Commission meeting to the players in that system - we started getting some immediate feedback from them and I would say an expression of concern for where the Commission was going and how and why they had been identified as a county with some issues in this area. These things all started to work together and we received an invitation to attend a meeting of the board of directors of the Juvenile Department Director's Association. Every county

has a juvenile department and a director and they meet regularly. This was a meeting of their board yesterday in Salem. We had previously requested to meet with that group but that request was not conveyed to the appropriate persons. In any case, they then invited us in response to what they had heard about your meeting. We arrived and were more or less anticipating a grilling by this group of people. We got a little bit of that. They, of course, are looking at their systems and how they work and are fearful that we will be introducing mechanisms that will cause delay and won't result in any benefit to the clients or to the system. They feel like they weren't really consulted. Some of them were concerned about the information that was included in the survey. It wasn't necessarily all hard data. There were a lot of estimates there and so they were concerned with the accuracy of that information. But I think after a lengthy discussion - we heard seven or eight different director's points of view and responded regarding the Commission's interest and the origin of that interest. I think we came out of the meeting with more of a sense that this is an issue we all need to address. They can assist us by showing us what the consequences would be of making particular changes at various stages of the process. They can help identify obstacles to implementation of enhanced representation in the juvenile delinquency system, and there are obstacles, one of which Commissioner Welch just referred to which are the eligibility standards. If you are a juvenile department and you are trying to get cases through your system in a relatively efficient way, and you have a group of youth who are charged with minor offenses, and then you have to stop the whole process of discussing alternative dispositions, and so forth, to have them confer counsel who may or may not be available that day or the next day, it really does introduce an element that has to be dealt with. Then there are parents, as was indicated at the last Commission meeting, who have no interest in contributing to the cost of representation of their child. All of those pieces are part of the issue at this point.

As a result of that meeting we agreed to prepare a letter to the juvenile department directors including a copy of the information that was provided to the Commission, and spell out representation requirements in certain areas, one of which is the formal accountability agreement. I think there was essentially a misunderstanding on the part of just about everybody in the system, the lawyers, the judges, and the juvenile departments about the role of counsel in that particular type of diversion and how you can make counsel available without destroying the process. The letter will address that. It will talk about the things that have come to our attention as problems relating to delinquency representation. In talking with Judge Welch we had decided we would also provide them, and then later the judges, with a list of the collateral consequences that result to juveniles who are adjudicated for juvenile offenses. One of the attorneys at the Juvenile Rights Project made a really fine presentation at the last OCDLA conference on collateral consequences. It is striking for anybody to see the long list of, in some cases, lifetime implications that arise from what sounds like a very minor sort of event as a juvenile. You can be barred from military service. You can be barred from public housing and eligibility for some colleges and occupations, not to mention being subject to sex offender registration for life and those kinds of things. Our thought was to send that along with a memo on the law that relates to representation. The attorneys in Pete's division are preparing a legal memorandum on that position so that we can address it in a more comprehensive way. It is our hope that we will have the full cooperation of the juvenile department people in helping us avoid creating obstacles for them or for us in terms of improving the access to counsel for juveniles in these cases. Once that is done and we get some feedback from them, it is our intention to send a similar letter to all of the juvenile court judges. There is a forum, it is the Juvenile Court Improvement Project, that puts on an annual conference but their funding is related only to the dependency side of juvenile court. They ordinarily decline to receive information about delinquency cases, but this might be an area where they would be willing to have at least some kind of presentation about this issue. That is in August and that might be a good time for that discussion. Nothing is firm yet and yet but I do feel like there is some momentum. This training that happened at the OCDLA conference was also extremely valuable because the advocates who were there from

all over the state have a better sense now of some of those issues. Judge Welch, Judge Forte from Deschutes County, George Yeannakis who was here, and Angela Sherbo from the Juvenile Rights Project made a panel presentation on this issue to those attorneys. They are also sensitive to the fact that kids are waiving counsel at significant rates across the state. We have gotten as far as raising consciousness at least and we will be gathering more information and keeping you posted about how things are going.

3:22:57 Hon. Elizabeth Welch

Can I say a little bit more? Ingrid is a very diplomatic person and I am not. One of the problems we have at this point is the data from Marion County. After we heard how it was obtained, basically the director from Marion County was very angry at us and was convinced that there was some sort of conspiracy going on, but basically she got a call that said, "I need numbers about how many kids waive counsel." It was one of those things where there was a colloquy and, "I just need a number, give me a number," and she gave them a number and then it gets chipped into the granite with a chisel. She didn't say it was wrong yesterday, she just said that she pulled it out of the air. My concern about that is to the extent that we are relying on information - and it may not be unique to Marion County - that isn't accurate, we may be inserting our foot in our mouth in a way that would not be a very good idea. The problem, and Ingrid and I have talked about this, is the lack of a realistic opportunity to improve the data. Nobody really has it in a form that is retrievable in a straightforward fashion, yet I am concerned about going forward when we are not sure of what we are talking about anymore. We thought we had good data, or assumed it was at least decent. There is certainly a big question about that. What is fascinating about this, because I have really been spending a lot of time on this and talking to a lot of people, is there are several courts in which what the judges say is what we said in Portland. "We don't care about eligibility standards. We don't care about any of the rest of the stuff. Every kid that is formally charged is getting a lawyer, period, end of discussion." That is not unique to Portland. That appears to be true in Lane County, Washington County, Deschutes County, and I think there are a couple of other small counties but I can't recall them off the top of my head. There are a good half a dozen and a chunk of the population in terms of these courts where this is a non-issue and then there are other courts where our data may be a bit open to question. I am worried about that and I am hoping that maybe we can come up with a way of pinning that down a little better - I don't know what it is - before we go out and say anything other than - maybe just dropping the empirical side of it and saying, "This is a constitutional right. The judges in all these counties give kids lawyers. Why don't you do it too?" and see what happens. I think there is a strategy issue now that I didn't have before yesterday.

3:26:25 I. Swenson

It seems like once we send them this entire report they can either choose to measure and correct that data, or give us a better estimate, or they can confirm that that is the best that they can do. I think with the numbers as big as they are, if counties are reporting 80 percent waiver rates, well maybe they are wrong, but they are certainly telling us that more kids than not are waiving counsel. Maybe we could wait and get additional feedback on the numbers, but I just think they are probably not going to be dramatically different. I will check back with judicial. They had indicated that they could not give us better data than that when we got the one number, but maybe there is a way to do that. On the eligibility issue, that is something that the Commission may want to look at separately. I don't want to offer a legal analysis here, but it certainly appears that it was the legislature's intent to free the court from the need to do that in juvenile cases. It is encouraged. It is a part of the process and yet the statute permits appointment without regard to eligibility for juvenile delinquency cases, for offenses that would be criminal in you were an adult. It clearly says you can appoint, period, whether or not this particular person is eligible. The Uniform Trial Court Rules also say that an adult may not receive appointed counsel if they are not eligible but a juvenile may. I think even though the standards by definition apply to juveniles as well adults, courts are free to treat them differently. Maybe it is a matter of reminding them that they can handle it that way if they prefer. To the extent that

eligibility really isn't bringing in a lot of revenue and it is undermining the purposes of the juvenile delinquency system by increasing delay and preventing appointment when parents are opposed to it, that might be a way of looking at it but we need to explore that element as we move along. We haven't given you a lot of answers today.

3:29:11 Chair Ellis

Other questions or comments?

3:29:18 I. Swenson

John, I know you wanted immediate action. I apologize because we haven't been able to get there yet.

3:29:22 J. Potter

I am glad to see that the Commissioner to my left is now agreeing with me. We just need to do it.

3:29:33 I. Swenson

The next item on your agenda is called "Management Review – Recommendation." I am sorry that Peter Ozanne isn't here today. As you know he is out of state. He and I have tried diligently to get together in the meantime, but he has been very busy with county matters. We haven't been able to do that. I did want to explore further with him the issues that came up at the last Commission meeting in terms of what the concerns are that he thinks needs to be examined. As I read the transcript, and as I recall his comments in the past, I think they relate mostly to the contracting process but at the last meeting when we discussed it, it sounded like it might be a broader interest in the whole management of the system. What I have handed you is just a summary of the responsibilities of the Commission as set forth in Chapter 151. I have highlighted them and added a little code here that shows that some of these are one time events that you have done or that have been done, and then another symbol that indicates an ongoing obligation of the Commission. I would like to go through those quickly if we have time today, and I think we do, so that you have a good view of the things that are expected of you by the legislature, that were assigned to you, and what has been done or is being done with respect to those responsibilities.

You did establish the Public Defense System and you are in the process of maintaining that system. That is your first responsibility. You were to establish OPDS and appoint an executive director. You have done those things. You submit a budget biannually and we are getting prepared to talk about that. You review and approve contracts biannually. This is an area of interest and previous discussion. I think this is where Commissioner Ozanne's concerns are centered, on this part of the process and this area of responsibility. We will come back to that one. You are to adopt a commensurate compensation classification system and a personnel plan for OPDS. As I have indicated there you do have a plan in place although the compensation is not yet commensurate as required. You are doing your utmost to get it there. Kathryn is working diligently, as the opportunity arises, to get us closer to equality with our counterparts in the system. Then you are told you should adopt policies, procedures, standards, and guidelines regarding all of the following items: financial eligibility, and as you will recall at your last retreat you had indicated that although we may want to continue the structural reviews that we have been doing in different regions in the state, we have largely been around the state the first time, at least, and so our focus should start to shift to some of your other responsibilities. We thought the first one that needed to be looked at was the eligibility standards. That is now under way and you will be receiving additional information and reports, and you can give us additional direction on how you want to proceed with regard to that issue. Then the appointment of counsel and substitution of counsel. I wanted to remind you that we have policies and procedures. They are called the payment policies and procedures. They are on our website if you ever want to peruse them. They are very detailed and they set forth, in great detail, how the appointment of counsel works and what the limitations are with respect to appointment of counsel, for example, when co-counsel can be appointed and what the process is for substitutions of counsel. In addition to those general policies, you adopted the death penalty legal representation plan. This is now one of your policies and it talks about how counsel is to be assigned and appointed in death penalty cases and what their

responsibilities are in these cases. We are considering development of a new proposal for juvenile delinquency representation. I have just indicated that that is a piece of that responsibility that we are currently examining. There certainly may be other issues related to the appointment of counsel that you may want to look at down the line. We haven't specifically identified those or had them brought to our attention at this point, but one other area of interest might be representation of children in juvenile dependency cases. As we noted in Polk County it was not the practice of the judges there to appoint. It is certainly a recommended practice nationally that children in these cases be represented. That may be an issue you want to examine further. Probate guardianship: Commissioner Welch had previously brought to your attention an issue related to the lack of representation in those circumstances, even though the implications for the people we are the subject of these guardianships are very similar to those experienced by those who are civilly committed and otherwise deprived of liberty.

Fair Compensation of Counsel: that is an area of your responsibility and so as you review the biannual budget and the allocation of funds pursuant to that budget, one of the things that you are considering is fairness of the compensation that is being provided. That is covered in our policies and procedures as well. Appointed Counsel Compensation Disputes: you are to adopt policies related to that. Again, that is part of the policies and procedures that you have adopted. Other Costs Associated with Representation: that is non-routine expenses, and the like, and routine expenses that are, again, covered in our payment policy and procedures.

Professional Qualifications for Counsel: you have adopted qualification standards. There were standards in place when the Commission assumed its responsibilities, but they have been updated, as you will recall, a number of times and most recently in May of 2009. Those are also online and you can examine them there on our website. Performance for Legal Representation: there are essentially two places to look for the actions you have taken with respect to adopting a policy on performance. One is the qualification standards, and the second is the death penalty representation plan, which provides for specific performance requirements in death penalty cases.

The Contracting of Public Defense Services - currently you would look to a couple of places to see your policies that are in place with respect to this issue. One is in the request for proposals that is sent out biennially. The last RFP is on our website. It will be revised with respect to the upcoming requests for proposals, but that is the one that was acted upon most recently. It includes all of the information about how one makes a proposal. What the requirements are for proposals. What the expectation is with respect to those, so it is a useful document to look at if you have questions about what is required for proposals for public defense contracts. Then the model contract itself includes all of the understandings between you, the Commission, and our contractors once it is executed. The most current model contract is on the website. Everybody who has a contract is subject to most of the terms of the model contract, but some contracts have special provisions and if that is ever of interest we can certainly make sure that you are aware of what some of those special agreements are, but in the absence of a special term the model contract terms apply to each and every contract. Contracting with Expert Witnesses: again, that is in the payment policies and procedures. You have responsibility for, and the authority for, any other matters necessary to carry out your duties.

