

**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, August 14, 2008  
9:00 a.m. to 1:00 p.m.  
Swan Room  
Geyser Grand Hotel  
1996 Main St  
Baker City, OR 97814

**AGENDA**

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|--|-------------------------------------|
| 1. Introduction of New Commission Member: Peter Ozanne   | Barnes Ellis                        |
| 2. <b>Action Item:</b> Approval of the Minutes of PDSC's June 12, 2008 meeting ( <i>Attachment 1</i> )                         | Barnes Ellis                        |
| 3. <b>Action Item:</b> Approval of the Minutes of PDSC's July 2, 2008 Meeting ( <i>Attachment 2</i> )                          | Barnes Ellis                        |
| 4. Presentations on Public Defense Delivery in Baker, Malheur, Grant and Harney Counties. ( <i>Attachments 3, 4, 5 and 6</i> ) | Invited guests and audience members |
| 5. Budget Update ( <i>Attachment 7</i> )   | Kathryn Aylward                     |

*Box lunches will be provided to Commission members at the conclusion of the meeting.*

*A Commission retreat is scheduled from 2:00 p.m. to 5:00 p.m. on August 14 in the Swan Room at the Geyser Grand Hotel.*

*The next regular meeting of the Commission will be held on September 11, 2008 from 9:00 a.m. to 1:00 p.m. at a location to be announced in Salem, Oregon.*

# Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

MEETING MINUTES

Thursday, June 12, 2008  
9 a.m. to 1 p.m.  
Mt. Washington Room  
Seventh Mountain Resort  
Bend, Oregon

MEMBERS PRESENT: Shaun McCrea  
John Potter  
Hon. Elizabeth Welch  
Janet Stevens  
Chip Lazenby

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

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TAPE 1, SIDE A

[The meeting was called to order.]

**Agenda Item No. 1 Approval of the Minutes of PDSC's May 8, 2008 Meeting**

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

**Agenda Item No. 2 PDSC 2009-2011 Budget Proposal**

Kathryn Aylward described the process of preparing the agency's budget proposal and the individual components of the base budget. She discussed the anticipated need for additional attorneys in the Appellate Division. She also identified proposed policy option packages. Package 100 seeks additional funding for juvenile dependency representation. Package 101 seeks funding to create a PCR section within the Appellate Division. A similar proposal was submitted in 2007. Package 102 seeks additional public defense provider compensation and is also very similar to a Policy Option Package submitted in the 2007 session. Commissioners and staff discussed the prospects for an economic downturn and the anticipated impact on state revenue. They also talked about the importance of informing the legislature of the true extent of the need in public defense. Metropolitan Public Defense Services Executive Director Jim Hennings reported that the caseload in Multnomah County is down and that providers there are losing ground to prosecutors in terms of compensation. They have gone from salaries that were 30% below average district attorney salaries to salaries that are now 40% lower. Bob Homan, Assistant Director of Public Defense Services of Lane County, added that his office recently lost an attorney to the Attorney General's office where she would receive an additional \$12,000 annually. Angela Sherbo, a supervising attorney at the Juvenile Rights Project, and Mark McKechnie, the Interim Executive Director of that office, spoke in support of the juvenile dependency representation policy package and

noted that public defender organizations had lost many mid-level attorneys because of the inability to provide adequate compensation. They noted that even with the increases in the last budget they had continued to lose ground in real dollars from where attorneys were a decade ago. Ingrid Swenson spoke about the need to make significant improvements in the representation provided in juvenile and post conviction cases. Commission members discussed the different types of organizations providing public defense services and the fact that Package 102 would affect only employees of full time public defender offices and hourly attorneys and investigators. Commissioner Potter suggested combining Packages 100 and 102. Chair McCrea expressed support for prioritizing the packages in the order they were submitted. In order to allow Commission Chair Barnes Ellis to participate in the discussion of budget priorities for the 2011 session, Commission members decided to schedule a telephone conference meeting for July 2, 2008 to discuss the budget proposal further before taking action on it.

**Agenda Item No. 3      Approval of Contracts**

Kathryn Aylward reported that the Marion County Association of Defenders had previously received death penalty cases under its contract. That part of its contract was discontinued and a request for proposals was issued. The Commission was asked to approve contracts with attorneys Dan Casey, Steve Gorham and Steve Krasik.

**MOTION:** Chip Lazenby moved to approve the contracts; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

**Agenda Item No. 5      Report on Site Visit Findings**

Paul Levy summarized the information that had been received in the site team evaluations of the 30 providers who have been reviewed to date. He also talked about the process used in each evaluation and the value of the information obtained to OPDS, the contractors reviewed, and the members of the site teams. Both he and the Commissioners expressed their gratitude to the many volunteers who have participated in these evaluations over the course of the last four years. Paul Levy noted that overall, the average rating of the quality of representation being provided is only “good,” rather than very good or excellent, with juvenile representation generally being found less satisfactory than representation in criminal cases.

**Agenda Item No. 5      OPDS’s Monthly Report**

Ingrid Swenson updated the Commission on developments in juvenile representation in Umatilla and Jackson Counties. Pete Gartlan reported that the former Legal Services Division has now officially become the Appellate Division. He noted that his office would be arguing *State v. Ice* in the United States Supreme Court on October 15, that they were filing an *amicus* brief in the Court in a case involving non-unanimous jury verdicts, and that the juvenile section in the office was now accepting cases and that Chief Judge Brewer had arranged a CLE in September for all the juvenile appellate practitioners.

Chair McCrea noted the retirement of Jim Hennings and thanked him for his many years of service to the criminal justice system in Oregon. Jim Hennings urged the Commission to continue its good work.

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

Meeting was adjourned.

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

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9 a.m. to 1 p.m.  
Mt. Washington Room  
Seventh Mountain Resort  
Bend, Oregon

MEMBERS PRESENT: Shaun McCrea  
John Potter  
Hon. Elizabeth Welch  
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**TAPE 1, SIDE A**

[The meeting was called to order.]

**Agenda Item No. 1 Approval of the Minutes of PDSC's May 8, 2008 Meeting**

- 0:19 Chair McCrea We are going to go ahead and convene the meeting. The reason for the delay is we were trying to get Barnes on the phone, because he is waiting for a jury and was going to be here by phone, but as you probably noticed with people coming in and out there have been technical difficulties. We will go ahead and convene the meeting and proceed and hopefully we can bring Barnes in at some point. First action item is approval of the minutes of the May 8, 2008 meeting. Do we have any additions or corrections, changes or comments?
- 0:56 Hon. Elizabeth Welch I got credit for something really smart.
- 1:06 C. Lazenby Do we know if anybody followed up on that. We had that discussion in the minutes about the comments from Pendleton. It seemed like there were almost two separate systems, one for Latinos and Indians and one for everybody else. Did anybody follow up? There was a suggestion that we follow up with the Chief Justice. Does anybody know if that happened?
- 1:26 Chair McCrea Aren't you kind of jumping ahead to the monthly report?
- 1:28 C. Lazenby No. They were in the minutes. Maybe I am jumping ahead.
- 1:34 Chair McCrea Well, I am just asking for approval of the minutes. Do we need to amend the minutes?
- 1:38 C. Lazenby Can I move for approval of the minutes?

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

1:47 Chair McCrea            Alright. The minutes are approved. Can we come back to that Chip?

1:48 C. Lazenby            Yes.

1:49 Chair McCrea            We will. So Kathryn would you like to take us through our 2009-2011 budget proposals?

**Agenda Item No. 2            PDSC 2009-2011 Budget Proposal**

1:57 K. Aylward            Yes. You have a separate handout. I am going to talk first about the page that is titled Package 040, Mandated Caseload. As you will recall, mandated caseload used to be trial level, non-death penalty caseload increase or decrease, and the process was, "If this is how much money the account had last time, and you are expecting a 10 percent increase in caseload, then here is a 10 percent increase in funding." But, as we have learned, it is too simple a model. Now the components of mandated caseload are, of course, number one you still need the caseload component and in this case we are actually projecting a one percent caseload increase a year based on what we were budgeted for in the current biennium. However, what we were budgeted for in the current biennium is a little bit on the high side. We are not going to quite make the caseload projection that we had for this biennium, so, in fact, we are projecting a decrease in the funding we will need based on trial level, non-death penalty caseload. The reason it is three million dollars is that the process allows you a 2.8 percent inflationary increase, so the inflationary increase would be 5.6 million, but because the caseload is going to be lower than what we projected for the current biennium, you end up with 3.7 million. It is a little bit confusing but it is the process we have used for many years. Item No. 2, death penalty caseload from prior biennia, that process was established by looking at current expenditures for death penalty cases and projecting, using regression analysis that somebody else did for me, what the increase in costs would be over and above what the funding would be with a 2.8 inflationary increase. No. 3, the mileage reimbursement - our current budget has funding at the rate of 44.5 cents a mile. We already went to 48.5 cents during the last biennium and now we are at 50.5 cents. The funding is chasing the increases and \$175,210 is the amount that exceeds the 2.8 percent inflationary increase. Mileage for us is big. For most state agencies, a big increase in the mileage rate might be something they could absorb. Their employees may travel very little. But for us, as you know, it is investigators and attorneys racking up lots and lots of miles, so it is not something we can absorb. No. 4, non-attorney provider cost increase, this is principally for psychiatrists' and psychologists' services. As Ingrid and the site review teams go around and visit people a lot of the comments you get in service delivery reports and in some site reviews are that maybe providers aren't making sufficient use of psychological exams. And so, because the word is getting out there, it actually is picking up. We are seeing a 21 or 22 percent increase in the use of these services. No. 5, the personal services adjustment - we have that in our current budget. And that figure is arrived at by taking the same percentage increase that the state provides for its own employees and applying it to non-hourly paid contractors, so basically, with our contract providers we assume that 85 percent of their costs are personal services costs, so, salaries, benefits, retirement, and we take 85 percent of their contract, and apply the same increase the state provides to employees. This year I think it is 10.7 percent increase.

6:19 J. Potter            10.7 percent for one year or for each year?