You were required by the 2003 legislature to establish a peer review system for approval of non-routine expenses. You did that in 2004. That was under House Bill 2074. A report was sent to the Judiciary Committee in 2004 about the adoption of that process. You were also instructed to adopt a complaint process which you did in October of 2004. Then you are required to reimburse the State Court Administrator for costs related to eligibility verification screening. Kathryn was telling you how that transfer of funds occurs routinely. The point of showing you all this today is to give you an understanding of the scope of your responsibilities, but also to allow you to question, "Alright, what have we done here? Is there something we need to do?"

My thought is that we could look closer at any of these. We had determined that eligibility was probably the most essential one to look at quickly, then the contracting process and my thought there would be at a future meeting to bring you copies of the request for proposals and the model contract, let you examine them and look to see whether there are pieces that you think are missing or things that need to be covered that aren't, or aren't covered the way you would like them covered. It is in your name that we execute these documents and I certainly want you to understand how we go about it and what the terms of those agreements are.

The only other piece with respect to contracting is the process. In our most recent strategic plan and at our retreat last fall, we had decided to add one more step to that process because it didn't feel satisfactory to commissioners to be approving contracts without that additional step. So in addition to what we did last time, it is our plan to convene another executive session, prior to the execution of contracts, at which the proposed contracts would be presented to you and a certain series of questions would be answered for you such as, "Who applied and didn't get a contract? What happened in counties X and Y that we have been looking at over the last biennium? Is there anything extraordinary about any of these? What is the highest rate? What is the lowest? How do they compare?" After you have already seen the initial plan that Kathryn and her staff create and reviewed that and given her additional direction, before you actually execute those contracts you will get a final opportunity to have information about the details of all of the proposed contracts. Then we will convene the final public session at which you decide whether or not to approve the contracts.

I also set out for you my duties because that is part of the same statute. At this point, at least, I think we are current on all of those.

- 3:43:41 Chair Ellis      You didn't put your little symbols there. I was grateful you didn't have a third symbol. Ignored, forgotten, undone.
- 3:43:43 I. Swenson      I don't know if there is further discussion that you want to have about any of that at this point, but the idea would be to come back before you have to go through another contracting process to show you what those contracts involve and include, what the RFP looks like. It is really your policy. We haven't called it that but that is essentially what it is.
- 3:44:24 Chair Ellis      Questions for Ingrid? Thank you.
- 3:44:30 J. Potter      I like it.
- 3:44:30 Hon. Elizabeth Welch      Mr. Chairman, I am curious if there is going to be another step in the process on attorney evaluation, etc., looking at Paul? Is there something that is going to follow from the discussion today?
- 3:44:50 I. Swenson      Well, previously we had talked about whether the Commission wanted to mandate some kind of process, having some kind of process in place, and, if so, whether it would be helpful to create some model evaluation processes which could be done by the Quality Assurance Task Force. They have looked at this before so that would be a different approach if you felt that was appropriate, or if you wanted further discussion. This was kind of a way of telling you what is out there.
- 3:45:32 Chair Ellis      I think of it more as a ladder. I think we have probably done all of the mandating we are going to do for a while. I think it is one of those things that is a best practice to do it. I think it is one of those things that with all of the cross-pollination that is going on with the peer review; it will happen in a pretty wide spread way. I suppose if you end up with situations where people are just not doing it we can address those.

- 3:46:10 J. Potter My guess is it would be back on the management conference agenda again. Lane's idea about bringing in people who are on the receiving end of the evaluation has merit. It is certainly not a dead issue. I agree with the Chair we probably shouldn't be talking about mandating something specific right now.
- 3:46:33 I. Swenson You did require boards or a process. It may or may not be just an attorney evaluation process. It may be something else but at least it incorporates the concept.
- 3:46:45 Hon. Elizabeth Welch I would like to see something more happen on it. I agree with John that given the alternative of what we did vote on today, that it would be helpful to people who wanted to follow that, to have the tools that the Commission, at least, thinks are okay. Mandating probably isn't the issue so much. My concern is the external aspects of this are really a distinctly different thing than the internal effort. Running a law firm as distinct from being responsive to the other participants in the system, getting their input and all of that. That is really critical and as I said when they were speaking, my experience is that the amount of contact that happens with the bench and DHS is modest. I think that is bad.
- 3:48:18 J. Potter You have to develop a culture that allows that to happen, encourages that to happen. We can certainly come up with models, these contracts, and you can put them in the materials. We can gather others that people use, but to talk about it at management conferences and other places with contractors to say as Lane said, a lot of it is about relationships, developing relationships with the court. It is doing the informal and not necessarily the formal evaluations that is really critical.
- 3:48:48 P. Levy One of the points that somebody made, and I think I made it, at a management conference in 2007, when this was a topic there is if you are an organization that conducts these reviews and go to the system people, the judges, the DHS, and others, not only are you getting input for your own evaluations, but by doing that you are announcing to these other players that you are interested in quality. Just having a process makes it clear that there should be expectations of quality. We outlined some recommendations and expectations in our practices. I think that our Quality Assurance Task Force would be a good body to ask to recommend some forms for both PD offices and consortia. There are still PD offices that are not doing this.
- 3:50:04 Chair Ellis Anything else on that. Do you want to talk about the budget process?
- 3:50:08 I. Swenson Yes.
- 3:50:08 K. Aylward Since the last Commission meeting there was a budget kick off meeting, which is the big meeting where all the budget people in all the agencies get together and we get handed a notebook of budget instructions. I went to that and it was good and it was gloom and doom and, "Here are your instructions." They have changed the timeline a little bit. It is not a problem but we carefully schedule Commission meetings to sort of fit in with when things were due. They kind of brought things forward a little bit in one aspect. Generally we had to have hard numbers in the budgeting system by September 1. Then the notebook, the verbiage, everything else could just come along later. Usually we do it before Thanksgiving just to get it done with. That is still true. The dollars in the agency request budget have to go in the system by September 1, but there is a separate system called PICS, which is the personnel system, and if you have any personnel in your policy option packages that information needs to be entered in PICS by June 30, the essential budget level, which this time they are calling the service level that we just calculate. If nothing changes then, "Here is who we have, here is what we need, and this is what it is going to cost." We have mandated caseload within our essential budget level. Again, remember, mandated caseload is where we say, "here is how much we think the trial level caseload is going to change," so the account might need 10 million more or 10 million less. We also doing mandated caseload for the appellate division to say, "Well, we have X number of attorneys now. We see the appeals skyrocketing so we

need X times whatever. We need more.” So as far as our essential budget level, that we can take care of and it is just generated, but what I need the Commission to weigh in on is our policy option packages. We don’t have to decide at this meeting but what I am hoping you will do is have a sort of consensus on what options you would like me to work up. Then at the June meeting I can bring them back and say, “Okay, this is the price tag on this one. Here are some details.” You can make a final decision. That meeting is June 16 or 17. That gives us until June 30 if you have a policy option package that involves people. For example, last time, you will recall, we had three policy option packages. One of them had to do with reducing caseloads in juvenile dependency representation. That would have reduced caseloads by approximately 30 percent. We said that was going to be \$17 million. We had a second one to create a trial level post conviction relief unit within our office that was four attorney FTEs and one support staff. The total price tag on that was only going to be \$300,000 because people doing the work now were paid out of the account, so we don’t pay them but we do pay our employees so that is why that was small. The third one had to do with public defense provider compensation. That is the one that had three components to it. Increase the hourly rate for attorneys, increase the hourly rate for investigators, and achieve salary parity with the DAs for full-time, not for profit public defender offices. What we didn’t have last time, and we have had every biennium prior to that since I joined the club, was a policy option package for AD attorneys to have commensurate compensation with the AG’s office. I can’t remember the discussion with the Commission but staff’s recommendation was they are not going to give it to us anyway, it is too much work to work it up, I could always just change the comp plan when we can find a way to do it and we will eventually get there. In hindsight I think you probably want it on there every single time just because it maintains the record. It just reminds people, “Hey, by the way, we are not still commensurate and we should be.” We haven’t had much success with our policy option packages. We will have very little success this coming biennium, but I think the legislature still needs to be told what the needs are and they can choose to fund or not fund. It is still our obligation to say, “Wow, in a perfect world, to operate this system, we think we need to have this, this, and this. You have to put it out there. If you can talk amongst yourself and figure out what you want to have this time.

3:55:37 I. Swenson

Not today.

3:55:37 Chair Ellis

No, she wants it today so she can work it up for June. The one of those that involved personnel, as I heard, it was the PCR.

3:55:49 K. Aylward

Exactly.

3:55:49 Chair Ellis

I have wanted that for any many years as we have asked for. It has just always made sense to me to do it this way.

3:55:58 I. Swenson

Mr. Chair, I do think we have made significant progress on that issue. We do have some current contractors who we anticipate will be doing very good quality work. It may that if you revisited that you might not feel as strongly about it. That had been the recommendation for a long time, but we may be in a position where you would find that the contractors are fulfilling that role.

3:46:29 K. Aylward

We just started a new contract with a new group on January 1. We had had separate contracts with Noel Grefenson and Dick Cowan and then they put themselves together and added Tom Bostwick and John Weiner. They really just got up and started since January. They are sort of PCR central.

3:56:57 I. Swenson

We might want to go take a look at the quality of representation they are providing down the line, but it is possible that that group of lawyers could fill the very need that you were trying to fill with an in-house unit.

3:57:09 Chair Ellis I am not wedded to it being in-house. What we used to see was a scattering and it was the orphan child of what we did. It was poor quality and we were risking losing their federal rights because we had people doing it who really were not good at it. It was a bad part of our system. It is probably not that hard, since you have the package from before to work it up and in June we will decide whether to proceed or not based on what you tell us about how things are going without it. Does that sound okay?

3:57:55 K. Aylward Yes.

3:57:55 Chair Ellis I am not trying to make busy work.

3:58:00 K. Aylward No, that is actually an easy one. The one that is tricky is the parity, DA parity, because you have to see where the DAs are up to now. That is a little more complicated.

3:58:19 Chair Ellis The appellate division parity with the AG is probably not hard.

3:58:23 K. Aylward That is not hard either.

3:58:23 Chair Ellis That data has to be pretty easy. Politically, I think, it is a bad thing for us to ask for it for the appellate division and not be doing something for the PD group at the trial level. Those three I can see us wanting to do.

3:58:47 I. Swenson Perhaps not pursuing the hourly increase rate this time?

3:58:53 Chair Ellis We have so few lawyers being compensated on an hourly rate. It is not where we have been going for a long, long time.

3:59:04 J. Potter And yet if I am reading the same form you are, Kathryn, we had a part of our policy package last time funding to provide an increase in the hourly rate to pay attorneys \$70 non-capital, \$95 capital. That came to \$12 million dollars.

3:59:18 K. Aylward That is correct.

3:59:24 J. Potter So we may not have many doing the work but the number comes up to be an substantial amount of money. Is that because a large percentage of that is capital defense?

3:59:25 K. Aylward That is correct.

3:59:32 Chair Ellis Wasn't that also when MCAD was on hourly?

3:59:36 K. Aylward Yes. We had more hourly paid people.

3:59:43 Chair Ellis I think there has been a change. Any other packages people want?

3:59:57 J. Potter And the funding increase for investigators that was in the package was \$35 an hour non-capital, and \$45 in capital. That was \$2.7 million. That whole public defender provider compensation was \$21,500,000.

4:00:20 Chair Ellis Is that a request that we go forward on?

4:00:20 J. Potter I think we have an obligation to try and raise all three of those including the appellate to the AG.

4:00:35 Chair Ellis That has been done as a separate package each time, I think.

4:00:39 K. Aylward It wouldn't have to be a separate package but generally we have done it that way.

4:00:45 J. Potter It could be an element of this package. It is a public defender provider compensation package.

4:00:53 J. Stevens I hate to be ignorant about it but can they pick apart a package and take one from column A and one from column B?

4:01:01 K. Aylward They can do whatever they what.

4:01:07 J. Stevens That is kind of what I thought.

4:01:07 K. Aylward One of things you might consider – improving the juvenile dependency representation we said caseloads are too high. That is why they can't do a good job. Let's reduce caseloads by 30 percent. You could decide that criminal caseloads should be reduced as well. We have talked about this a lot. They are overworked and underpaid. However you tip those scales you want to be able say that more funding is required because one of these things is going on and it should stop. I personally like the overworked one because when you say somebody is underpaid it is like who cares.

4:02:08 J. Potter Overworked raises ethical questions as well.

4:02:12 I. Swenson I do think it is worthwhile to continue to have the juvenile dependency piece there. There remains a lot of legislative interest in that representation and there is currently an inter-branch work group that the Chief Justice chairs looking at ways of addressing the problems in juvenile dependency cases and after many months of discussion they continue to talk about compensation for court appointed lawyers as one of the chief issues with regard to the whole system. I think there would be an expectation that we would be asking for funds in that area.

4:02:54 J. Potter Mr. Chair, I don't see any problem asking for all of those items that we believe are validly defensible. We will find out in the post conviction if something has changed in that, but if that changed it would be the only one that has substantially changed from previous budget requests. Is that accurate to say?

4:03:10 K. Aylward Although as you say the hourly one would be smaller.

4:03:19 Chair Ellis If I recall we are supposed to rank these.

4:03:21 K. Aylward That is true and you are supposed to name them. There was an issue a couple of years back where somebody said, "Can't we call it something different?" After you put it in the system you can't change it.

4:03:38 Chair Ellis They are on to us. We don't have to rank them today? We can do that in June?

4:03:45 K. Aylward That is correct. Well, unless, I am - no, no that is fine. You can rank them in June.

4:03:54 Chair Ellis So that was a yes to everything.

4:04:01 K. Aylward So work up everything and maybe anything else that staff can think of.

4:04:12 Chair Ellis Okay.

4:04:18 K. Aylward We should have a better idea then of what the mandated caseload package is going to be. We are still conscious of this gut reaction thing. If it looks like mandated caseload needs to be big and you have big policy – there is sticker shock on the budget now. I don't know that that really should matter. It helps to put it in perspective if you don't need a lot for mandated caseload.

4:04:45 Chair Ellis It is my belief that we are going to be on defense not offense.

- 4:04:50 K. Aylward We are not going to get any of these anyway. You do it for the record.
- 4:04:53 J. Potter What is the current budget projection deficit? Maybe John Borden knows this. Do we have a sense in rough billions?
- 4:05:04 J. Borden 2.6 million. Just to give you an idea for the judicial branch alone, the current service level it is projected to go up 22 percent. There is one other piece of the current service level budget to promote judicial and public defense services is House Bill 2287. That was the other funds revenue with the court fees that came in. That will go back to the general fund. Is that correct, Kathryn? That alone is a \$14 million increase for the Commission's budget.
- 4:05:49 K. Aylward To replace the funds that we got from somewhere else. It will look like a big jump.
- 4:06:00 J. Potter John, I know it is too early to tell but will there be an analysis by LFO regarding the initiative petition on three percent to fund the judicial department's budget and how that might affect public defense?
- 4:06:19 J. Borden We are working on an analysis. I am not sure exactly how that will be communicated out. I don't think it will be one of our formal budget briefs, but working closely with Kathryn on some budget figures and some caseload numbers for public defense services, so we can look at things parallel with the judicial department and the branch as a whole. I am afraid I don't have a very clear answer for you. We will work behind the scenes to share our analysis with both the judicial department and public defense.
- 4:06:51 Chair Ellis I am understand there is an initiative petition in the works that would increase mandatory minimums on some sex crimes and in DUIIs. I don't know how that would impact us if that happened. That is one that if it is going to happen we ought to be anticipating what the impact would be.
- 4:07:22 J. Potter Initiative petition 13.
- 4:07:23 K. Aylward It is always tough because we have to get budget numbers in September and the elections are in November. I think in the past we make sure what we put in the narrative is. "These are the assumptions that we made in projecting the caseload. If things change we may need more or less."
- 4:07:43 Chair Ellis I think it would be helpful to the public dialogue on that petition, if it gets signatures and gets on, to know our best estimate as to what the cost impact would be for us.
- 4:07:54 K. Aylward We often get requests for fiscal impact statements for the voter pamphlet where they have to put an estimate of what the cost would be. They contact us and ask what is your piece and pull it all together.
- 4:08:20 Chair Ellis Anything else?
- 4:08:21 I. Swenson We don't meet in May. We will meet in June at the conference. It will be a busy agenda.
- 4:08:36 Chair Ellis Any other issues? If not, I would entertain a motion.

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

Meeting adjourned.

# Attachment 2

**Public Defense Services Commission**  
**Service Delivery Plan for Deschutes County**  
(June 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. From 2004 through 2009, the Commission completed investigations of the local public defense systems in Baker, Benton, Clackamas, Clatsop, Coos, Curry, Grant, Harney, Jackson, Josephine, Klamath, Lane, Lincoln, Linn, Malheur, Marion, Morrow, Multnomah, Polk, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the functioning of public defense system in Deschutes County undertaken in preparation for PDSC's public meeting in Bend on Thursday, June 17, 2010.

PDSC's service delivery planning process

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

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

Third, after considering OPDS's preliminary draft report and public comments

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

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

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

#### Background and context to the service delivery planning process

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

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

Commission has undertaken a range of strategies to accomplish this mission.

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

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

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

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

Another area of practice in which significant concerns about quality of representation have been raised by the Oregon State Bar and others is post conviction relief cases. In March 2008 PDSC heard from judges, the Department of Justice and a number of attorneys whose practice includes post conviction relief about the need for improvement in the quality of representation being provided by public defense attorneys. A work group was convened by the bar at the request of PDSC to create performance standards for attorneys in these cases. Those standards have now been approved by the bar's Board of Governors and adopted by PDSC as the standards to be observed by court-

appointed attorneys. The work group also made additional recommendations to PDSC for improving services in this area of practice. Those recommendations were presented to PDSC at its March 2009 meeting. A service delivery plan for post conviction relief cases was reviewed at the April 16, 2009 and June 18, 2009 PDSC meetings and is awaiting final action.

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

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

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

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

In light of the distinction between structure and performance in the delivery of public defense services and the relative capacities of PDSC and OPDS to address these issues, this report will generally recommend that, in the course of

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

this service delivery planning process, PDSC should reserve to itself the responsibility of addressing structural issues with policy implications and assign to OPDS the tasks of addressing performance issues with operational implications.

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

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

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

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

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations. The organizations that currently deliver public defense services in

Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d) individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county's or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

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

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

1. Not-for-profit public defender offices. Not-for-profit public defender offices operate in eleven counties of the state and provide approximately 35 percent of the state's public defense services. These offices share many of the attributes one normally thinks of as a government-run "public defender office," most notably, an employment relationship between the attorneys and the office.<sup>2</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

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

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>3</sup> As a result, PDSC expects public defender offices to share their management and law practice expertise and appropriate internal resources, like training and office management systems, with other contractors in their counties.

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

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

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<sup>3</sup> Id.

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

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

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

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

individual law firm members to ensure the delivery of quality, cost-efficient legal services, along with the external methods of training, standards and certification outlined above.

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

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

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

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

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

## **PDSC's Preliminary Investigation in Deschutes County**

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

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

In April 2010 OPDS Executive Director Ingrid Swenson and Public Defense Services Commissioner John Potter visited with stakeholders in Deschutes County. They met with or spoke by telephone with six of the seven Circuit Court judges; the juvenile court referee; the trial court administrator and members of his staff; the District Attorney, his chief deputy and chief misdemeanor deputy; the Citizen Review Board coordinator; Juvenile Department staff; two CASA supervisors; DHS supervisory personnel; a Department of Justice attorney, State Representative Judy Steigler; and directors of all four contract offices.

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

### **OPDS's Findings in Deschutes County**

#### **The Circuit Court**

There are seven Circuit Court judges in Deschutes County. Judge Michael Sullivan is the presiding judge. The others are Michael Alder, Alta Jean Brady, Stephen Forte, Barbara Haslinger, Edward Perkins, and Stephen Tiktin. The Trial Court Administrator is Ernest Mazorol. Steven Kurzer is a part time referee

who handles primarily juvenile delinquency cases. All of the judges handle criminal matters. Judge Forte is the principal juvenile judge. Two of the Circuit Court judges restrict their caseloads to what were District Court cases prior to the consolidation of the state courts<sup>4</sup>.

The court operates a number of specialty courts – a drug court, a family court (in which all cases relating to a particular family are consolidated), a mental health court and a domestic violence diversion program. There is also an early disposition program in the county.

#### District Attorney

Long term Deschutes County District Attorney Mike Dugan was defeated in the May election and will be replaced by Patrick Flaherty. There are currently 18 deputies in the District Attorney's office. Two deputies are assigned to handle juvenile matters and their offices are located at the juvenile facility located several miles from the county courthouse.

#### Procedure in Criminal Cases

The court uses a hybrid docketing system. While cases are assigned to individual judges at the time of filing, they do not actually go to the assigned judge until after the entry of plea. The five felony judges alternate handling the arraignment docket on a weekly basis, with out-of-custody arraignments in the morning and in-custody arraignments at 1:30 daily. All in-custody arraignments are done by video from the jail. Attorneys are present in the courtroom and can communicate with incarcerated clients over a secure telephone connection. The judge assigned to handle arraignments also handles changes of plea<sup>5</sup>.

Misdemeanor cases are assigned to the two "District Court" judges, with odd numbered cases going to one judge and even numbered cases going to the other. These two judges alternate between hearing trials and hearing short matters. Delays in resolution of misdemeanor cases resulted in a backlog of unresolved cases that required the court to bring in an out of county judge to help clear the docket<sup>6</sup>.

Both felony and misdemeanor cases may be set over by either side.

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<sup>4</sup> This system may be changing at the end of 2010 upon the retirement of one of the "misdemeanor" judges; other docket changes may also be considered.

<sup>5</sup> This system was implemented several years ago at the request of both the prosecution and the defense in order that attorneys could have all of their criminal appearances in a single courtroom.

<sup>6</sup> There was a difference of opinion about the cause of the backlog which resulted in cases being set out five and six months after the entry of plea, the defense attorneys indicating that the deputy district attorneys who appeared did not have authority to settle the cases and the district attorney's staff indicating that the assigned defense attorney were often not present.

Obstacles to resolution in felony cases were reported to include: not having a deputy district attorney present with authority to settle the case, defense attorneys not meeting with their clients<sup>7</sup>, defense attorneys not making counter offers to the offers made by the deputy district attorney at the time discovery is provided.

An entry of plea date is set in both felony and misdemeanor cases within 21 days after the arraignment for in-custody defendants and 35 days after arraignments for out-of-custody defendants. At the entry of plea hearing a case may be resolved, set for trial or continued. Settlement conferences are scheduled frequently. Cases are sometimes settled on the day of trial. Trial rates in Deschutes County are below average<sup>8</sup>

## Procedure in Juvenile Cases

### Delinquency cases

The juvenile court referee is assigned to hear delinquency cases one and one-half days a week in a courtroom at the juvenile facility. Attorneys are generally present at initial hearings. An “admit/deny” hearing is scheduled two weeks after the shelter hearing.

Juvenile caseloads are declining according to the juvenile department. Five positions in the detention center were terminated in April. A portion of the 56 beds in the Deschutes County detention facility are rented to other counties and some are used to house juvenile Measure 11 defendants. The county has not been required to reduce juvenile department probation staff, however.

One juvenile department team handles only formal accountability agreements (FAAs). According to a spokesperson for the juvenile department, the county seeks to divert as many youth as possible to FAAs and to informal diversion programs operated by the Bend City Police, the Redmond City Police and the cities of Sisters and LaPine. Minor offenses such as Theft II, Assault IV and Minor in Possession are handled informally and do not require involvement of

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<sup>7</sup> One person noted that the jail is four miles from the courthouse making it more difficult for defense attorneys to meet regularly with clients.

<sup>8</sup> In 2009, according to the State Trial Court’s “Cases Tried Analysis,” 3.4% of felonies and 2.2% of misdemeanors went to trial, compared to a statewide average of trials in 5.7% of felonies and 4.4% of misdemeanors.

juvenile department staff<sup>9</sup>. Probation violations are prosecuted as motions to revoke probation.<sup>10</sup>

It is rare for a juvenile in Deschutes County to waive counsel<sup>11</sup>.