6:22 K. Aylward            For the total biennial funding. One thing that was interesting, we have often talked about identifying some other system that is comparable to ours and there really aren't very many, but the Oregon Health Plan does something almost exactly like this. When they build their budget there is a package that provides the standard 2.8 percent inflationary increase. Everyone gets that, and it changes from biennium to biennium, but then there is a special medical inflation rate that is 4.4 percent. But even that is not going to continue to buy

medical services in the same way that we couldn't continue to buy legal services with that small increase. But then they have a separate package which is a rate increase linked by statute to some sort of standard cost of medical services, so they get 15 percent on top of that, as an example, so they end up with a 20 percent increase because that is what is necessary when you are buying medical services. This is exactly what we are doing and we wish we would have applied it sooner. No. 6, appellate mandated caseload - unfortunately I just lost my connection. Pete, help me out. Five additional attorneys?

7:56 P. Gartlan

Yes.

7:57 K. Aylward

Thank you. Yes, we need two additional attorneys just to keep up with the work that is coming in, because we are not actually keeping up. Then three additional attorneys are needed because the Court of Appeals has informed our office that they are reducing the time that they allow between record settlement and filing the opening brief. They want to shorten that timeline down to 180 days so we will need those positions. We think it will take almost the full biennium to reach that target. Then those positions would continue to be needed because of caseload growth in future biennia.

That is mandated caseload and it came in under \$20 million which is good for us. I think last time it was \$29 million. The other side of the page is for policy option packages. Mandated caseload goes into what is called the essential budget level. Essential budget level is what an agency needs to continue to operate without a change in policy. Everything else that an agency wants to do is put into a policy option package. These three that we have listed here were all three presented - well at least two - in our last two budgets. The first one, juvenile dependency representation, is pretty vague and I am hoping the Commission will have a good discussion about how additional funding could be used. We know we need improvement and we know that additional funding will assist with that improvement, but the question is do you go in and say I need \$25 million to make it the way I know it should be, or is that unrealistic and inviting you to get shot down? Do you chose something smaller and figure out, "Well if we had a little bit of funding here we can make some small increases and improve, for example, review hearings." For people who have to travel, we don't provide very much right now. It is under \$300 and if you have to travel and visit the family and monitor the case between review hearings it is a lot of work. Even though we think of it as a monthly amount of money for ongoing work on the case, people sometimes associate the individual task with the case credit value in their contract. It is very easy for people to say, "Well, I just spent eight hours and I only got \$240 and that is not enough. I can't cover my overhead." So I think that is an area where we definitely need to increase rates. You could decide that maybe what is needed is more support staff. Maybe you say to a contractor, "We are going to provide additional funding in your contract for you to hire a social worker or a case worker who can help you maintain contact with the family." It may be that we need a specific request for funding so that we can increase training opportunities. Maybe that is where we see the need and we can put something together that provides training. With all of these options what a policy option package needs is it needs to be tied to a key performance measure or at the very least you need a way to measure the improvement. If you are going to say to the legislature, "Please provide this much money so that we can accomplish this," you need to be able to come back to them and say, "This is how we know we accomplished it." You can't just say, "Well, we provided training so they must be better trained now." You have to have some bang for your buck. We have had some difficulty thinking through what would be a good approach for improving this. Do you want to talk about it or should I carry on with the rest?

12:11 Chair McCrea

Why don't we go through all three of them and then we will come back and discuss it.

12:18 K. Aylward

Okay. Package 101, Post-Conviction Relief, trial-level relief - these would be employees of our office. It would be one senior deputy defender, one deputy defender II and two deputy defender Is and a legal secretary. We have put this package in before and the assumption was

that an attorney could handle four PCR cases a month. The Commission has heard testimony where people have said, "That is not doable. You are not doing a good job if you can handle four." We heard from other people who said, "Well, you know, you get a lot of cases where there isn't much you can do, but cases that you are actually working on will take a lot of time." If such a section were created, that would, of course, reduce the funding for the Public Defense Services account. We are currently paying people outside of our office to do this work. We wouldn't need to pay them if we were doing it in-house.

Package 102, Public Defense Provider Compensation - these are the same three components that we put into the package last time. One of them is funding to increase full-time public defender salaries to corresponding deputy district attorney salary levels in their counties. If you wish to continue to have that one in there, I would need to do a survey again of current salaries for public defender offices. As you know, in this biennium we did have some additional funding provided to address that. It is difficult to know how directly that translated to salaries. In some incidences it may have been necessary for a public defender to hire an additional attorney because caseload was more of an issue than salary. Maybe there was a trade off - a little less work, a little more money. So I will do a survey if you want to have that included. The second part was to increase the hourly rates for attorneys. Last time we had asked to go to \$70 an hour for non-capital cases and \$95 an hour for capital cases. We did again receive a portion of the funding and we increased rates from \$40 to \$45 for non-capital and from \$55 to \$60 for capital cases. I could work up numbers for those same dollar figures. And we did have an increase for investigators as well. It used to be \$25 an hour for non-capital and now it is \$30, and it used to be \$34 for capital cases and now it is \$39. I know it is a little bit difficult, in the absence of dollar figures, to know where these are going. It is difficult to work up an exact dollar figure and then have someone say, "Well no, how about \$75 or how about \$100," so I don't have exact dollar figures on any of these, but my personal view is that you decide what you want to do, you figure out how much it cost about saying, "Oh that is such a big number. We don't want to ask for that much. Let's ask for less." It costs what it costs.

16:33 Chair McCrea

I agree with you. I have a question, Kathryn. We are under \$20 million this time and last time we were at \$29. What is the difference?

16:46 K. Aylward

Roll ups. Things that were funded last biennium, that would roll up into this biennium, don't need to be added into mandated caseload again. Last time it was almost like they made a one time fix to get us on the right track and now that we are on the right track, hopefully we will not need to make major adjustments like that again.

17:14 C. Lazenby

We just squeaked through with the last revenue forecast but isn't the sort of smarter thinking in Salem right now that the next revenue forecast is probably going to be down for the one that the '09 legislature looks at, so as we look and think about these policy options shouldn't we think about the fact that we are going to have diminished revenue in all likelihood. If we are going out and just saying, "Well, let's put out a package that gets an additional 10, 12, 14, 15, 20, pick a number, million dollars, the reality is the money probably isn't going to be there even if we are coming in and asking for less. We may be lucky just to be given the \$19 million dollar figure. Is that right?

17:59 K. Aylward

That is my understanding and I went to a training session for policy option packages and the word at that point was that all agencies were looking at 95 percent of essential budget level. That was the estimate of what could be funded for next biennium. So we said, "Why do we have an eight hour training on how to develop a policy option package when it is not going to go anywhere?" They said, "Well, you never know and sometimes there is a little bit of money at the end and if there is a place to put it..." You would actually feel sorry for yourselves if you didn't give them a method for giving you a little extra money. I think there is something to that psychology. You know, if your budget including policy packages is a bigger number than your essential budget level, it is almost like protection for your essential budget level to

say, "Well really we wanted this much and you only gave us this." I don't know if it is that simple but all other agencies are doing it, so I think it would be wise to put in policy option packages. But I agree with you we can't just go in and say, "Well, we want to make everything perfect in one two-year period." I think realistically you have to say, "We know the state is balancing a lot of different needs and therefore our plan is a little bit this time, a little bit next time, and here is the direction we plan to go."

- 19:33 J. Potter We had that plan in the last session. We had a one-sixth increase as a two-year goal. We can conceivably keep on that track even in the face of potential diminishing revenue. I don't think that we should deviate based on trying to guess what the revenue situation is going to be, unless the board changes its policy line.
- 20:02 Chair McCrea You mean the Commission? I think you targeted three areas that we have been really concerned about. We have had a lot of testimony about them and I certainly understand and acknowledge what Chip is saying and the grim reality, but the fact is these are not just wish lists. They are needs that the system has. It seems to me, as one of the Commissioners, that that is an important thing to bring to the legislature's attention. We know if don't ask for it we are not going to get it. If we keep bringing it to them and saying, "We have a need, and here is what it is, and here is why." If we can make incremental increases and gains, then we have done something.
- 20:52 K. Aylward The one-sixth was just what we ended up getting. If we go in and say, "Here is the total. We got one-sixth of the way. Thanks very much and we are assuming that we can do it in like six years," but at least then you have given them the total amount. If they choose to they can say, "You know what. We don't want to drag this out for four more years. Let's just fix it now." I agree with you. I think you put the package in that is the total remaining, the five-sixths that is left, and just say we hope that it will be funded, but if not we will take it piece by piece.
- 21:28 C. Lazenby Just doing my job as Commissioner Coldwater. That's all. My job is just to put some cold water out there every once in awhile.
- 21:40 Hon. Elizabeth Welch I have a couple of questions. The first one is in terms of what happened the last round given that these three items were presented, or was a formula presented? Was it your sense that the legislators were convinced of the need and just didn't part with the money, or were they not convinced of the need and they didn't part with the money?
- 22:01 K. Aylward I think there was some very convincing testimony – like hearing from that woman with four children who still lives with her mother because that is the only way she can afford to continue to do the work she does. There were stories about law school debts and a lot of very moving remarks about people saying they love the work but they can't afford to do it.
- 22:33 I. Swenson The members of the Public Safety Sub-Committee, which heard our budget and made a recommendation to the full Ways and Means Committee, essentially to a member, commented at the end of the hearings that the recommended amount clearly was not enough. They told us, "We know we haven't gotten you where you need to be and we hope to make better progress next time." They allocated a large proportion of their discretionary funds to PDSC because they felt that our essential budget simply didn't meet the need. That is why we got additional funding.
- 23:07 Hon. Elizabeth Welch My other question has to do with the first item on the juvenile dependency representation. I am not clear what the difference is, or what is the connection between that suggestion or proposal and this on going ....
- 23:26 K. Aylward Gang of four.

23:27 Hon. Elizabeth Welch Yes.

23:30 I. Swenson Well they are certainly related concepts. As you know, we had a particular champion in the legislature last session, Senator Brown, who brought to her role the perspective of a juvenile court attorney. So she was able to organize and gather together some like-minded legislators who had participated in a sensitive case review, and as a result of their work, determined that it was an important priority for them as legislators to see that there was improved representation in juvenile dependency matters. They proceeded with a bill that passed through the Judiciary Committee and then went to Ways and Means that would have allocated \$23 million dollars for that purpose. I think I may have mentioned last month, but perhaps not, that that same group of legislators is still interested in the concept but they believe that this session a pilot project would probably be more in order, rather than the full funding piece.

24:51 Hon. Elizabeth Welch I guess my question is how does that fit with this? Do you want to go ahead with trying to get the pilot program funding and to do this?

24:58 I. Swenson Independently, yes. Even though the legislators would be sponsoring the pilot project, they would, I am sure, be supportive of this policy package although they might not be as optimistic about it, and then a decision would be made at some point during the session whether to fund either of those packages.

25:28 K. Aylward I think our agency, if anyone, ought to be putting it forward. If it is wonderful if someone else did too, but certainly we need to be the ones coming forward and saying, "This is what this agency needs to do or should do."

25:46 C. Lazenby Does this still have enough juice with Senator Brown's leaving the legislature for Secretary of State office? Do you think they still have the juice to make it a priority? Kate had a lot of juice.

25:59 I. Swenson There is certainly intense interest. They are a bipartisan group and represent both bodies. Senator Monnes Anderson is taking Senator Brown's place in this group. I think it is an important effort.

26:16 C. Lazenby Are you suggesting that all three of these be policy packages or are we picking from a menu here to create a priority?

26:26 K. Aylward We are suggesting that all three of these be policy option packages.

26:28 I. Swenson Madam Chair, I know we have contractors present who are interested in commenting and I don't know if they have comments on specific pieces of this package and want to express support or lack of support for any of them or for the entire proposal. You might want to hear from them before the Commission makes a decision.

26:49 Chair McCrea Janet, did you want to comment or ask any questions?

26:49 J. Stevens No. I am just listening still.

26:51 Hon. Elizabeth Welch Can I ask another one? Is there a downside to prioritizing packages? Is that dangerous? I don't know.

- 27:03 K. Aylward They have to be prioritized. The budget system requires you to prioritize them and the order that they are in is the priority that I put them in there. You can certainly change that, but that is the way they are situated now.
- 27:27 Chair McCrea Does anybody want to comment? Yes, Jim.
- 27:34 J. Hennings A couple of comments.
- 27:35 I. Swenson Jim, do you want to have a seat here at the table?
- 27:36 J. Hennings Good morning. I am glad to see the sun. It has been so long. I am Jim Hennings. I am the Executive Director of the Metropolitan Public Defender, soon to be retired, so please take with a grain of salt some retrospective that I may indulge in. First, the caseload is decreasing and everything that I am seeing is it is going to plummet over the next biennium, primarily because the funding for law enforcement is city and county paid and the counties, especially outside of the metropolitan area, are going to track, I think, what has happened in the metropolitan area. The caseload in Multnomah County, so far this year, about half way through the year, is two percent higher on an annualized basis than it was in 2003 when we had the BRAC reduction. The caseload on C felonies is down substantially, roughly 23 percent. The caseload in Measure 11s is down. Not quite as much. There has been a flip upwards just recently in the A and B felonies. This is a longstanding trend at least in Multnomah County. There has been this constant decline. Some of it is the mess in the justice system in Multnomah County. Some of it is that the crime rate actually has decreased. We know of areas in the state where there may be one or two deputies at most in the sheriff's office, so there simply won't be the ability to continue to support the caseload. I think that is dangerous because the legislature wants a steady state and this is not a steady state. We are going to be chasing our tails for a good time. A good example of chasing our tails is the aim last time was to get one-sixth of the way toward parity for full-time defenders. The problem is that the target keeps moving. In Multnomah County and in Washington County we have gone in the last ten years from 30 percent behind the district attorney offices on salary - compensation is something else - from 30 percent behind to 40 percent behind. That becomes dangerous. Really what you are going to have to do is guarantee the future quality of the services. People will not be able to stay in this particular field longer. The ones that are coming in now, really, the ones who should be the leaders of those who are coming in now, are looking at leaving, in other words that mid-range group. I am seeing that in my office. You are going to lose all of the gains that have been made. Oregon has a marvelous criminal justice system but it really depends upon continued growth, continuing to bring people in, so that one-sixth was really not one-sixth because at least in the Metropolitan areas there were increases. Now in Eugene there were increases at the expense of laying off deputy DAs, but there were still increases in the salaries that were being paid. On your juvenile dependency representation, I think a pilot is a good idea but what wasn't in this list was an evaluation component. What sold the idea of reducing caseload in dependencies in Washington was a very good evaluation that showed that the cases were resulting in placement much earlier actually saving the state a considerable amount of money. If you don't have that component you are not going to have the ammunition in the future to say here is the level of caseload that ought to be handled by juvenile attorneys. On your post conviction trial relief FTEs, what is missing in that is any word of investigation. I have done post conviction. I have made proposals twice to do post convictions and both times turned down because it was too expensive. One of the reasons it was too expensive is because I included investigative costs. If you are going to do post conviction properly you have to investigate it as if it were a brand new case. You can't do that, and shouldn't do that, with the attorneys. It really needs investigation.
- 32:54 K. Aylward The policy package assumes that investigation would continue to be covered out of the account. So in other words, we don't want a bunch of state employee investigators in Salem. We want to continue to buy investigation services around the state.

33:10 J. Hennings That may be a good idea because you have to investigate where it took place.

On public defender compensation, I think that is critical if you want to guarantee the quality of future services. Otherwise, you are going to see a slow degradation of the services provided and makeup is really going to be very, very difficult. You will have lost all the leadership, all the gains we have made over the last – how long has OCDLA been around John?

33:40 J. Potter Twenty-nine years.

33:44 J. Hennings Twenty-nine years. It was a very different picture 29 years ago before we had the kind of quality push that we now have with one of the biggest, I think the biggest, criminal defense organization. That is a big part of what we have in Oregon. If we lose that it is going to be very difficult to get it back again. Those are my comments. If you prioritize, I would prioritize the compensation first because that is the future, but I think they are all very, very important issues. Any questions that you have?

34:18 Chair McCrea So Jim, when you talk about the evaluation component for the juvenile dependency representation, are you saying something different than what Kathryn was saying about we have to tie this to a key performance measure to be able to show some kind of improvement?

34:32 J. Hennings No. It is how you are going to tie it. You are going to tie it by having it built in to begin with. It is going to be difficult. It would be much easier to pay the bills that are sitting on the table right now. The cases that are being handled right now, but without it you are not going to get the kind of traction I think you need. I think it will be important to build that in from the beginning and sell it to the legislature. This will be evaluated and we can look at the other studies and say this is what we think we are going to find, but we ought to prove it in Oregon.

35:06 Chair McCrea Thank you.

35:06 J. Hennings The other good thing about that is there are some offices that have social workers. You can get your pilot, you can evaluate your pilot, but you can also evaluate some of things that are already being done in some offices.

35:33 Chair McCrea Anyone else? Bob, why don't you come up to the table.

35:37 B. Homan I just had a scenario that I was going to add and it has to do with the compensation packages. Bob Homan, Assistant Director, Lane County Public Defenders. We just lost a three-year attorney in our office because she couldn't afford not to take a job with the AG's office at \$12,000 more a year. She didn't want to go but she has a new baby, and a family, and she didn't have any choice. That is a big jump in her current salary. She is making under \$50,000 with us and she is going to be making that much more with the AG's office. That is all I wanted to add.

36:12 Chair McCrea So you would agree with Jim that funding should be the number one priority?

36:18 B. Homan Absolutely. These are people we want to keep.

36:24 Chair McCrea Yeah. We have got to have another crop coming.

36:26 B. Homan Some of us are getting up there and we are not going to be around forever. Thanks.

36:31 K. Aylward Could I say that I didn't just randomly chose this order. It is not my opinion. This is the priority that the Commission established last biennium. I did not comment on that.

- 36:41 C. Lazenby So it is our fault.
- 36:44 K. Aylward Yes. It is your fault.
- 36:45 Chair McCrea Other comments? Come on up.
- 36:48 A. Sherbo I am Angela Sherbo and I am the supervising attorney at the Juvenile Rights Project and this is Mark McKechnie who is our Interim Executive Director and, interestingly, a social worker. Not surprisingly we want to talk to you about the juvenile dependency representation policy package. I am not sure that either of us would prioritize it over the competency package because it is essentially the same thing. A couple of things I do want to say about the juvenile representation package: We have invested a lot of time as you have - the Commission, OCDLA, our lawyers at JRP. We spent the last interim on two different work groups, a work group convened by Bill Taylor and the Judiciary Committee and a work group convened by Hardy Myers and the Attorney General's Office. We participated throughout the legislative session. We made really strong statements to the policy makers about the necessity for providing quality representation both for children and their parents who are faced with this unbelievable intrusion by the state into their lives. I don't think we should back off from that now not having gotten what we told them we need. I would urge you to continue with that work and I think there is a lot of work that those of us in the field can do help in terms of creating some of the information about what our caseloads are like, what the requirements of a dependency case are now. what they may have been in the past in terms of how much more difficult they are, how much speedier they are, what the level of adequacy of practice is that lawyers are being judged against on a constitutional basis. I don't want to go head to head with other public defender organizations but we have lost many, many, many, mid-level attorneys who can neither afford to raise their children, nor take care of their parents, nor pay off their student loans at the rates that we pay. As much as they desire, and I have been in constant communication with one who was forced to leave trying to get him back, and the conversations are agonizing. Ultimately the AG's office paid him \$25,000 more than we could pay even after the increases from last session, which we had hoped might enable us to entice people back. That is really all I have to say. I think Mark has some numbers.
- 39:34 M. McKechnie Good morning. Again, I am Mark McKechnie, the Interim Executive Director of Juvenile Rights Project. For three months that I have been executive director but I have been a social worker for JRP for nine a half years. I would comment that I have been able to stay at JRP that long in part because of the additional programs and the revenue that those bring in that have supplemented my position and my ability to work at JRP that also allowed me to be a resource to the attorneys on our defense cases. But without those additional programs supporting my position that probably wouldn't have occurred. I come from within JRP but I am also able to look at our budget with somewhat fresh eyes. I can see the disconnect between the standards of practice that we have aspired to at JRP for many years and the standards of practice that this Commission and the office seeks to achieve. But the math simply doesn't support that kind of practice. I think we do our best in spite of the circumstances that we have. I will note one area of progress. And after almost a decade of decline in the compensation for dependency cases, there was a six percent increase in real dollars over what we were paid in 1998. Of course, that is using the more conservative consumer price index figure, not taking into account the 85 percent of costs on average are personnel driven and the fact that increases in health care and those kinds of things are usually significantly higher than the simple rate of inflation for goods. But we are still losing ground even with the increases in dependencies. The compensation rate for review hearings, which is one of the most frequent activities for our attorneys, is down three percent in real dollars from a decade ago. I think because there has been less emphasis on juvenile delinquency rates, those numbers are down 12 percent for juvenile felony cases and 14 percent for misdemeanors in real dollars just since 2002. I would just add, and this is probably for a future conversation, but coming in as a new set of eyes and looking at our contract, I noticed the difference between compensation for juvenile delinquencies and adult criminal