Trial rates in delinquency cases are above statewide averages.<sup>12</sup> In sex offense cases, a procedure has been developed in which counsel for the youth obtains a sex offender evaluation. Depending on the evaluator's conclusions, the report may be provided to the state. Through the use of a "conditional postponement" it is often agreed that the court will adjudicate the youth on one or more non-registerable offenses and the youth will make factual admissions to one or more registerable offenses with disposition being withheld on the registerable offenses. Successful completion of probation, including sex offender treatment, results in dismissal of the registerable offenses.

### Dependency cases

In Deschutes County the Department of Human Services prepares dependency petitions and the District Attorney's office files them. Preliminary hearings occur in the afternoon and are scheduled only as needed. The Oregon Judicial Department reported that there were 77 petitions filed in Deschutes County in the one year period ending September 30, 2009. Attorneys are appointed for both children and parents in almost all cases according to DHS. No discovery is provided prior to the hearing and usually only the petition and the temporary custody report are available. DHS staff indicated that initial hearings are never contested. A custody review hearing and settlement conference is generally scheduled for several weeks after the initial hearing. The great majority of cases are resolved at this hearing or at a third hearing, if needed. Statistics for the year ending September 30, 2009 indicate that 11 cases were tried.

The court and the Citizen Review Board (CRB) both conduct regular reviews in dependency cases. The Judicial Department reported that there were 555 review hearings in the year ending September 30, 2009 in Deschutes County,

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<sup>9</sup> Statewide Juvenile Justice Information System statistics indicate that in calendar year 2009, approximately 55.8% of youth were diverted in Deschutes County (compared to 34.0% statewide). However, 43.4 percent of youth had cases dismissed or not petitioned statewide compared to only 22% in Deschutes County. The percentage of youth adjudicated in Deschutes County (21.3%) was nearly identical to the statewide percentage of 21.2%. See: [http://www.oregon.gov/OYA/jjis\\_data\\_eval\\_rpts.shtml# Dispositions](http://www.oregon.gov/OYA/jjis_data_eval_rpts.shtml# Dispositions).

<sup>10</sup> While informal sanctions are often used to address probation violations, in 38 cases in 2009 a total of 728 days of detention were imposed post adjudication with an average length of stay of 19.2 days.

<sup>11</sup> Email from Bob LaCombe, Division Administrator, Deschutes County Juvenile Community Justice and testimony of Judge Steven Forte at the OCDLA Spring Juvenile Conference, April, 2010.

<sup>12</sup> Oregon Judicial Department statistics indicate that in the one year period ending July 30, 2009, 29 of the 402 delinquency petitions were resolved by trial (approximately 7%), compared to approximately 4% statewide.

which is a ratio of approximately seven review hearings to each new dependency case filed<sup>13</sup>. The Deschutes County District Attorney's Office appears at these hearings.

Contested trials in termination of parental rights cases are reported to be rare in Deschutes County<sup>14</sup>. Most of the cases that proceed to termination are family court cases in which an array of services have already been provided in an effort to reunite the family.

Deschutes County has an active CASA program.

### Civil Commitment Cases

Attorneys sitting as pro tem judges usually hear civil commitment cases in Deschutes County. Most of these hearings occur at the courthouse although some are held at St. Charles Hospital. A delay in processing the required paperwork in these cases has now been addressed. County Counsel represents the state in commitment proceedings.

### Specialty Courts

Deschutes County has a relatively new family drug court that opened in 2007. Judge Brady is the family drug court judge. There are 21 clients in the program that requires involvement of family members. The court is directed primarily at women, many of whom are single parents. The family court drug team meets weekly.

The county also has a family court that was started in 1994. It was the first pilot site in the country and has been written up as a best practice model by a number of organizations including the National Center for State Courts and the National Institutes of Justice. All of the judges have cases that have been designated as family court cases. Currently each judge has between 15 and 20 cases<sup>15</sup>. Participation in the court is not voluntary. Cases are subject to family court treatment if members of a family have multiple cases before the court, at least one of which is a juvenile dependency case. Once the cases are "bundled" and sent to one judge, any new cases will also be transferred to that judge. Active involvement of the court requires that family members be willing to execute releases and waive confidentiality. If they choose not to, the cases remain bundled but are processed in the traditional manner. Active family court cases involve frequent court hearings and occasional family meetings with participation by multiple treatment providers. Brie Arnette is the Family Court Coordinator.

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<sup>13</sup> The statewide ratio according to Oregon Judicial Department data is less than 2 review hearing for every new dependency petition.

<sup>14</sup> One state's attorney could not recall a termination trial in the past five years.

<sup>15</sup> As of May 25, 2010 a total of 302 families had been assigned to the court. Currently there are 93 active cases.

The county also sponsors a mental health court. Jail staff usually makes the initial referral of a potential mental health court candidate to the district attorney who determines whether the person appears to meet program admission criteria of: a pending non-violent felony or misdemeanor with a history of mental health issues. Judge Tiktin presides over the court. Participants appear twice a month. Successful completion of the program results in a dismissal of the charges. The Mental Health Department recently received a grant that will permit it to enhance coordination. The program can serve a maximum of 25 clients.

A domestic violence diversion program is overseen by Judge Sullivan. Persons charged with both felonies and misdemeanors are eligible to participate. The court meets every two weeks. A diversion offer is initially made by the district attorney. If the defendant accepts he or she must enter a guilty plea and agree to get into a batterer's intervention program within 30 days. The case is then continued for 60 days to confirm that the defendant has entered the program. The program lasts approximately 18 months. The defendant is returned to court upon successful completion of the program or if diversion conditions are violated. Successful completion results in a dismissal of the charges. Approximately 50 to 60 program participants are monitored by the court and approximately 100 by probation and parole.

There is an early disposition program in the county. There were approximately 500 EDP cases last year. Most cases involve minor property crimes such as Theft II. EDP permits the district attorney's office to focus on other offenses, including domestic violence cases and DUIs. According to Brendon Alexander, the attorney with whom PDSC contracts to handle these cases, there are between six and sixteen defendants a day referred to this program. Discovery is provided a day or two before the hearing; defendants plead guilty and are ordered to complete 8 hours of community service. Mr. Alexander describes his role as an advisor rather than an attorney<sup>16</sup>. He meets with the defendants as a group and describes how the court works. If they have any concerns about the process he tells them that they can contest the charges if they wish or take a brief continuance to consider their options.

Current funding does not permit the county to create a special DUII court or a veteran's court, both of which have been explored.

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<sup>16</sup> He acknowledges that it is a "close" ethical question whether he has an attorney/client relationship with the participants. PDSC's guidelines for representation in these courts (which are attached as Exhibit A) assume an attorney/client relationship. The district attorney expressed willingness to include felony drug possession offenses and Theft I cases in the early disposition program but Mr. Alexander objected.

## Public Defense Providers

PDSC contracts with four providers for non-death penalty cases in Deschutes County: Crabtree and Rahmsdorff, the Bend Attorney Group, DeKalb, Brenneman & Brenneman, and Alexander and Associates.

The Crabtree and Rahmsdorff firm was established in 1981. It is a non profit public defender office with 13 attorneys and a number of non-attorney employees including investigators, administrative and clerical staff. The firm represents public defense clients in both Deschutes and Crook Counties. The current contract includes 3,640 Deschutes County cases per year, including all major case types except aggravated murder, and includes mental health court cases and family drug court cases. The executive director, Tom Crabtree, serves at the pleasure of the office's board of directors, which also reviews and approves office policies, budgets and contracts. The board's outside members include representatives of the local business community.

The Bend Attorney Group, a consortium of 9 attorneys, contracts to handle 1,914 cases per year, including family drug court cases and all major case types except murder and aggravated murder. Jonathan Pritchard is the administrator. The consortium formed a board of directors over a year ago. Members include a civil attorney, a deputy district attorney from another county, a criminal attorney in private practice, and a consortium member. The board hires the executive director, approves contracts, survey's judges and district attorneys, and reviews complaints and quality assessments.

Dekalb, Brenneman & Brenneman is a law firm with five attorneys that contracts for 1,537 cases per year including primarily criminal matters, a small number of juvenile dependency review hearings and cases in the mental health court and the family drug court. Jacques DeKalb is the senior partner in the firm and manages the contract.

Alexander and Associates is a law firm with three attorneys which contracts for 542 cases per year including all major case types except aggravated murder and contracts to handle the early disposition program. Brendon Alexander manages the contract.

Non-contract attorneys are not needed on a regular basis but there are some Bend attorneys in private practice who are willing to accept occasional public defense cases and one of the contractors in Crook County also accepts Deschutes County cases when necessary.

## Comments regarding Local Public Safety System and PDSC Providers

### Criminal Cases

OPDS received comments from judges, court staff, district attorneys and defense lawyers about court scheduling issues. There was no consensus regarding the causes of scheduling conflicts. The judges noted that felony trials are sometimes delayed for long periods because the appointed attorney is not available. They said that some contractors handle cases more expeditiously than others and are more cooperative with the court's effort to make the process more efficient. One lawyer is so contentious that he doesn't settle cases when it would be in his client's interest to do so. The judges said that there is a need for more attorneys qualified to handle major felony cases. Court staff noted that attorneys don't usually have calendars in the courtroom. If they did it would help to prevent scheduling conflicts.

District attorneys said that the defense bar moves slowly and has no real incentive to resolve cases quickly. Some of the attorneys will make an affirmative effort to negotiate, others won't. Defense attorneys don't always meet with their clients before settlement conferences and the need to confer with victims limits the state's ability to negotiate at the last minute. The district attorneys said that because all of the judges handle criminal cases lawyers often have multiple appearances, making scheduling conflicts common.

Defense attorneys point to the judges' individual dockets as the principle scheduling challenge and also note that it is difficult to resolve cases at settlement conferences when the deputy district attorney who is present lacks the authority to amend the offer. Scheduling has improved in misdemeanors since there is now a deputy in charge who has the authority to settle cases.

### Representation of parents

Juvenile dependency system representatives reported that most attorneys provide good representation to parents but some are more skilled than others at collaborative efforts on behalf of their clients in family court, with some appearing to prefer the adversarial model of representation. Several interviewees said that some contractor attorneys are not meeting with their clients before court, necessitating the rescheduling of hearings. Individual attorneys were identified as providing particularly zealous representation and others as providing relatively apathetic representation.<sup>17</sup> It was said to be unusual for all but two of the attorneys to have any contact with DHS between court hearings. One state's

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<sup>17</sup> One interviewee said that if he were a public defense client and either of two attorneys he identified were appointed as his counsel, he would sell his dog to be able to retain his own counsel. Information about the reported performance of particular attorneys was provided to contract administrators in each office.

representative said that sometimes attorneys are too passive and sign off on terminations without a fight. Attorneys are said to use the CRB process well.

### Representation of children

Children's attorneys are visiting with their clients more often than they did in the past. Other interviewees reported that they are generally on top of their cases. Some attorneys exceed expectations in the frequency of their contact with their child clients and the strength of their advocacy. Teens have expressed appreciation for their attorneys' efforts to assure them a voice in family court. One interviewee said that many attorneys are not adequately trained in how to communicate with child clients. They also don't meet with clients as often as they should. One dependency system representative said that adoption is a "black hole" in Deschutes County and urged that children's attorneys make a greater effort to see that adoptions are finalized.

### Delinquency cases

State representatives note that defense attorneys often fail to meet with clients before the admit/deny hearing, often requiring that the hearing be reset. Some attorneys also fail to return phone calls from clients and their parents. There are attorneys who are prepared and do excellent work and others who "are just there for the pay check."

## **OPDS's recommendations for further inquiry at PDSC's June 17, 2010 meeting**

Based on the information provided to OPDS during meetings and telephone conversations with justice system stakeholders, OPDS recommends that the Commission consider the following in developing a service delivery plan for Deschutes County.

### The Structure

Under the system currently in place, PDSC contracts with four providers in the county. The variety of provider types allows for some of the benefits and involves some of the weaknesses noted in the description of public defense providers at pages 6 to 9 of this report. A non-profit public defender office serves as a recruiting and training resource for the county, the consortium attorneys can represent multiple parties in a single case without conflicts, the law firms can provide special expertise such as the high quality representation in serious cases reportedly provided by the DeKalb, Brenneman, Brenneman firm and the ability of the Alexander firm to represent clients described by court staff as "difficult."

Currently, the caseload is declining in the county. Over time it is possible that fewer providers will be needed although there appears to be general agreement that there is a need for more attorneys qualified to handle serious felony cases. Attorneys are still described as “stretched thin” and many interviewees acknowledged that as a result of the hybrid docketing system attorneys appear to be scheduled in multiple places at the same time, a situation that is aggravated by the fact that the jail and the juvenile court are located several miles from both the county court house and the law offices of most of the attorneys.

Commissioners might wish to question providers at the hearing on June 17 about ways in which the providers and PDSC could recruit and retain more attorneys skilled in serious cases.

### The Juvenile Dependency System

In Deschutes County, as elsewhere, representation at shelter hearings, even where it occurs, is compromised when attorneys don’t have adequate notice or access to discovery and when they aren’t able to meet with their clients until the hearing is in progress.<sup>18</sup> These are difficult problems to address since shelter hearings must occur within 24 hours of removal meaning that there is very little time to give notice to attorneys, to prepare and provide discovery to attorneys and to expect attorneys to meet with potential clients to prepare for the hearing. Critical decisions are made at shelter hearings that can shape the final outcome of the case. Some counties have had success in providing meaningful representation at this stage but they are a small minority.

Even if representation at the initial hearing is undermined by circumstances beyond the attorneys’ control, and efforts to modify the system have been unsuccessful, by the time of the second hearing it is reasonable to expect that attorneys will have met with their clients and discussed their cases and determined whether an expedited hearing should be requested, whether more time for investigation is needed, whether the case is likely to be settled or set for trial. The failure to have met with the client by the time of the second hearing in dependency cases is often explained by the attorneys in Deschutes County as well as attorneys in other areas of the state as the failure of the client to respond to a letter directing the client to call the attorney’s office and schedule an interview. PDSC’s contracts include the following requirements regarding initial interviews with clients:

#### **7.1.4.1 In-Custody Initial Interviews**

Contractor shall, whenever possible, speak to and conduct

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<sup>18</sup> Standard 3.5 “Obligations of a Lawyer Regarding Shelter Hearings and Pretrial Placements,” Specific Standards for Representation in Juvenile Dependency Cases, 2005 revision, Principles and Standards for Counsel in Criminal, Delinquency and Dependency Cases requires active representation of the client’s interests at this hearing.  
<http://www.osbar.org/docs/resources/juveniletaskf>.

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.

Paragraph 7.1.4.2 appears to sanction a minimal effort by the lawyer to communicate with the client by notifying the client of what the client must do to schedule an interview time. It appears that both the client and the system would benefit from a greater effort on the part of the attorney to make contact with the client. Demands on public defense lawyers' time are already great. Initiating contact with the client as well as visiting with some child clients, monitoring compliance by both the client and DHS with the service plan as well as many other components of good representation in dependency cases can be performed by a well trained legal assistant or social worker. Several of PDSC's contractors have hired such professionals to supplement the work of the attorneys. PDSC could consider a policy option package in its '11 – '13 budget proposal to provide additional funding in juvenile dependency cases to either lower the caseloads of the attorneys or add support staff to assist them.<sup>19</sup>

### EDP Representation

Commissioners may want to talk with some of the invited guests at the June 17 meeting about the Deschutes County EDP program. While the program does not conform to PDSC's Guidelines for the operation of EDP programs, some members of the local justice system consider the program a success and urge that providing direct, conflict free representation for each participant is not necessary and that both the state and the clients are satisfied with the way these cases are being handled. Assuming that Mr. Alexander's relationship with the defendants in these cases is not an attorney/client relationship under applicable ethical rules, PDSC may want to consider whether it should be compensating a public defense contractor for participation in this process or whether someone other than a public defense attorney should be making the "orientation" presentation.

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

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

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<sup>19</sup> The Juvenile Dependency Interbranch Workgroup is considering support for a similar proposal. The workgroup includes representatives from all of the agencies involved in juvenile dependency cases.

# Attachment 3

**CLACKAMAS COUNTY UPDATE AND PROPOSED SERVICE  
DELIVERY PLAN– June 2010**

(1) SUMMARY OF INFORMATION AND TESTIMONY RECEIVED BY PDSC  
FROM AUGUST 2009 to JANUARY 2010

Information from previous PDSC meetings relating to the public defense delivery system in Clackamas County is available on the Commission's website: <http://www.oregon.gov/OPDS/docs/Agendas/03-04-10.pdf>. The most recent summary appears on page 1 of Attachment 1 to the Agenda for the March 4, 2010 PDSC meeting.

At its January 28, 2010 meeting the Commission continued its discussion on Clackamas County and received testimony from Ron Gray and Brad Jonasson, from CIDC and from Marty Cohen representing IDI. They reported as follows:

Ron Gray introduced Brad Jonasson, the chair of CIDC's board, and reported on what had occurred since PDSC's August 2009 discussion on Clackamas County. He said they had completed a judicial survey on the quality of representation provided by all of the consortium attorneys. Board members met with each attorney and discussed the information received from the survey about the attorney's performance. When the board believed that attorneys needed to improve the quality of their representation, work plans were made with follow up reports to be provided. In some cases if attorneys did not progress it was expected that they would be terminated from consortium membership. CIDC decided to add an outside board member and selected retired Judge Raymond Bagley. Another CIDC member had recently been appointed to the bench and the consortium was considering filling that vacancy as well as the one created by a previous judicial appointment. There were two apprentice lawyers receiving training. One board member had volunteered to accompany Ron Gray to board meetings and other events in order to learn more about his administrative duties and potentially be available to succeed him as the administrator.

Chair Ellis inquired whether the CIDC board had considered adding a fully independent board member.

Ron Gray responded that there had been discussions at a number of board meetings over the qualifications for membership on the board. They decided to add Judge Bagley. He said that some members had questioned the value of having outside board members who are not familiar with the requirements of good representation, and some questioned why change was needed if CIDC was being held up as a model to others. There had been discussions at board meetings on this issue and PDSC might have to mandate the composition of boards if it is not satisfied with the members chosen by the contractor.

Commission members discussed some of the benefits of having truly Independent members such as bankers and business people. Ron Gray said the CIDC board had previously included a business lawyer. He could not think of a circumstance in which the board needed advice on issues that outside members might be more familiar with. When necessary, CIDC members had hired outside legal counsel to advise them on particular issues.

Brad Jonasson said that he understood the value of having public members on Boards and felt that the CIDC board had taken a major step by recruiting Judge Bagley.

Ron Gray said that with the time and effort that went into the attorney evaluation process the board had not had time to update its bylaws but intended to do so. He also explained how he and the board had responded in the past to reports of lawyers not providing proper representation.

Judge Steven Maurer said that the court was very satisfied with the work of CIDC. The lawyers in the group are capable, competent and committed. Since PDSC's last visit to the area there had been discussion about the composition of the board and other issues. CIDC took those matters to heart and Ron Gray spoke to Judge Maurer at length about them. Judge Maurer had suggested the addition of a senior judge to the board. CIDC surveyed all the judges on the level of competence of CIDC attorneys. This survey represents a more formal process than any used in the past to monitor quality.

Commission Potter inquired about how the court assesses quality. Judge Maurer said that the judges observe the level of professionalism in the relationship between the defense and the prosecution and obtain information about the quality of defense representation not only during trials but during plea discussions in which the court must either approve a plea agreement or not. Sometimes the court does not approve resolutions that appear too favorable to the defense. Early preparation, investigation and negotiation benefit the client because the state's offer is more generous at beginning of the case. Attorneys in Clackamas County are also effective at the disposition stage, bringing new information and recommendations to the court and advancing the client's position in a way that does not ask the court to accept unreasonable options. He said that CIDC had been doing a good job of bringing in lawyers and mentoring them. They brought in new lawyers in the past who are maturing and developing well. Judge Maurer said he thinks that when vacancies do occur, it would not be difficult to fill those positions. The group has significant drawing power.

Marty Cohen said there had been some structural changes in the Clackamas County juvenile court. Judge Darling was no longer hearing dependency cases; Judge Van Dyk was handling them. Attorneys were required to appear in two different courtrooms now, which was taking up more of their time. A meeting

had been scheduled with all the stakeholders in juvenile dependency cases for the first week in February to discuss court scheduling and other issues, including setting trial dates that did not conflict with the juvenile court schedule. The juvenile consortium had been recruiting outside board members. It wanted to include a member with a medical or education background but had been unsuccessful in recruiting one. He said that the consortium had only ten members and did not want to expand its board too much. The juvenile delinquency caseload was continuing to fall but the number of dependency cases had been increasing. The consortium needed to add attorneys to reduce workload since some members were taking fewer cases leaving the others with heavier caseloads, but they hadn't been able to retain new attorneys because of the low level of pay. He said that the consortium was experimenting with having two lawyers represent only children in an effort to improve the quality of representation for children. An online evaluation system had been created for the consortium as a whole but an evaluation process for individual attorneys had not yet been finalized.

Judge Deanne Darling said that the juvenile consortium had been very responsive to the concerns she had raised with the Commission. Practice appeared to be improving. The group needed to add some more members, however and, since many of them had been doing this work for 30 years or more, replacements would be needed but two of the younger lawyers they mentored declined to join the consortium because of the compensation. The Commission should look at the payment structure for juvenile dependency cases to see if there isn't a better approach to paying attorneys than the system currently in place. Permanency hearings require a lot of preparation and consume a large amount of court time. Those hearings may not be receiving proper recognition. Members of the group believe they are not being paid for the things they should be paid to do. She said there were fewer delinquency cases than in the past which might be due to the county's efforts at prevention and family involvement.

Further discussion on a service delivery plan for Clackamas County was deferred until resolution of the question about whether or not boards of directors should be required, and, if so, what the composition and responsibilities of those boards should be.

At its April 22, 2010 meeting PDSC adopted a policy statement requiring, with respect to contracts beginning in January of 2012, that every public defense contractor (a) be governed by a board of directors with at least two independent members or, in the alternative, (b) demonstrate to PDSC's satisfaction that the contractor has appropriate financial safeguards and quality assurance mechanisms in place.

## (2) PROPOSED SERVICE DELIVERY PLAN FOR CLACKAMAS COUNTY

### Comments

The public defense delivery system in Clackamas County relies on a single provider for criminal defense representation and a single provider for juvenile and civil commitment representation. Lack of competition does not in itself, appear to have negatively affected the delivery of public defense services in the county but when the sole provider is a consortium it is more likely than other types of providers to lack a system for evaluating the work of member attorneys, a method for addressing underperformance and mechanisms for admitting new members and preparing for transitions in leadership.

Overall the representation provided by members of CIDC is rated as “good,” and representation by IDI as “good to excellent.” The quality of representation provided in individual cases, however, is reported to vary from one attorney to another in both consortia.

Neither of these contractors, at the time of the Commission hearing in March of 2009, had in place a process for systematic evaluation of the work of their attorneys and both had sometimes failed to address significant performance issues even when they were well known. After the March 2009 hearing both contractors took some very positive steps to address attorney performance. At the January 28, 2010 PDSC meeting it was reported that CIDC had nearly completed its initial round of attorney evaluations. IDI had begun research on an evaluation process and implemented some quality improvements. One attorney was terminated from IDI consortium membership. Two attorneys began specializing in child representation as part of a six-month pilot project. IDI members met with Judge Darling, with CASAs, and with DHS to discuss ways of enhancing their effectiveness as community partners.

It is hoped that these positive developments will continue. PDSC has invited representatives of both consortia to report on the results of these efforts at the PDSC meeting on June 17, 2010. Assuming that their reports indicate that they have put in place effective quality control mechanisms, and that they both continue to provide avenues for admission of new members and processes for filling vacancies in their membership and potentially in their leadership, the principal concerns identified in the initial report will have been addressed.

### Recommendation

While it will be critical for both consortia to ensure that they have the capacity to “evolve” to meet changing circumstances, the current public defense delivery system in Clackamas County appears to be functioning satisfactorily and no changes are currently recommended.