representation. Adult criminal cases are tiered based upon the severity of the offense, whereas there is a single rate for juvenile delinquencies for C felonies, B felonies, and A felonies. We are working at a rate that is comparable to the adult C felony rate even when we are representing juveniles on sex abuse in the first degree and other very serious charges that have life-time consequences in terms of sex offender registration and other consequences in their lives that will last well into their adult years.

- 43:09 Chair McCrea So you are suggesting Mark that we should tier the juvenile cases like the adult cases?
- 43:16 M. McKechnie Yes.
- 43:16 Chair McCrea On the severity of the offense?
- 43:18 M. McKechnie Yes.
- 43:20 A. Sherbo I think that maybe the reason they weren't tiered, but that no longer applies, is that up until '95 the duration of a juvenile adjudication was 21, regardless. The significant difference between a B felony and C felony was not what it is today with that change in the law.
- 43:47 Chair McCrea Questions? Thank you. Any other comments from the public? Ingrid, do you have any sense of where Barnes is on the policy packages?
- 44:06 I. Swenson No, and I was going to suggest that if you want to take a break at some point I would like to call him and get some input from him if we are not able to connect.
- 44:17 K. Aylward Just call him on a cell phone and put it on speaker.
- 44:21 I. Swenson If it would work.
- 44:24 K. Aylward Mine works pretty well.
- 44:24 I. Swenson Shall we try that?
- 44:33 Chair McCrea Okay. Let's take a break and see if we can get Barnes on the phone.
- (Break)
- 1:00:46 Chair McCrea So I understand we have not been able to make contact with Barnes?
- 1:00:53 I. Swenson Well, I did speak with him but he had just gotten a call and the jury had a question. He was heading over for that and wasn't sure when he would back. He said he would give me a call when he is free. I asked if he had particular input that he wanted to provide on the budget and he said, "Not being part of the discussion it is hard to do that."
- 1:01:13 Chair McCrea Ingrid, do you have some comments that you want to make?
- 1:01:15 I. Swenson Just a couple, Madam Chair. When we look at the dependency package versus policy package 102, I suggest that you keep in mind that item 1 in that package refers to salaries of only non-profit public defense offices. The benefits of that piece do not extend to consortium members and others. If you look at the juvenile representation package that would, of course, apply to all – at least as we have conceived it it would apply to all providers in juvenile dependency representation regardless of the contractor's structure.
- 1:02:10 J. Stevens Ingrid, could I ask a question? Do you know what percentage of people who represent juveniles are in consortia and in public defender offices?

1:02:21 I. Swenson Kathryn would have the best idea.

1:02:25 K. Aylward I don't know. I can't give you an exact number.

1:02:27 J. Stevens Can you give me a rough guess?

1:02:31 K. Aylward Sure. Maybe 20 percent.

1:02:38 J. Stevens Are in a consortia?

1:02:37 K. Aylward No. No. Twenty percent are public defenders.

1:02:43 J. Stevens So 102 would miss most of them.

1:02:45 I. Swenson Yes. That is true. I also wanted to mention that I think policy package 100 is probably of more interest to legislators, for whatever reason. That body tends to reflect more concern for the quality and scope of representation being provided in juvenile cases than in criminal cases, so there is some appeal there and frankly I think our juvenile lawyers are more needy and I have expressed that in different ways at different times, but on the whole, as you know from our structural reviews and Paul and I know from our site reviews, the most serious criticism we receive is of juvenile representation. It is not unanimous and sometimes the juvenile component is stronger than the criminal, but on average it is pretty clear that people generally feel like criminal lawyers are doing better work than the juvenile lawyers. There appears to be more room for improvement there and we also hear about the caseloads of juvenile lawyers much more frequently than we do about criminal lawyers. That is not objective information. That isn't a measure of what each of these lawyers is actually doing, but that is the information we receive from the people we talk to in these site visits and structural reviews. It is the juvenile lawyers who appear to be under the most time pressure. I think the needs there are pretty significant and then finally, as has been mentioned, the Oregon Criminal Defense Lawyers Association has been here a long time. It is a very valuable support system for criminal lawyers. They are reaching out more and more to juvenile lawyers, but juvenile lawyers do not have the same support system, the same networks, the same resources that criminal lawyers do. They are just needier and that may be why the last time around when you looked at this you decided that that was an appropriate priority. Then my other comment is with respect to post conviction relief. As you will recall, in March we had a hearing on current issues in post conviction relief. They remain every bit as serious as were when the bar did its initial report, I think it was in '95 or '96. We haven't really addressed those issues. I know Kathryn keeps making good efforts to do that and I think we are making improvements, but as you heard from the testimony, we are not there yet , or even close to being there. I provided you with a copy of a letter Tony Bornstein wrote to you. If you will recall, when Steve Wax testified in March he talked about the fact that at the federal level they find cases where they cannot obtain relief for the client because of an error or one kind or another on the part of post conviction counsel. At that hearing, Barnes expressed some surprise that were such cases and we then asked the federal defender to address that in writing. Tony's letter is in response to that request. And then in addition I asked him to provide us some specific examples, which he has done, of cases in which there was some failure to act on the part of the post conviction attorney that resulted in defaulting the person's claims in the federal system. These are sometimes murder and aggravated murder cases and people being denied relief because they didn't receive appropriate representation in the post conviction arena. Those are my comments.

1:06:52 Chair McCrea Comments by the Commission?

1:06:57 Hon. Elizabeth Welch Ingrid, I thought, maybe not the primary, but one of the issues on this point that this letter was addressing was time frame concerns aside from the quality issues, that there was just straight

time frame problems. That the Oregon process was too long and that certain - is that not right, Paul?

1:07:22 P. Levy I think you may be remembering testimony about the statute of limitations trap that can occur which there is a two-year statute of limitations in the state PCR and a one year in federal habeas. While that is a trap for some it is not –

1:07:48 Hon. Elizabeth Welch Not a big deal?

1:07:46 P. Levy No.

1:07:46 Hon. Elizabeth Welch Looking at package 102, there is a provision here for increasing public defender salaries and a provision for increasing hourly rate lawyers. Now people who aren't addressed there are consortium lawyers. I guess I don't understand that. I'm not saying they should be here or they shouldn't be here, but it is a little hard for your eyes to kind of focus here, and particularly for me learning this stuff and being very new. Do you have adequate money to pay consortia lawyers so you don't need to ask for more, or do you not have adequate money to pay these people? I don't understand?

1:08:39 Chair McCrea I think the correct term is "we." Do we have adequate money? The Commission.

1:08:46 K. Aylward I think the issue is that with a consortium it is very difficult to separate the funding that comes from the contract from any other funding. I know that a lot of consortium members say, "Well, this is all I do or this takes my full time," but as a model you could have a member who takes retained cases in the afternoon and does public defense in the morning. Should the overhead that it covers be 50/50 or should public defense cover less of the overhead? I know I am not supposed to say that your retained work subsidizes your indigent defense work, but that is the reality of what happens for a lot of people. They like having a contract because it guarantees a certain amount of money coming in. It is the bread and butter. It makes it easy to operate a business and then you hope that you will actually make your profit. These are the areas where people come to us and say, "I am an employee of a public defense office and I don't have an option to make income elsewhere and I can't continue to work for this employer when the employer across the street will pay me \$12,000 a year more or \$24,000 a year more. We can identify that and we can quantify that and I think that is why it is in here.

1:10:12 I. Swenson I think we haven't heard as often from consortium members. Not that they shouldn't receive additional compensation. I don't think their rates should be any different if possible than other people's, but for them, as a whole, it is probably working better. We are not losing consortium members. In fact, vacancies in consortia are sometimes hotly contested within an area and people are anxious to apply for those vacancies, so the model seems to be working fairly well for most of them.

1:10:48 C. Lazenby Even if they are not included in the rising tide that lifts all boats, if we were to get the compensation increase there would probably be a correlating increase in what the consortium folks are getting paid.

1:11:01 I. Swenson Well you know, the components of the mandated caseload part of it work to their benefit too. This time around I think we were able to provide additional compensation to almost everyone.

1:11:20 K. Aylward In addition, the Commission indicated that there shouldn't be such a huge disparity between the rates that are paid to a public defender office and a consortium. In other words, you shouldn't be twisting it down so tight with a consortium that they don't last or they break apart or bankrupt themselves. You are right, all boats should float a little more equally, or all boats rise.

1:11:52 Chair McCrea      John, were you going to say something?