# Attachment 4

## Marion County – Update on Service Delivery in Criminal Cases

June 17, 2010

### Prior Reports

The Public Defense Services Commission initiated a review of service delivery in criminal cases in Marion County in early 2005. In February of 2006 it issued a report and service delivery plan that included the addition of another provider, a non-profit public defender office, to supplement the work being done by long time Marion County contractor, MCAD (Marion County Association of Defenders). A copy of the final service delivery report may be found on PDSC's website: <http://courts.oregon.gov/OPDS/PDSCReports.page>.

After finalizing its service delivery plan, PDSC received periodic progress reports on the creation of the public defender office and on the performance of both contractors on September 14, 2006, October 12, 2007, and January 22, 2009. Copies of written reports and testimony from these hearings may be found on the PDSC website.

The Public Defense Services Commission last reviewed the delivery of services in criminal cases in Marion County on January 22, 2009.<sup>1</sup> Following are excerpts from the minutes of that meeting.

Chair Ellis introduced the discussion of service delivery in Marion County by noting that it appeared that there had been two positive developments that had arisen out of the changes implemented since 2005, the opening of the public defender office (PDMC) and improvements made by the Marion County Association of Defenders (MCAD).

Tom Sermak introduced the current and former chairs of the public defender's Board of Trustees, Bill Copenhaver and John Hemann. The office began taking cases in July of 2007 and in the calendar year 2008 represented approximately 30 percent of the indigent criminal defense clients in the county. The attorneys have had good success in trial. The office has worked effectively with the District Attorney, the Sheriff and with MCAD. He described the system for receiving appointments in new cases and said that the office continues to work on its calendaring system and on getting its lawyers to court on time. Board members have participated in discussions with the court about this issue and the office has enlisted the assistance of the Professional Liability Fund. Bert Putney with the Southern Oregon Public Defender office will be consulting with PDMC about it as well. A training manual has been developed. New attorneys are assigned only misdemeanors at first. Mr. Sermak identified each of the attorneys employed by the office and their prior legal experience. He said that he had not been able to establish pay equity between the attorneys in his office and deputy district attorneys except at the entry level and that this had been a detriment to his recruiting efforts. The office has been able to hire a number of staff members and one attorney who speak Spanish. Mr. Sermak would like to add three or four lawyers in the future. Mr. Copenhaver described the composition of the board and said that it has been very active and is a good steward of public funds. He said that Tom Sermak receives input from the board without defensiveness. Mr. Hemann said that it had been a challenging period for the new office but that Tom Sermak is doing a good job and

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<sup>1</sup> PDSC also reviewed service delivery in juvenile cases at the 2009 meeting. OPDS will be scheduling a site review of the juvenile consortium in the near future and, therefore, no update is being presented at this time.

has managed to create a functioning law firm in only eighteen months.

Paul Lipscomb said it had been a year of significant change at MCAD after the former executive director resigned. He became the executive director in July of 2008. The MCAD board set a goal of excellence that has been communicated to members who were already very motivated to make positive changes. It was a shock to the organization to lose 25% of its market share. One of Judge Lipscomb's goals is to stem the further loss of market share. MCAD currently has 52 members. The group also experienced a significant change in its compensation system, going from an hourly rate to a unit rate. MCAD is not currently adding new members although six to eight newer lawyers are about to complete their probationary periods and some of them will be seeking approval to handle felony cases. The work groups that were established in 2005 to improve quality continue to meet on a regular basis. Four MCAD members are currently on or developing professional improvement plans. MCAD would like to become the best indigent defense provider in the state. Mr. Lipscomb recommended that the relative shares of the caseload handled by MCAD and the public defender office remain the same in the next contract cycle. This would be a recognition of the progress made by MCAD and would allow the public defender to mature as an organization.

Olcott Thompson said that although the criticisms of MCAD that were made in 2005 were deserved a lot of growth has occurred and is continuing. The use of individual court dockets in Marion County contributes to the problem.

Paul Lipscomb has been working with the court to address issues identified by the judges and court staff. He has met with the judges as a group on two occasions and meets with individual judges as well. He provided the bar's Performance Standards to all MCAD members and suggested that each work group review them.

Prof. Mike Weiss teaches at Willamette Law School and is a member of the MCAD board. He believes that commitment to quality is an important goal of both the membership and the board.

Paul Lipscomb said that the PDSC's challenge is to insist on quality representation even in an underfunded system. It will be very difficult to replace experienced lawyers when the pay is not commensurate with the level of experience needed.

### Provider reports

Attached to this document are reports from each provider, outlining developments in the last year. Exhibit 1 is the Marion County Association of Defender's report and Exhibit 2 is the Public Defender of Marion County's report.

### Comments from the court

Presiding Marion County Circuit Court Judge James Rhoades advised all of the judges at a monthly judge's meeting that PDSC would be reviewing the work of these two offices in June and asked that they contact OPDS staff with any current concerns or comments.

Three judges submitted comments. One judge reported that both providers are doing well, that the "dead wood" has been removed from both. It appears that the lawyers have stepped up their determination to be good lawyers. This judge has no complaints. Things are going well.

A second judge said that MCAD had improved 1000%. They had terminated one lawyer who wasn't providing high level service and three or four other lawyers were put on probation. There was a time when lawyers were missing court appearances. That has changed. Attorneys in both groups have been well trained to call if they are going to be unavoidably detained in another courtroom. Some issues remain with individual lawyers. Some lawyers are growing and progressing but others struggle. Both providers have attorneys who sometimes miss critical issues, but the same is true of some retained lawyers as well.

Both MCAD and public defender lawyers are now covering for their colleagues when necessary. If a lawyer fails to appear, someone will usually stand in for that lawyer.

On the whole, things are going well. Communication between the public defender's office and the court has improved.

The third judge said that quality still varies from one attorney to another but lawyers are covering for each other more often.

MCAD's quality improvement process is working. One of the attorneys on probation probably will not get a contract.

The court still feels that it is sometimes necessary to appoint an attorney other than the attorney who would be appointed in the normal course in order to ensure that the defendant receives appropriate representation.

# Exhibit 1

# Annual Report of MCAD to OPDS/PDSC 2010

## Introduction

The year 2009 was primarily a year of consolidating gains and institutionalizing previous changes and improvements and MCAD. However, substantial additional progress was made as well.

## Growth and Development

- 1) Our still new “Quickbase” billing system continues to work well. We have tweaked the system a bit over the past year to better serve the needs of our attorneys as well as the OPDS, together with our own office staff.
- 2) Both the Board and the membership have continued their commitment to excellence. This commitment is reflected in our new completed Mission Statement, Business Plan, and Strategic Vision Statement. Both the Board and the Membership have been enthusiastic about our continuing evolutionary progress throughout this process of change and renewal.

A complete copy of the above documents is attached to this report. One of the aspects our Business Plan is worthy of particular emphasis in this setting; that plan reflects the Board’s decision to fully implement, during the last contract period, each of the “Best Practices” recommended by the Quality Assurance Task Force of the Office of Public Defense Services. (The details of that implementation are set forth in the Business Plan as attached.)

## Annual Report of MCAD to OPDS/PDSC | 2010

- 3) The Work Group and Mentoring Programs adopted by MCAD over the past few years continue to work well. Our last group of new lawyers has now completed its probationary service and all but one was admitted to full membership this Spring. (Briefly, each member is assigned to a workgroup which meets monthly to discuss cases and performance improvement issues, and each new member still on probation works with his or her mentor on a more frequent basis.)
- 4) This Fall, our board initiated a renewed emphasis on quality control of our member's professional performance as part of our commitment to excellence. We recently completed a judicial survey of all of the Marion County Circuit Court Judges on our member's professional performance. As a group, our members rated quite well: an average total score of 4.1 on a scale of 1-5. However, a few lawyers were identified as having some significant performance issues and they are now either no longer under contract with MCAD or are working through Professional Improvement Plans that they have developed in conjunction with the Executive Director. Their plans will be completed under the supervision of their individual mentors and their work groups, and this process will be monitored by the Executive Director.

Additionally, all of our members were required to submit a new application for a new contract. As part of the application for a new contract with MCAD, each of our members committed to following the Oregon State Bar Professional Standards for Criminal Cases, and to have their performance assessed in accordance therewith.

## Annual Report of MCAD to OPDS/PDSC 2010

- 5) A copy of our judicial survey instrument, together with a compilation of average overall results is attached for your review. (These results have been shared with the judges and with the membership as well.
- 6) With our new two year contract now in place, and with the reductions in members under contract with MCAD, our board recently voted to initiate our first membership recruitment program in several years. That recruitment is currently underway and we already have several strong applications.
- 7) Our existing Education Policy has been re-emphasized and reinforced. No one can remain a member in good standing unless they are in full compliance with that policy. This includes maintaining active and current membership in both the OCDLA and the Oregon State Bar's Criminal Law Section. Regular CLE attendance at criminal law seminars is also required. And unless our members are in full compliance with these standards they are not permitted to register for calendar assignments.

MCAD also maintains an active local CLE program open to all local lawyers. Three CLE programs were produced this past year and approved for credit with the Oregon State Bar. The MCAD hosted CLE's consisted of informative presentations on the subjects of Habeas Corpus, House Bill 3508, and the Negotiation of Criminal Law Cases.

### Conclusion:

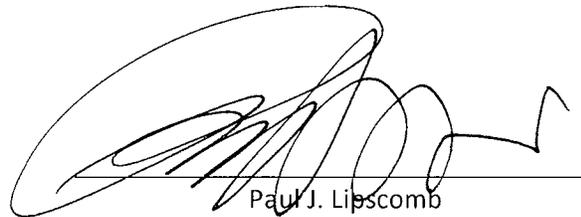
The changes described above are those that are most obvious and most tangible. But perhaps the single most pervasive change has been one of attitude.

# Annual Report of MCAD to OPDS/PDSC | 2010

There is no question that the past year has been a very good one at MCAD: the painful changes of the past are now largely behind us, and there is a growing sense of pride and accomplishment. Both the individual morale and the professional satisfaction of our membership are higher than ever before. The membership has, seemingly without exception, embraced a renewed commitment to professional excellence, and their daily work reflects that.

On this important achievement, as with the others, it has been our Board of Directors who have led the way. And we look forward to continuing the tasks ahead together, as a team, and with a shared commitment to excellence in all we do.

Respectfully submitted this 14th day of May, 2010.



Paul J. Lipscomb  
Executive Director

# Marion County Association of Defenders

Mission Statement, Business Plan, and Strategic Vision

## **Mission Statement:**

Marion County Association of Defenders (MCAD) is an affiliation of individual attorneys providing excellent indigent criminal defense services to the public in Marion County on behalf of the State of Oregon. As the principal public provider of criminal defense services in Marion County, MCAD is a model program committed to continuing improvement in the delivery of quality legal services to its clients. As a model organization, MCAD provides excellent support and training as well as prompt and consistent compensation to its dedicated lawyers who have committed themselves to providing indigent defense services to our community.

## **Business Plan**

### Organization:

Marion County Association of Defenders (MCAD) is a group of approximately 40 indigent defense lawyers affiliated with each other through the association, but each working as an independent contractor. MCAD has operated continuously since 1993. The association is governed by a Board of Directors consisting of three public members and six members of the association.

The Board elects three officers from amongst its members: a Chair, a Secretary, and a Treasurer. The board also hires an Executive Director on part-time basis who oversees an office manager and acts as the administrative officer of the association. The Board of Directors meets monthly. In accordance with its by-laws, the membership of MCAD elects its six positions on the Board of Directors at its annual meeting in October of each year. Two of these six members are elected each year for a three year term.

The membership also meets monthly to discuss any issues of general concern and to coordinate the delivery of indigent defense services. During the meeting individual attorneys are assigned to cover the various court calendars on specific dates and to handle the representation of all clients appearing before the court at that time consistent with the attorney's qualifications.

### Basic Structure and Management:

MCAD receives all of its funding through its contracts with the State of Oregon's Office of Public Defense Services (OPDS.) Typically, these contracts are entered into on a biennial basis. The contract between MCAD and OPDS is based on a prediction of the likely workload, and, with the agreement of both parties, adjustments to the contract can be made semi-annually to adjust for unforeseen changes in the caseload. Payments are made to MCAD in

# Marion County Association of Defenders

## Mission Statement, Business Plan, and Strategic Vision

equal monthly amounts throughout the contract period. Generally, member attorneys bill MCAD every two weeks for each case completed since the last billing cycle, and payments are distributed one week later. MCAD currently holds back 10% of the contract case amount for administrative services and any unforeseen contingencies.