1:11:52 J. Potter          I agree with Ingrid’s memory and analysis that last time around we did prioritize the juvenile dependency issues, in large measure, because the legislature, we believed, was going to be sympathetic to that issue. We prioritized the post conviction in large measure because the Chief Justice was greatly concerned about that and the money to fix it wasn’t a significant amount. Then we prioritized the third package. Even understanding and agreeing with that, I think we might want to take another look at how we do it this time. I would float this idea; that we take a look at changing the priorities so that the compensation package, one of two, becomes the number one priority and take item number one out of the 100 package, that is the language that says, “funding to reduce caseloads and improve compensation,” and add that as number four into this 102 package so it says, “funding to reduce caseloads and improve compensation in juvenile and adult representation by consortium lawyers. That becomes part of the compensation package and then the 100 package, the juvenile dependency, the remaining three targeting increases, funding additional support staff, funding for enhanced training opportunities, would become a pilot project for targeted juvenile dependency representation and number three would be the post conviction relief.

1:13:35 I. Swenson      Certainly an interesting approach, John, and a good idea. I think two, three and four were sort of viewed as pieces of one. If we didn’t get one, then one or more of these pieces might fill that gap, but they could be presented as a separate package I suppose.

1:13:56 J. Potter          I understand that if you had funding that was in 102 under this scenario, that was the number one, and we got that additional money, that takes care of part of the problem and now you can focus on dependency representation with two, three and four, because folks would have been paid more under the new number one. Is that clear or not clear? I haven’t fleshed this out any more than five minutes of thinking about it. We may have to change our emphasis is my suggestion.

1:14:35 I. Swenson      So we would make 102 a bigger package?

1:14:40 J. Potter          Right.

1:14:40 I. Swenson      It would be significantly larger for one thing. Last session we calculated what is 100 here at \$23 million, so independently that is a big number.

1:14:57 J. Potter          That would reduce, considerably, the pilot project idea. We backed off of the notion that we were going to get \$20 something million dollars pretty quickly when the realities of that set in.

1:15:12 I. Swenson      The last day of the session we gave up on that one.

1:15:15 K. Aylward      Commissioner Potter, I thought what I heard you say is that number one becomes full funding to reduce caseloads and improve compensation for representation of parents and children in juvenile dependency matters, but did I heard the word consortia thrown in there?

1:15:30 J. Potter          Yes. By consortium lawyers.

1:15:36 K. Aylward      Only?

1:15:36 I. Swenson      All of them. As well.

1:15:38 J. Potter          Because it now becomes part of this number one package down here. Those other things – you have the public defenders in there right?

1:15:48 K. Aylward      Yeah, but that is strictly salary parity. That won't reduce caseloads and it won't target juvenile dependency representation. If you want to include the full funding for caseloads and compensation, I think it would have to do it for all providers and I think that package would then be \$40 million, \$50 million, and even though I said, "You just tell them what it costs," I have a sort of gut check level ....

1:16:23 J. Potter      But they also need to know what it costs if we are going to make a policy that supports doing the right thing. We can massage the language. I don't have any problem with that, but it seems like we have an obligation to tell them what it is going to cost to do it the way they should be doing it.

1:16:40 K. Aylward      Absolutely, but I would recommend breaking it into separate packages because if you say, "Here are 10 packages at \$5 million each," you know someone might say, "You know for \$5 million I think we ought to do that." Whereas if it is \$50 million people just say, "Oh, we don't have \$50" and it gets discarded.

1:17:00 J. Stevens      If you put your \$50 million out and then you had four items of 10 or 20 plus or whatever it is, my math is terrible, they can pick and chose among the subsections, can they not?

1:17:17 K. Aylward      That is true and that is kind of what we did last time where we did actually show them the three components.

1:17:24 J. Stevens      Right.

1:17:24 K. Aylward      They didn't end up actually saying, "Okay. We want to fund component two or component three." They just sort of said, "Well, here is some money we have," and then the Commission decided where to channel it.

1:17:40 J. Stevens      On that same idea, is it better for us to give them these four items as a single thing and hope they say, "Okay, here is \$20 million. Go have fun with it and do whatever you want." Is it better for us to have them do it that way or to say, "Okay, we like number 4 which is \$20 million dollars. So we will give you \$20 million dollars for number four that is part of this 102 package." Which accomplishes more for us?

1:18:05 K. Aylward      Well, from a contracting point of view, the less specificity the better because ..

1:18:13 J. Stevens      You can spend it on whatever you want.

1:18:13 K. Aylward      You aim it toward what the intention was but sometimes you are stuck. Someone says, "I don't do juvenile dependency representation so where is my improvement?" I like less.

1:18:29 C. Lazenby      I think John's idea is worth pursuing a little bit more. I wonder because I sat through the conversations here and I know there was a lot a legislative activity around increasing compensation for our lawyers in this field. I have experienced sort of legislative fatigue when the same issue resurfaces again. Not saying that it is not really our top priority but the other two pieces as separate packages, the juvenile dependency as well as the post conviction which seems to be getting a lot of traction from a lot of different areas, from the judges and a number of other folks, is a fresh look at a new issue as opposed to just coming back and saying, "Yes we know you gave us more money last time, but we want more money again now," which is a common refrain and quickly disposed of. The other reason I think we need to kind of look carefully at what John is proposing is when you put together a larger package you are right, Janet, that you have got to put it together and think about what parts of it you are willing to throw overboard first. If you go in with an all or nothing, you are more than likely to get a nothing. It is just a cautionary comment. I think there are some synergies between one and three, but we need to be careful how we do it and structure it in a way that

we can focus this without the whole thing falling apart, and keep in mind the legislative fatigue around, “We gave you raises last time and now you are back asking for more money again. Is that all you are about?” That can damage us in a lot of different fronts if we pursue that.

1:20:19I. Swenson One comment, Commissioner Lazenby. They did invite us to come back. The Public Safety Subcommittee recommended that we come back for more. That is one of the strong pieces in favor of that package.

1:20:39Hon. Elizabeth Welch This is my new observation on all of this. I cannot understand why 102 would not be the first priority of this organization. I just don’t understand that. What has been so fascinating about the time that I have had on here is coming to understand the struggles that so many defense organizations have getting and keeping capable lawyers so that people who are being charged with crimes get a fair shot at defense, that there is fairness in the system and that is so fundamental. I just don’t see how it could be anything other than the first priority of the Commission, that we raise the standards of compensation so that in places like Coos Bay, Burns, Pendleton, and even smaller places, there is a functioning, capable, professional organization representing people charged with crimes, and everything else is a detail.

1:21:44Chair McCrea I guess I look at it a little differently. I look at it like sailing because with sailing you can’t get from point A to point B by just going there. You have to tack and zigzag with the wind and those kinds of things. At least for me, in the time I have been with the Commission, it seems to me that 102 has been our top priority but it has been sort of trying to do it without tacking different ways. I talked to Ingrid at the break and said, “Would it make a difference if we made 102 the top priority.” I hope you don’t mind my repeating this Ingrid? Ingrid’s analysis was that the legislature is going to look at where they perceive the need to be. It seemed to me that this list, as it is set out, was almost like in a pyramid shape. The juvenile was correctly put first because it is where we have the legislature interest. You have got them hooked if you will. We may at least get the pilot project and we have significant need there, although it is not the overriding need. On post conviction I think we have do something. We have to do something on all of these, but I think something has to happen with that. In reading Tony’s letter I was appalled at the meeting in March and it breaks my heart to see these things. In terms of the public defense provider compensation, you know I care about all of our providers but I got to say I am especially concerned about the PD offices because we have taken a position with the Commission that the public defenders are different because they are institutional and we have an expectation of what they are going to do for us which is different than what we expect from private lawyers and our consortia. We expect to be on the cutting edge. We expect them to be training and bringing people up to speed and if we are losing that, based on what we were hearing, not just today but other days, that is critical to the criminal defense infrastructure. For what it is worth, I totally agree with you in terms of our mission and our goal that in terms of the 2009-11 policy packages, I would leave it as it is. There is my two cents. Now, we have to make some kind decision before this has to go in on July 31. I am very uncomfortable with not having the wisdom and input of the Chair. I am wondering if the Commissioners would agree to set a phone conversation when Barnes is available for us to have further discussion. I think this is obviously very important. What is the reaction to that?

1:25:04I. Swenson We could have a transcript made of comments so far and get those to him.

1:25:14J. Potter I think that is right we should have a phone conference.

1:25:13C. Lazenby Me too.

1:25:17Hon. Elizabeth Welch As long as it happens soon.

1:25:18 Chair McCrea Okay. We could do it by email?

1:25:25 J. Stevens No let's do it by phone.

1:25:38 J. Potter When is the deadline Kathryn?

1:25:40 K. Aylward The figures for the essential budget level are due in the system by June 30. The essential budget level is just this package 040.

1:25:50 Chair McCrea I don't think there is any issue with the essential budget at all.

1:25:55 K. Aylward And then the policy option package figures, the complete agency request budget, needs to be in the system by July 31. Then the actual budget binder, the supporting narrative, is due September 1, so I will bring that to the August meeting for the Commission to review and comment on.

1:26:15 J. Potter So in order for you to plug things in after the Commission sets their priorities, how much time do you need?

1:26:25 K. Aylward It depends on which one you pick. Maybe two weeks.

1:26:32 Hon. Elizabeth Welch May I ask you a question, Kathryn? If package 100 remains package 100, when you create it will you break it down with numbers attached? I assume you do. You just don't go out there and say, "Give me money."

1:26:46 K. Aylward When it is submitted there is a figure, depending on what you choose. I agree with Ingrid and the Chair that the priority doesn't really make a difference other than politically, I suppose, or publicly. They won't say, "Oh, we have this number of dollars so we are going to fund your first priority." It is just that the system requires you to set the priority, but depending on which components of package 100, which approach you want to take, then it would be different dollar figures.

1:27:27 J. Potter July 7, 8, 9, in that range. Does that give you enough time?

1:27:32 Hon. Elizabeth Welch What about July 1?

1:27:36 I. Swenson If we could let's pick a couple of dates and get ahold of Barnes and see when he is available.

1:27:47 J. Potter Any particular time you want to do it?

1:27:51 Hon. Elizabeth Welch May I ask another question? How do we do this and not violate the public meetings law?