Currently there are a few case types that on which MCAD actually pays out more than it receives through its OPDS contract. These “extra” payments have been authorized in order to attract sufficient interest among the membership to perform these services. However, this is expected to be a short term solution to this problem, and MCAD hopes to be able to contract with OPDS for this work in the future at a rate that will attract enough members to voluntarily perform these services without an MCAD supplement.

### Present Policies and Procedures:

The Board of Directors has formally adopted all of the “Best Practices” recommended by the Quality Assurance Task Force of the Office of Public Defense Services. The Best Practices have been implemented as follows.

- 1) Policy of zealous advocacy: MCAD prides itself on its client focused delivery of indigent defense services. The individual attorney assigned to each case is personally available to the client at each step of every legal proceeding, from the time of arraignment through the end of the case. The District Attorney’s criminal discovery is obtained and personally reviewed together with the client, whether in or out of custody, and all legal steps and proceedings are carefully explained to each client on an individual basis. Non-English speaking clients are assigned to a bilingual lawyer whenever possible, and court certified interpreters are utilized during all formal court proceedings to ensure the client’s complete understanding. MCAD also maintains a “clothing closet” for in custody defendants in need of civilian clothing for trial. And as a practical matter many of our attorneys often assist their out of custody clients with clothing purchases when necessary for trial in jury cases.
- 2) Board or Advisory Group: As noted above in more detail, MCAD is governed by a Board of Directors which includes three public, unaffiliated members.
- 3) A business or strategic plan: This document represents MCAD’s business and strategic plan, and it also includes a mission statement and a strategic vision statement.

# Marion County Association of Defenders

## Mission Statement, Business Plan, and Strategic Vision

- 4) Evaluation of Management: With the appointment of a new Executive Director in July of 2008, MCAD has established an annual evaluation process, and is committed to formally review each year, the performance of the Executive Director, the Office Manager, as well as an evaluation of the overall operational practice of MCAD. These evaluations will be led by the Board's Chair and will include public members.
  
- 5) Professionally acceptable law office management policies and procedures: All of our attorneys are independent contractors, and they are responsible for their own internal law office management practices. MCAD has established a written communications policy and a written education policy to better ensure that each of its contracting lawyers maintains quality law office management policies and procedures. All new attorneys are assigned an individual mentor, and all of our attorneys work together in small work groups to process case problems and system issues in a collaborative manner. All MCAD members are also expected to follow the OPDS Best Practices and the Oregon State Bar Criminal Practice Performance Standards.
  
- 6) Modern, professional-quality law office space, technology, and equipment: By insisting that each of our contracting attorneys have access to e-mail (which is part of our written communications policy), and by requiring that all billing requests be supported by attorney generated data base updates, MCAD ensures that all of its members maintain access to modern law office technology and equipment. We also contractually require each lawyer to maintain an appropriate law office in the greater Marion County/Salem area.
  
- 7) Case Management: Our attorney of the day case management system several ensures that attorneys do not undertake case assignments for which they are not fully qualified. All of our contracting attorneys also maintain a conflicts system to ensure that any conflicts cases are identified at the earliest possible date.

Our Office Manager maintains, through our Quickbase database, a case monitoring system which tracks the number of cases assigned to each attorney. Our attorney of the day system matches an attorney to daily court calendar assignments on a monthly basis, typically several weeks in advance of any court appearance date.
  
- 8) Compensation and advancements: With few exceptions our attorneys are paid directly in proportion to the work they undertake and the appropriate case count value attached to that workload in our contract with OPDS. Our internal work group system ensures that our more experienced attorneys work with our newer lawyers to bring them along

## Marion County Association of Defenders

### Mission Statement, Business Plan, and Strategic Vision

and to develop their professional skills so that they can progress to more serious and more complex cases.

- 9) Training and Evaluation: Our written education plan includes at least two CLE per year directly orientated toward our contract work. Each attorney is also required to be a member of the Oregon Criminal Defense Lawyers Association (OCDLA) and to complete at least 50% of Oregon's MCLE requirements through courses in criminal law and procedure. We are also undertaking a formal written performance evaluation procedure which will be implemented during the contract period for each attorney member through their work groups. Our internal qualifications are more rigorous than the state guidelines, and all attorney members are also expected to subscribe to the OSB performance standards.
- 10) A method of obtaining client input: We will be piloting a client satisfaction survey during the second half of the contract period.
- 11) Involvement in the overall legal system: Most of our contract attorneys are members of the local Marion County Bar Association and many are also members of one or more local legal affinity groups such as the Willamette Valley Inns of Court, the Mary Leonard Law Society, the Oregon Women Lawyers, and the Marion County Courthouse Connection. Several of our lawyers serve on various community boards and commissions as well, and others serve on the Marion County Domestic Violence Council, the Public Safety Coordination Counsel and the Marion County Annex Committee.

### **Our Strategic Vision for the Future: Beyond Best Practices**

- 1) Excellence in all we do: At MCAD we will strive for excellence as our standard for customer service for both our member attorneys and their indigent clients. We will meet and exceed the Exceptions Qualification Standards set by PDSC/OPDS and become the first Oregon Indigent Defense Provider sanctioned to set its own internal standards for attorney qualifications.
- 2) Leading by Example: We will become the flagship model for Indigent Defense Practices and Procedures for the State of Oregon. As the Principal Indigent Defense provider in that state capital, MCAD is uniquely positioned to showcase excellence as the standard for delivery of all Indigent Defense Services. And, by encouraging

# Marion County Association of Defenders

## Mission Statement, Business Plan, and Strategic Vision

our members to become more involved in statewide issues of general concern to the indigent defense system, and through our own commitment to high quality client representation, our organization will continue to increase its own public respect and political standing, as well as that of the entire Indigent Defense Community.

- 3) Seeking Fair Compensation: Without fair compensation, the continued delivery of quality indigent defense services cannot be maintained over the long term. Our member attorneys have other economic options and professional opportunities that they could seek to pursue. Unless the compensation system is upgraded, and unless fees for services increase, we will continue to lose some of our best, our brightest, and our most experienced attorneys each year. We commit ourselves to political outreach and educating on these issues in our efforts to secure fair compensation for all indigent defense providers.
- 4) Preserving Idealism, Encouraging Passion, and Promoting Pride: By its very nature, indigent defense work is often routine, frustrating, and relatively unappreciated. By supporting and encouraging each other in our daily work, however, we can form a team with shared core values, a sense of self worth that is not dependent solely upon on our monetary compensation, and a real sense of accomplishment in the differences we are able to make in our clients' lives.
- 5) Increasing our Visibility and Involvement in our Community: As an organization we encourage our members in their individual efforts on behalf of our community, whether through coaching youth sports, participating in faith-based charities, volunteering on local boards and commissions, participation in the arts or involvement in our children's schools. We will also educate ourselves about other community resources that are available to our clients and will connect our clients to the appropriate services in our community whenever possible. As individuals we will strive to give back to our society some measure of the benefits we have received through our education and profession.

## Judicial Survey for MCAD Members

Scale of 1 to 5

*1 = Poor*

*5 = Excellent*

Total Number of Attorneys scored <b>42</b>	Judgment In Assessing Cases	Legal Research and Pretrial Motions	Professional Demeanor	Trial and Sentencing Advocacy	Calendar And Case Management
<i>TOTAL AVERAGE</i>	<b>4.09</b>	<b>3.92</b>	<b>4.27</b>	<b>3.96</b>	<b>4.22</b>

## Judicial Survey for MCAD Members

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Please evaluate Attorney \_\_\_\_\_ on a scale of 1 to 5 (circle appropriate number) with 1 being poor and 5 being excellent on the following criteria. If you have no opinion about the criteria, or do not know enough information about the attorney in relation to specific criteria please circle NI.

### Preliminary Data:

I have had the following contact in the context of a criminal case with this attorney:	None	Seldom	Occasional	Frequent
The last contact that I have had with this attorney in the context of a criminal case has been within the last:	Week	Month	3 Months	6 Months

### Professional Ability:

#### Judgment in Assessing Cases:

Poor  $\longrightarrow$  Excellent

The attorney recognizes the issues in the case that are necessary for the proper defense of the client and, demonstrates an ability to evaluate and assess a case taking into consideration its strengths and weaknesses.	1	2	3	4	5	NI
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#### Legal Research and Pretrial Motions:

Poor  $\longrightarrow$  Excellent

The attorney has a satisfactory working knowledge of resource materials for use in criminal practice:	1	2	3	4	5	NI
The attorney prepares well written and researched motions that are timely filed in appropriate cases:	1	2	3	4	5	NI

#### Professional Demeanor:

Poor  $\longrightarrow$  Excellent

The attorney's demeanor is professional and conducive to effective representation:	1	2	3	4	5	NI
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#### Trial and Sentencing Advocacy:

$\longrightarrow$

The attorney demonstrates effective trial skills:	1	2	3	4	5	NI
The attorney makes thorough use of sentencing laws, seeking imaginative and creative sentencing alternatives and argues these effectively to the Court:	1	2	3	4	5	NI

## Judicial Survey for MCAD Members

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**Work Habits and Professional Courtesy:**

<b>Calendar and case management:</b>	Poor	—————▶				Excellent	
The attorney satisfactorily handles the number of cases he or she accepts and manages his or her schedule professionally:	1	2	3	4	5	NI	
The attorney appears in court punctually and keep the court apprised of his or her whereabouts when unavoidably delayed:	1	2	3	4	5	NI	
The attorney maintains contact with both in and out of custody clients sufficient to provide competent representation for each court appearance:	1	2	3	4	5	NI	
The attorney's interaction with staff is appropriate and demonstrates a spirit of cooperation, mutual assistance, and respect:	1	2	3	4	5	NI	
The attorney can be reliably contacted when needed and/or responds to communications with the court punctually:	1	2	3	4	5	NI	

Other Comments: \_\_\_\_\_  
 \_\_\_\_\_

Particular Strengths: \_\_\_\_\_  
 \_\_\_\_\_

Particular Weaknesses: \_\_\_\_\_  
 \_\_\_\_\_

Dated this \_\_\_ day of \_\_\_\_\_, 2009

Submitted By: \_\_\_\_\_  
 (optional)

# Exhibit 2

Public Defender of Marion County, Inc  
Annual Report to Public Defense Services Commission  
June 1, 2009 to June 1, 2010

As Public Defender of Marion Co., Inc approaches its third anniversary we find ourselves about where we expected to be. We have expanded from two lawyers and one staff person to eight lawyers, two investigators, a legal assistant and three full time office staff.

When our office was formed in 2007 we developed our own “best practices” as a guide to our development. PDMC has been represented on the OPDS Quality Assurance Task Force while that body has developed the current “Best Practices for Oregon Public Defense Providers.” We believe our organization to be largely compliant with them. Our mission statement clearly sets forth our goal of a client-centered practice:

*The overall mission of the Public Defender of Marion County is to provide high quality, cost effective legal services to poor people accused of crimes while maintaining the confidence of the clients that they are receiving zealous and proficient legal representation.*

Our Mission Statement and Vision can be found on the homepage of our website, [www.pdmarion.org](http://www.pdmarion.org).

Our seven-member board of trustees includes non-lawyers and community members. One board member contracts with OPDS to handle Post Conviction Relief cases. Two other members do criminal defense as a small part of their practice and two attorneys do no criminal law at all. One member is a banker and the last is the executive director of a large non-profit. The Board meets monthly and remains very active.

PDMC has a five-year lease (01/01/2010 to 12/31/2014) on comfortable new office space, which will allow us to expand at our projected growth rate. Our office equipment is up to date and properly maintained. The office presents an attractive, professional environment that inspires confidence in our clients and provides a safe, comfortable, efficient work environment for our lawyers and staff.

We are constantly improving and refining our database and office software with a view to making it more useful, flexible and reliable. Every lawyer and staff person can electronically access any file in the office, see what dates are scheduled, review any notices that have been sent, review all discovery or other documents that have been scanned into the database, do a conflicts check or a multitude of other functions. While we have not perfected the system to the point that we can rely on it exclusively, we are archiving all our cases digitally. The database and the archives are backed up regularly and automatically to two off-site locations in different parts of the country.

PDMC has also maintained our efforts to collaborate with the local and statewide criminal justice systems. Marion County has for many years had a monthly meeting

of the local criminal justice community where representatives of the judges, court staff, district attorney's office, jail staff, sheriff's office, parole and probation, and the defense bar meet to address problems and discuss changes in policy and procedure. PDMC has taken and continues to take an active part in that process.

In 2007, The Executive Director of PDMC was appointed by then presiding judge Paul Lipscomb to a seat on the Marion County Public Safety Coordinating Council. He has since been reappointed by Judge Rhoades, the present presiding judge. Mr. Sermak has tried to take an active role in that body; his participation has proved valuable to our organization and we hope has proved beneficial to MCPSCC as well. PDMC is also represented on the E-court Criminal Law Advisory Group, technically the Criminal Group of the Confidential Information Subgroup of the Law and Policy Work Group (LPWG-CISG-CG). It feels like we are pretty far down the food chain but we do have a voice at the table and are having some input into the way electronic access to the courts will impact our clients, the bar and the public. PDMC also actively participates on the OPDS Contractors Advisory Committee and Quality Assurance Task Force where we play a role in steering statewide policy as well.

Cases are assigned within our office with adherence to the "Qualification Standards for Court Appointed Counsel." Our newest lawyer is qualified to do misdemeanors only. Though he has co-counseled on several felonies, none have gone to trial yet; he has however tried several misdemeanors to juries and to the court. We have two lawyers with approximately three years experience who have tried numerous felonies and have co-counseled on measure-11 cases that have gone to trial. One lawyer is qualified to try lesser felonies and will be co-counseling on a Measure-11 soon. Our newest hire had co-counseled on a Measure-11 prior to joining PDMC and will soon be qualified to handle them for us. The three remaining attorneys all have well over ten years experience. On balance the PDMC attorney staff is progressing at a very acceptable rate as they gain skills and experience. We all, however, benefit from the collegial environment of the office. We staff cases as a group weekly; the office policy is that before any case goes to trial the assigned attorney has to staff it with at least one other lawyer. Newer lawyers are encouraged to seek out opportunities co-counsel with more experienced attorneys, and to impel that process along, when the client of a less experienced lawyer picks up a new charge that exceeds the lawyer's qualifications that lawyer stays on the case to provide continuity of representation but he or she associates "lead counsel" on the higher charge. When the attorney and the executive director believe the attorney meets the qualification standards for more serious cases, the attorney is assigned a case as "lead counsel" with a more experienced attorney as second chair. If that goes well they are ready to solo.

We encourage and support continuing Legal education beyond what the Bar requires. We have in-house CLEs on issues of law and procedure. We have a training manual which unfortunately is in need of updating. West Law is available to all the attorneys.

To help assure continued quality representation, we have implemented and are maintaining an annual performance review of all the attorneys and staff. The

process involves seeking input from judges, court staff, prosecutors, and other members of the criminal justice system as well as a self-evaluation by the attorney and a formal interview with the Executive Director.

It has long been the practice of the executive director to visit with judges frequently in person to solicit input on how the office and its lawyers are performing in court. Recently we have also begun a process of sending a survey to the judges periodically to give them an opportunity to provide their insights in writing as to how the office as a whole is performing; the survey form also invites them to comment about individual lawyers if they choose to do so.

Of course we continue to send a "client Survey" to each of our clients at the end of their case to solicit feedback from them as to how they felt they were represented. We use information gathered from those sources to guide our ongoing training program.

Inevitably, there has been turnover in our attorney staff in the last year, but at present we have seven very fine and effective deputy public defenders. Some came to us with experience and some began their careers with PDMC.

In the course of our growth and expansion we have managed to acquire sufficient financial reserves to make us hopeful that, with careful stewardship, we will weather any economic crisis looming in our future.

From very early on PDMC has taken part in the Extern Program at Willamette University School of Law. We now host at least three student volunteers every semester. They are encouraged to sit in on client interviews, we arrange for them to tour the jail if they wish to, they take part in our weekly case staffings, they do research for us, and those who are third year certified students are encouraged to go to court to argue motions or help try a case. They are a valuable resource to the office and we pride ourselves that they have a rich exposure to the criminal justice system.

We have recently set up an in-house wiki to serve as a brief bank and collaborative research tool to augment the form program we are also in the process of building.

We are establishing a working relationship with OCDLA and their legislative efforts on behalf of public defense. We've already worked on some projects with Gail Meyer; we have encouraged her to look upon our office infrastructure as a resource, and we make ourselves available to assist her in her efforts before the legislature.

Of course we do not lose sight of our primary purpose, which is to continue to provide quality representation to our clients. We continue to improve as an office and as individuals. In the last year we have made significant strides in our ability to efficiently meet our obligations to our clients and the Marion County community.

# Attachment 5

**2005-07 Biennium Agency Request Budget**

<b>POP#</b>	<b>Name</b>	<b>Cost</b>	<b>Notes</b>
100	ACP transfer	-\$201,542	1.45FTE auditor positions transferred to OJD
101	Employee Commensurate Compensation	\$223,801	AD attorneys to match DOJ attorney salaries
102	Post-Conviction Relief	\$765,888	Add 4 AD attorneys
103	Parity	\$10,642,151	Atty hrly \$55/\$75; investigator \$30/\$40; \$4.8 mill for partial PD gap
	<b>Total</b>	<b>\$11,430,298</b>	

**2007-09 Biennium Agency Request Budget**

<b>POP#</b>	<b>Name</b>	<b>Cost</b>	<b>Notes</b>
100	Juvenile Dependency Representation	\$526,546	Add 4 AD juvenile appellate attorneys and reduce the Account
101	Employee Commensurate Compensation	\$350,659	AD attorneys to match DOJ attorney salaries
102	Post-Conviction Relief	\$303,453	Add 4 AD attorneys and reduce the Account
103	Public Defense Provider Compensation	\$29,358,320	Atty hrly \$70/\$95; investigator \$35/\$45; \$6.2 million for PD parity
	<b>Total</b>	<b>\$30,538,978</b>	

**2009-11 Biennium Agency Request Budget**

<b>POP#</b>	<b>Name</b>	<b>Cost</b>	<b>Notes</b>
100	Juvenile Dependency Representation	\$17,274,024	30% trial-level caseload reduction
101	Post-Conviction Relief	\$331,651	Add 4 AD attorneys and reduce the Account
102	Public Defense Provider Compensation	\$21,576,514	Atty hrly \$70/\$95; investigator \$35/\$45; \$6.7 million for PD parity
	<b>Total</b>	<b>\$39,182,189</b>	

**2011-13 Biennium Agency Request Budget Possibilities**

<b>POP#</b>	<b>Name</b>	<b>Cost</b>	<b>Notes</b>
100	Juvenile Dependency Representation	\$11,033,520	20% trial-level caseload reduction
101	Employee Commensurate Compensation	\$1,112,948	AD attorneys to match DOJ attorney salaries
102	Post-Conviction Relief	\$117,794	Add 4 AD attorneys and reduce the Account
103	Public Defense Provider Compensation	\$18,223,558	Atty hrly \$70/\$95; investigator \$35/\$45; \$6.5 million for PD parity
	<b>Total</b>	<b>\$30,487,820</b>	

# Attachment 6

Public Defense Caseloads  
FY1989-FY2010

<b>Fiscal Year</b>	<b>Total Caseload</b>	<b>Change (cases)</b>	<b>Change (%)</b>
1989	84,614		
1990	92,038	7,424	8.8%
1991	96,730	4,692	5.1%
1992	103,028	6,298	6.5%
1993	103,330	302	0.3%
1994	108,963	5,633	5.5%
1995	121,700	12,737	11.7%
1996	129,693	7,993	6.6%
1997	133,596	3,903	3.0%
1998	147,038	13,442	10.1%
1999	152,950	5,912	4.0%
2000	163,944	10,994	7.2%
2001	166,658	2,714	1.7%
2002	167,893	1,235	0.7%
2003*	146,947	-20,946	-12.5%
2004	170,902	23,955	16.3%
2005	171,850	948	0.6%
2006	179,058	7,208	4.2%
2007	178,002	-1,056	-0.6%
2008	170,282	-7,720	-4.3%
2009	169,493	-789	-0.5%
2010**	170,319	826	0.5%

\* Appointments were deferred to the following biennium

\*\* Projected

**Members**

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

**Ex-Officio Member**

Chief Justice Paul J. De Muniz

**Executive Director**

Ingrid Swenson

**PUBLIC DEFENSE SERVICES COMMISSION**

May 3, 2010

The Honorable Peter Courtney, Co-Chair  
The Honorable Dave Hunt, Co-Chair  
State Emergency Board  
900 Court Street NE  
H-178 State Capitol  
Salem, OR 97301-4048

Dear Co-Chairpersons:

**Nature of the Request**

The Public Defense Services Commission (PDSC) was requested to report to each Emergency Board by the following budget note in HB5100 (2010 session):

The Judicial Department and the Public Defense Services Commission are requested to report to each Emergency Board and Interim Joint Ways and Means Committee and the Joint Committee on Ways and Means at the beginning of the 2011 Legislative Session on the following:

- (a) estimated versus actual revenue receipts from House Bill 2287;
- (b) legislatively approved Other Funds budgeted expenditures and applicable positions;
- (c) actual expenditures and applicable positions funded with House Bill 2287 revenue;
- (d) caseload changes; and
- (e) any management actions taken related to any anticipated House Bill 2287 revenue changes.

PDSC requests that the Emergency Board accept this report.

**Estimated versus actual revenue receipts from House Bill 2287**

The Oregon Judicial Department (OJD) initially estimated that HB2287 would generate \$39.6 million in additional revenue. OJD soon revised that estimate to \$30 million. If HB2287 revenue continues at current levels without additional growth, OJD anticipates 2009-11 collections of \$25.8 million. Actual collections as of March 31, 2010 were \$7.5 million

**Legislatively approved Other Funds budgeted expenditures and applicable positions**

The Legislatively approved Other Funds limitation for the Public Defense Services Account for funds received from the Justice System Revenue Account is \$12,380,573. There is no additional position authority associated with this expenditure limitation.

The Honorable Peter Courtney, Co-Chair  
The Honorable Dave Hunt, Co-Chair  
Page 2  
May 3, 2010

**Actual expenditures and applicable positions funded with House Bill 2287 revenue**

As of this date, \$1,435,141 has been transferred from the Justice System Revenue Account to the Public Defense Services Account. Actual expenditures to date are \$747,176.

**Caseload changes**

As the attached table shows, up until FY2007 public defense caseloads increased every year by varying percentages. [The decrease in FY2003 caseload was an anomaly caused by deferring appointment of counsel until after July 1, 2003 so that expenditures would be incurred in the following biennium.]

The unexpected decrease in FY2007 caseload was not of significant magnitude. Data for FY2008, however, shows not only a continued decline in caseload but an increased rate of decline.

In early 2009, the agency notified Legislative Fiscal Office that \$2.6 million of the amount appropriated to the Public Defense Services Account for the 2007-09 biennium could be disappropriated and returned to the General Fund. In addition, the agency requested a \$9.2 million reduction to its 2009-11 biennium Essential Budget Level.

The agency does not have an explanation for this unprecedented drop in caseload in FY2008 but in prior budget requests has identified a non-exclusive list of budget driving factors including changes in crime rates, law enforcement funding and practices, prosecution practices and the like. The majority of the decrease is attributable to Class B and C felonies and traffic misdemeanors. Caseload continued to decline slightly in FY2009 but projections indicate a small increase for FY2010.

Given the unpredictability of caseloads and the lack of a clear trend, the agency is unable to make a reliable projection for FY2011 at this point.

**Management actions taken related to any anticipated House Bill 2287 revenue changes**

PDSC's statutory mission requires that it establish and maintain Oregon's public defense system in the most cost efficient manner consistent with quality representation. Under the Commission's direction, the Office of Public Defense Services continues to identify and implement cost saving practices in its own operation as well as in the provision of services by its private providers. The principal drivers of public defense costs, however, are factors beyond the control of PDSC – caseload (the number and seriousness of the cases prosecuted by the state) and the cost of doing business by PDSC's providers. In the past PDSC has participated in legislative planning groups to help identify ways of reducing the size of the public defense system as well as of the public safety system as a whole and will continue to cooperate in future efforts to identify ways of reducing its caseload.

Sincerely,

Ingrid Swenson, Executive Director  
Public Defense Services Commission