1:27:56 I. Swenson We will give notice. We will have to give notice and provide access to the public.

1:28:08 C. Lazenby July 1 anytime after 9:30.

1:28:11 I. Swenson July 2 did you say?

1:28:13 C. Lazenby July 1. July 2 is completely open.

1:28:22 Hon. Elizabeth Welch What would be a good time?

1:28:22J. Stevens For me 10:30.

1:28:28J. Potter 10:30 works on either one of those days for me.

1:28:31I. Swenson So July 1 or 2 at 10:30 for everyone? Could we look at the following week as well and maybe tentatively .....

1:28:58K. Aylward I just realized on package 102, Item No. 1, shall I assume that it will not be wasted effort to go ahead and survey the public defenders and get current salaries and go ahead work up a number for that. It is likely that the Commission will ....

1:29:16J. Potter In light of Jim Hennings' comments, I think it is a worthwhile exercise.

1:20:3 K. Aylward Okay. I could go ahead and work up numbers for 102 even though the Commission hasn't concluded; I might as well do it.

1:29:29 Chair McCrea Yeah, go ahead and do it.

1:29:40I. Swenson How about the 8<sup>th</sup>? Does that work for people? Tuesday the 8<sup>th</sup>.

1:29:49J. Stevens Again, I am always tied up until about 9:30.

1:29:54I. Swenson And the 9<sup>th</sup> is a Wednesday. Same thing?

1:30:30J. Potter The 9<sup>th</sup> works for me too.

1:30:02I. Swenson Very good. That should be enough to work with. I'll try to reach Barnes again during the meeting and see what his schedule is.

1:30:15K. Aylward Prior to that meeting I will provide figures on the items in 102. On 100 I won't do anything until I get some direction.

1:30:26J. Stevens If you were to do 100 there was some talk of a pilot project. Is there one going on now? Did I understand that?

1:30:34I. Swenson There is a workgroup of legislators who have asked us to pursue a proposed pilot project. Kathryn and I are meeting with a couple of our providers in the next couple of weeks to explore what a pilot might look like in those jurisdictions. Then we would need to get back to the legislators and ....

1:30:59J. Stevens Would that be separate from 100?

1:30:59I. Swenson Yes. At this point I believe they would like to sponsor a bill of their own and it can be mirrored in our proposal or it can be independent of our proposal.

1:31:17Chair McCrea Very good. Let's move on to Item No. 3.

**Agenda Item No. 3**

**Approval of Contracts**

1:31:24K. Aylward It is behind the pink tab divider in your materials. We issued a request for proposals for death penalty contracts and principally it was necessitated because MCAD and Marion County had included aggravated murder under their contract. They were the only general purpose contractor that included aggravated murder cases. We decided we were going to remove aggravated murder from MCAD's caseload and have aggravated murder cases in Marion County handled the same way as everywhere else in the state, so we issued the request for

proposals. These were the three bidders we had. Dan Casey has been on our Capital Appellate Panel. He is an excellent attorney and we are thrilled to have him. Steve Gorham and Steve Krasik had been handling the aggravated murder cases that were under MCAD's contract so this was a natural progression. The contracts are the same standard number of hours per year and the typical rate of \$90 an hour. I recommend approval of these contracts.

1:32:54 Chair McCrea Discussion or questions by the Commission? I would entertain a motion.  
**MOTION:** Chip Lazenby moved to approve the contracts; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

**Agenda Item No. 4 Commission Discussion of Service Delivery Plan for Judicial District 14**

1:33:10 Chair McCrea Item No. 4, Commission Discussion of Service Delivery Plan for Judicial District 14, Josephine County, which is behind Attachment 3. We lost Ingrid. Let's come back to that. Paul, why don't you go ahead and give us the report on the site visit findings.

**Agenda Item No. 5 Report on Site Visit Findings**

1:33:45 P. Levy I will be happy to do. I also was hoping Ingrid would be here for this as well since she has participated in most of these site visits. Traditionally, at this meeting here, the Commission has received an update on the site review process and in your materials you have a list that you have seen at this meeting in the past updated with all of the site reviews that we have done and the volunteers who have served on those teams. I think the Commission has always expressed its appreciation to those volunteers for the work that they have done. I am sure that you will want to do that again today, but what we also wanted to do today is to provide you an overview of some, what we would call preliminary findings or conclusions that we can draw from looking at all of the site reviews that we have done since 2004. That is what I propose to present to you now including a little bit of detail, if you wish to have it, about the site review process. The peer reviews have been happening since 2004. As I mentioned, there have been 30 providers who have been evaluated by peer teams. That is 30 detailed reports about the quality of representation, with those providers representing roughly – is Kathryn here? Do you have the percentage of the caseload that – this was a blank that I needed to fill in for you, but I think it is 60.

1:35:54 K. Aylward I was going to guess 58.

1:36:00 P. Levy About 60, 58 percent of the public defense caseload has been examined. So you know, these reviews have been identified in the Commission's strategic plan in the current biennium and in the past as a key strategy in the goal of the Commission to assure quality public defense. The process is overseen by the Quality Assurance Task Force; this is an advisory body to the executive director. Jack Morris just took over duties as chair of the task force after the original and long serving chair, Jim Arneson, resigned. Other members of the Quality Assurance Task Force are Jim Hennings, Ron Gray, a representative or two from the Juvenile Rights Project and Mark McKechnie was at our most recent meeting, Tom Sermak, Greg Hazarabedian, Karen Stenard, and Jennifer Kimble. I am not sure if all of you are familiar with how the process works or whether you would like me to describe it?

1:37:20 Chair McCrea Why don't you give us a brief description?

1:30:25 P. Levy After we have selected a provider to evaluate, established a date for that evaluation and a team, in advance of a site visit we send a survey to all of the major local officials in the criminal justice, or juvenile, or both, systems asking a variety of questions to get their views about the performance of the provider. The provider helps us identify those people and then we also schedule, usually with the assistance of the provider, interviews with all of these officials that take place over the course of two very intense days of interviews. On the third day of the site visit, the team meets to try to reach preliminary conclusions and then shares

that with the administrator of the provider. Following that, after a month or sometimes longer, a report is produced. The report is provided to the administrator and we ask for comments and that has been included in the report. The goal of these site visits is to first determine the quality of representation that is occurring, and also to identify what is working particularly well with this provider with the view that that can be shared with other providers in the state, and then to also identify areas that need improvement and to offer assistance with achieving improvement where it is needed. A fundamental operating principle of these visits is that the people who we survey and ask for input are promised confidentiality and anonymity and they provide their comments with that understanding. Because of this the reports that follow are considered under the Public Record's Law as confidential reports and also because of these promises and conditions, we have gotten very good response, very good participation in the survey, very good participation in the interviews, and good, frank comments about how our providers are doing. Preserving that confidentiality and anonymity, we can still provide you with some overall observations, without identifying particular providers or the source of the information, about these site visits. I want to do this with a couple of caveats. First of all, every site visit has looked at the particular circumstances of that provider. Its focus has been dictated by the jurisdiction and the needs of the provider. They have not been uniform in a way that you can compare them easily, necessarily. Every team has different members with their own focus and values. I have tried, in looking recently at all 30 of these reports, to draw generalizations from them and some of that has been my own interpretation and filtering of this information. One thing that each report does do is reaches a conclusion about the overall quality of representation, generally, looking at a scale of excellent to poor and that is what our survey asks. Across all of the reviews, the representation is most often said to be good with the understanding that with every provider, I think it is safe to say, there have been one or more attorneys who have been identified as doing very good, or excellent work, but there have also been with almost every provider, attorneys who are widely known or said to be performing unsatisfactorily. "Good" is probably, in the view of the Commission and I think in our view, not good enough, especially when it is understood in the context of specific comments and information that we also receive in these site visits. One observation that Ingrid has already shared with you and won't come as any surprise is that juvenile representation is consistently rated as inferior to the representation that is being provided in criminal work. The reasons for this are ones that you are familiar with, the complexity of the cases, the need for specialized skills and knowledge, and high caseloads. Another issue, though, that is frequently identified to site teams is that you have good criminal defense lawyers doing juvenile work not as well. That is because in many jurisdictions they have to, or it is at least thought that they have to, because you need these lawyers because of the number of parties and conflicts. They are compelled to do the work and they don't necessarily make the transition well to an entirely different kind of advocacy. Some are not really interested in doing the work. The one thing, aside from this, that is very interesting in these site visits is that in the juvenile field you have more people, more parties, and more interested individuals who are available to report to you about the work that is being done. You have the CASAs, you have CRBs, and you have DHS, lots of sources of information. There are really fewer people in the criminal world that are willing to give you good, frank information about the performance of attorneys although we do seek them out. What we hear across these site reviews in the juvenile area most frequently is inadequate client contact. What is often reported to us by a variety of sources is that attorneys are thought to be meeting with their clients only at court hearings and only shortly before them. We know from our own database, and this is also reported to us, that attorneys in juvenile work make minimal use, sometimes shockingly minimal use, of investigative and expert resources. There is often confusion about the role of counsel in these cases. There is confusion about basic statutory and regulatory processes. Interestingly, we frequently hear that attorneys either too easily acquiesce in what DHS or a juvenile court counselor is recommending, or are too combative and too adversarial. It is an interesting problem that is often brought to our attention. Across the board in these reviews, we are hearing that manageability of workload and caseload is a major problem for our providers and, again, I'm sure this comes as no surprise. In some reviews we are provided with or we have access to actual numbers which we know exceed

national standards. More often it is anecdotal reports, though, and client contact is the most consistent area where attorneys are said to have too many cases and are not able to meet their clients in a timely and meaningful way. We also receive reports about failure to be prepared, difficulty in scheduling hearings and other meetings because the attorneys have too many cases and too many obligations and too many places to be.

The site visits also look at management issues within providers and interestingly, most providers, looking at the 30 reviews that we have done, have not had in place mechanisms for recruiting, training, supervision, and evaluation of attorneys. The providers who do have mechanisms, and typically those are found in public defender offices, are having trouble performing those evaluations and supervision duties, and there remain attorneys within these providers who are, as I said, widely known to have performance problems. On the other hand, we have found in the site reviews that most providers do now have in place boards of directors which increasingly include outside board members, members who are not part of the providers. Generally with consortia there is more of a trend toward more structure in these groups. I think we are hearing and know that this is a result of the Board's initiative in this area. Consortia have more boards and they are adopting attorney agreements or contracts which set performance standards or expectations, and also mechanisms to deal with underperforming attorneys.

Site teams also look at systematic issues - the practices of courts, law enforcement, prosecutors, DHS since all of these affect how public defense services are delivered and the quality of those services. Again, as you have learned, the site visits document the availability of court time, court scheduling and docketing practices and the impact they have on how attorneys operate. Among the good news from the site reviews is that most providers participate in systemic discussions. They are part of workgroups. They are part of standing groups that talk about and deal with systems issues. A number of providers, we have been told, have successfully dealt with docketing issues and other issues that cause inefficiency and interfere with the ability to provide good representation. As you also know, providers are involved, where they exist, in specialty courts, drug courts, domestic violence courts. Most of the jurisdictions that we have looked at in site visits, though, have not had formal early resolution courts.

Again, with systemic issues, what we hear frequently when we are looking at providers that do juvenile work is that problems with DHS affect the quality of representation. The problems that are usually identified with DHS, in addition to lack of training, is a high rate of turnover and high caseloads at DHS. Among the major system issues that every site visit has looked at is whether attorneys are present at the initial hearings in both criminal and juvenile cases. What we have found is that most are not. Most providers are not present at arraignments in criminal cases, the initial arraignments. They are not present at shelter hearings in delinquency and dependency cases. They are working on this and some have moved toward achieving representation there.

As I said, with every report, a draft is sent to the provider. We ask for a response, which is included in the report, and then we follow up a year or so later to see what progress has been made on the recommendations. With almost every site visit the provider has expressed, I think, genuine appreciation for the review and has made some change as a result of the observations. Those changes range from dealing with a particular problem that had been brought to their attention that was widely known within the community but somehow was never brought to the attention of the provider, or a more general need for structure in a group, the implementation of training programs, greater monitoring of attorney performance. With almost every site review there have been changes. We have not revisited providers with follow up site reviews, so it is difficult to tell you or to know what has changed overall as a result of this process, the process which is still ongoing. We did, as you know, conduct a statewide survey recently asking about the quality of representation. The survey has its limitations and flaws, but it does suggest that there has been overall improvement. But what

the survey also identified as a major impediment to quality of representation is the same one that the site reviews have identified, primarily caseload problems and then a number of other problems specific to providers. I don't mean to paint a gloomy picture here. As I have said, we have seen and heard about some outstanding practices across the state, but there is clearly, across the board, a great deal of room for improvement. Ingrid staffed the vast majority of these site reviews. Do you have any other comments you would like to add?

- 1:53:33 I. Swenson No. I think that is good summary, Paul, of what we have found over the course of almost four years now. Did you figure out the percentage? I wasn't here when you started.
- 1:53:44 K. Aylward Fifty-six and a half percent.
- 1:53:51 K. Aylward There have been 29 site reviews. Nineteen of them adopted changes and that represents 56 ½ percent of the caseload. We track this because, as you know, it was one of our key performance measures. It is currently a key performance measure that we are going to recommend that we not use anymore.
- 1:54:18 I. Swenson So we still have a few to do. The Commission's structural reviews have overlapped, to some extent, so there isn't the urgent need to send a site team to places where you have been and explored some of these same issues.
- 1:54:26 Chair McCrea Well, I want to express my gratitude on behalf of the Commission to you, Ingrid, and to all the people who are listed in here who have helped and assisted and been able to make the time to go an help out with these.
- 1:54:41 I. Swenson Lots of volunteers.
- 1:54:42 Chair McCrea Lots and lots of volunteers and it is much, much appreciated.
- 1:54:44 P. Levy I would also like to add the providers are appreciative even when they are not necessarily happy. They are glad to have had another set of eyes. The teams, the people who serve on these teams invariably take away information and knowledge that they then use in their own organizations as well.
- 1:55:12 J. Potter I belong to a loose knit group of executive directors or criminal defense organizations, and I have mentioned this to them from time to time, and there is no state that I am aware of that does anything remotely like this. It is pretty unique. It is truly a feather in our cap. It strikes me that it is one of those things that, even though I know Ingrid and Kathryn talk to the legislators about this, it may be something that we need to trumpet a little bit more.
- 1:55:51 Chair McCrea Other comments?
- 1:55:54 I. Swenson I did reach Barnes' office and July 2 at 10:30 would work for him, so why don't we convene a conference call at that time. I told his office I would get him at least unofficial minutes of this discussion and I will certainly get them to all of you to so that you can read that beforehand. If there are other requests for information before that please let us know.
- 1:56:32 Chair McCrea So, Ingrid, I put Paul in the hot seat while you were out of the room calling Barnes' office. We can got back to Item 4, which was the Commission Discussion of Service Delivery Plan for Josephine County.
- 1:56:45 I. Swenson Very good, Madam Chair. Last time, as you will recall, we got very involved in a discussion about Jackson County, and did not get to a review of Josephine County. The Commissioners had heard from witnesses from both of those counties when we were in Medford in April. The report, which you have, has been updated just to include a summary of the testimony that you heard. I would be happy to run over the highlights of that report, unless that is not

necessary. If you have all had a chance to review it, you may not need further update, but essentially, I think we learned that they were doing good work. The combination of providers there was the appropriate one, at least at this point in time. They have a public defender office. It is not as large as the one in Jackson County. It has only seven lawyers but it is certainly filling the function of a public defense office and they have a very healthy consortium. They have recently had to address some difficult issues, but they have done that and moved on. They are currently recruiting for some additional consortium members. On the whole, people were satisfied in the judiciary, the district attorney's office, and in juvenile court with the work of these lawyers. In terms of a structural situation it is probably the appropriate delivery system for that county.

1:58:29 Chair McCrea

That was my impression.

1:59:30 J. Potter

It appears as well that it may be the county in Oregon that, although Coos may argue differently or Curry, that is going to be hardest hit by the loss of O&C funds in the criminal justice system. They may be a totally different kind of system a year from now.

1:58:44 I. Swenson

It is true. I looked at their most recent budget update, which is online, and when they got the one year extension of O&C funds they split it in two and spent \$6 million the first year and set aside \$6 million for the second. As of July 1, they will have reduced the Public Safety Budget from \$4.3 to \$3 million in anticipation of the loss of revenue and they basically indicate in their budget update that they do not know what the situation will be in '09-'10, so there are a lot of unknowns for them.

1:59:30 C. Lazenby

Did they come close to closing their jail a few months ago?

1:59:31 I. Swenson

They talked about that as an option and it may still be on the table. Some counties are considering doing that, closing their juvenile detention facilities as well and housing prisoners in other locations when they need to. As some of you may know, the Governor had convened a task force to look at ways the state and others could assist the counties that were hardest hit by this funding loss and they have a number of proposals. There is no final report yet, but they will be following up with a number of proposals in the legislature and elsewhere in terms of how to help these counties through this crisis.

2:00:22 Chair McCrea

Anything else on Josephine County? Okay, so what do we have in the way of monthly reports.

#### **Agenda Item No. 5**

#### **OPDS's Monthly Report**

2:00:30 I. Swenson

I will ask Pete, in a minute, to talk about our appellate division but very quickly we also talked about Umatilla County last month and a couple of weeks ago I went to Pendleton and met with a number of people regarding the juvenile representation piece. As you will recall, 50 percent of the kids who came to court with formal petitions were being assigned counsel, 50 percent were waiving counsel and that was of concern to this Commission. In the report which you reviewed last month, the juvenile department essentially reported that the representation being provided to juveniles was not valuable and that nobody was particularly interested in promoting additional appointments until it was clear that there was a benefit that would come from those appointments. A number of discussions have taken place. I did talk with the juvenile judge, with the trial court administrator, with our provider. And the judge is prepared to increase the rate of appointment. Our principle provider there is looking at dedicating some of his positions to juvenile representation so that these attorneys could specialize and begin to treat these cases with more concern and interest. They are convening a group of interested representatives of various local agencies to talk further about that. I will keep you updated on that but I think there are some things happening that might be useful. I wanted to note, as I informed Commissioner Welch earlier, that I heard from Judge Orf just before coming to this meeting and she reported significant improvement in the contact

lawyers were having with children in Jackson County. Both providers, she thought, were evidencing significantly greater effort in contacting and maintaining contact with their clients. I think those are the only updates I have. Pete?

- 2:03:13 P. Gartlan Thank you, Madam Chair, members of the Commission. For the record, Pete Gartlan, Office of Public Defense Services. I am somewhat sad to say that the days of LSD are waning. We will be officially changing our name to the Appellate Division. There may be some flashbacks over the next couple of weeks. That should be the last of the flashbacks.
- 2:03:40 C. Lazenby It has been a long strange trip hasn't it?
- 2:03:41 P. Gartlan But we have enjoyed the ride. I thought I would bring the Commission up to date with our U.S. Supreme Court litigation. The U.S. Supreme Court has set a date for Wednesday, October 15, as the argument date in *State v. Ice*. The state has filed its brief on the merits. We are drafting the response right now. The first due date is early in July. We have a draft relatively completed, that first draft only. We will be ready and going back to D.C. It seems like our U.S. Supreme Court practice is expanding somewhat. We will be filing an *amicus* brief in a case out of Louisiana with respect to unanimous jury verdicts. Right now, only Louisiana and Oregon allow a guilty verdict on a less than unanimous verdict, so for felony cases in Oregon it is possible to have – “possible?” It occurs daily - a guilty verdict based on a 10-2 verdict or an 11-1 verdict. If the Court does not take the Louisiana case, we will be filing our own cert petition sometime in the future on cases coming out of Oregon. Finally, I want to report in the juvenile section, our juvenile attorneys have cases assigned so they are working on cases now. We have worked with the Court of Appeals, which has been incredibly helpful for us, and Chief Judge Brewer has arranged a CLE in September for all the juvenile appellate practitioners on the defense side and in the Attorney General's Office and there will be four Court of Appeals judges participating in that. It will be a half day event. As for what is happening internally, Angela Sherbo, who reported to you earlier today, has been terrific assisting the attorneys and instructing them on substantive juvenile law. That is about it. Thank you.
- 2:06:04 Chair McCrea Do we have any other reports?
- 2:06:06 S. Gorham Madam Chair, could I ask Peter a question about one of the things he just mentioned?
- 2:06:11 Chair McCrea Okay. If it is not personal or about flashbacks.
- 2:06:13 S. Gorham No. It is a substantive question. Should we be objecting to 10-2 verdicts if you are going up on a potential cert on this, would it be to our client's advantage to be objecting to this if, in case, the Supreme Court takes it?
- 2:06:37 P. Gartlan As usual, it is better to be safe than sorry, so I would advise that. I think probably if we prevail, if the U.S. Supreme Court decides that a unanimous jury verdict is required, that would probably be considered structural error and would apply, at least, to all cases still alive on direct appeal.
- 2:07:01 P. Levy I note on this, the cert petition that was filed in the Louisiana case was filed by Jeffrey Fisher and he is pursuing that. It is an excellent cert petition and it is all federal constitutional law. There are state laws as well, but you can find that cert petition or I can somehow make it available.
- 2:07:26 Chair McCrea Okay. Any other reports? As Jim Hennings indicated he is retiring and we on the Commission, and those of us who have practiced in Oregon for any period time, know how much of a debt we owe to Jim and how important he has been to public defense in Oregon. We wanted to recognize and honor him and that was delegated to our illustrious chair, who is not here, and Jim may see that as a back door way of making him come to the next meeting

because Barnes had a number of things that he wanted to say. He wanted to make a presentation so Jim you may just have to come over to Baker City with us. I as an Oregonian and as somebody who has practiced in the state over the past 25 years - I can't believe it has been that long - you have always been in my life. You have always been there and I just want you to know how much I appreciate, and everyone on the Commission and in this room, appreciate all you have done for us and we hope you will keep hanging in here with us.

2:08:55 J. Hennings

I am going to be very, very brief. I can't say how proud I am of Oregon and of the criminal defense bar and the Commission. I just urge you to keep up the good work. You have a good group of attorneys. There are flaws and blemishes and things that have to be done, but you have a group that really wants to do it right. I urge you as a Commission to continue to support that, and push that, and I urge the field to continue to be the best that you can be, the attorneys that we know can excel. Oregon has created a process in which criminal defense attorneys are part of the system, part of the bar and that was my intent when I first started. I am just so proud of everyone. Thank you.

2:09:47 Chair McCrea

Any other business?

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

Meeting was adjourned.

# Attachment 2

PUBLIC DEFENSE SERVICES COMMISSION

MEETING MINUTES

Wednesday, July 2, 2008

10:30 a.m. to 11:30 a.m.

A Telephone Conference Meeting

Office of Public Defense Services

1320 Capitol St., NE

Salem, Oregon 97310

MEMBERS PRESENT:

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

STAFF PRESENT:

Ingrid Swenson  
Kathryn Aylward  
Paul Levy  
Billy Strehlow

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Agenda Item No. 2

**PDSC 2009-2011 Budget Proposal** (continued from the June 12, 2008 meeting)

Chair Ellis called the meeting to order. He noted that there was no issue regarding the mandated caseload budget and that the subject of today's meeting was the proposed policy option packages, two of which were essentially the same as two packages submitted in 2007. The third, the juvenile representation package, was different from and significantly larger than the juvenile appellate package submitted in 2007.

Ingrid Swenson recommended that the Commission propose full funding for each of the proposed packages, rather than a portion of each.

Chair Ellis suggested that the defender compensation package be described as "funding to increase full time public defender salaries to attract and retain qualified career providers" rather than as an effort to obtain "parity" with district attorney salaries. He also asked Commissioners to consider whether an incremental approach to increased funding might not be advisable, especially since it would build upon the step taken by the legislature last session.

Commissioners McCrea and Lazenby expressed approval of the Chair's proposed language and the other commissioners concurred.

Kathryn Aylward reminded Commissioners that only the title and total amount of policy option packages had to be submitted by July 31. The agency can describe the purposes of the package however it chooses in the budget narrative which will be prepared and submitted later. On the question of whether the Commission should take an incremental approach to increased funding, Kathryn Aylward pointed out a potential complication with the use of that approach. Even though the last legislature provided funding that would have allowed public defenders to receive one sixth of the amount needed to reach parity at the time, more money would be required in 2009 than in 2007 to reach parity since district attorney salaries have

increased. Parity might never be achieved if only a sixth of the amount needed were sought every session.

Greg Hazarabedian, the Executive Director of Public Defense Services of Lane County, recommended that the Commission at least start out by stating what the full need is.

Commissioners approved including the full amount proposed for Policy Option Package 102.

Mr. Hazarabedian also recommended that the Commission consider a separate policy package dealing with caseloads.

Ingrid Swenson said that this session it might be preferable to address juvenile caseloads as part of Package 100 since there was already legislative interest in that area, but defer a broader discussion of caseloads until a future session.

**VOTE 5-0** to approve Policy Package 102.

**VOTE 5-0** to approve Policy Package 101.

The Commission discussed the four proposed options in Policy Package 100: (1) full funding to reduce caseloads and improve compensation, (2) targeted increases, e.g. review hearing rates, (3) funding for additional support staff for increased client contact, and (4) funding for enhanced training opportunities. Chair Ellis inquired what the cost of option (1) would be and Kathryn Aylward said that since the Commission had already approved Package 102 and since the budget has to be put together as a whole the amount needed to fund option 1 would be reduced as a result of the increases proposed in Package 102 and consequently she would not be able to provide the Commission with a number today.

Commissioner Potter then discussed his proposal to integrate Option 1 in Package 100 into Package 102.

Kathryn Aylward recommended submitting the packages separately in order to draw special attention to juvenile representation. Chair Ellis asked if it wouldn't be a better approach to combine them in the hope that a single package might be more successful. After further discussion of the relative impact of multiple policy packages, of the percentage of juvenile providers who work in consortia and therefore would not benefit from Package 102, and of the difficulty within public defense offices of providing pay increases to juvenile defenders without corresponding increases for criminal defenders, Commission members decided to approve Option 1 in Package 100 amended to request "full funding to reduce caseloads" rather than to reduce caseloads and increase compensation. This package would cost approximately \$17 million.

**VOTE 5-0** to approve Option 1, as amended, in Policy Package No. 100.

**MOTION:** Shaun McCrea moved to adjourn the meeting; John Potter seconded the motion;

**VOTE 5-0** the motion carried.

Meeting was adjourned.

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Wednesday, July 2, 2008  
10:30 a.m. to 11:30 a.m.  
A Telephone Conference Meeting  
Office of Public Defense Services  
1320 Capitol St., NE  
Salem, Oregon 97310

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

STAFF PRESENT: Ingrid Swenson  
Kathryn Aylward  
Paul Levy  
Billy Strehlow

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**TAPE 1, SIDE A**

03 Chair Ellis I'm sorry that my absence a couple of weeks ago required a follow up meeting, but I very much appreciate the Commissioners that were in Bend planning this because I am interested and do want to be involved. As I understand it, there is no real issue on the mandated caseload budget. Am I correct on that, Ingrid and Kathryn?

33 I. Swenson I believe so. I think Commissioners understood that these are numbers that are sort of mandatory figures and we have actually submitted those already. They were due June 30, so the issues for your discussion today have to do only with the policy option packages.

56 Chair Ellis Just to make sure I am right; is our calculation on mandated caseload done with the revised methodology that the legislature approved last session?

1:09 K. Aylward It is done with the same methodology as last session.

1:13 Chair Ellis Right. Which was an improvement over what we had for 20 years before that.

1:20 K. Aylward That is correct. It was a correction to how it actually properly should be done.

1:28 Chair Ellis Then as I understand it, that piece this year is \$19.4 million and that is significantly less than the \$24.8 million that we sought and received last time.

1:43 K. Aylward That is correct.

1:47 Chair Ellis I got that right?

1:47 K. Aylward Yes.

- 1:47 Chair Ellis Then turning to the three packages, these are the same packages that we submitted last session, am I right?
- 2:04 K. Aylward Actually, two of them are the same. The Post Conviction Relief package and the Public Defense Provider Compensation package are almost virtually identically to what we submitted last time. Regarding juvenile dependency representation, last time we had a package that provided us FTE juvenile dependency appellate attorneys to handle cases internally, so that package is slightly different, but the other two are the same as last time.
- 2:32 Chair Ellis If it is alright with everyone else I would kind of like to start with 102 which is the provider compensation package. I guess before that I would ask does any Commissioner, or staff for that matter, have any other package that they want the Commission to consider?
- 2:55 Hon. Elizabeth Welch No.
- 2:55 Chair Ellis We are okay with the three we are talking about? On the provider compensation piece, Kathryn and Ingrid do you want to kind of set the table on this and describe to the Commission the discussions you have had with legislative staff?
- 3:19 I. Swenson Well, just a preliminary comment. Let me say that as we talked about it at the last Commission meeting, some of us were concerned that we not ask for a huge increase over what is in our mandated caseload and our essential budget package. But, after we looked at budget proposals from other agencies, and the approach other agencies are taking, we certainly feel less inclined to ask for anything less than what we actually need in all of these areas with the understanding that, as you know, during the course of legislative hearings we can talk about options that would cost less in each category, but at this stage I think it would be our recommendation that these numbers be essentially the ones that Kathryn has worked up in Package 102, 101, and then with respect to item 100 ...
- 4:30 Chair Ellis You are cutting out on me, Ingrid, is anybody else ...
- 4:36 I. Swenson I'm sorry, is that better? In any case, at this point we would be recommending that in 102 we would essentially fill in the information, the current information, that would correspond to what we asked for last time; and with respect to 101, the figure which appears in the document you received would remain the same. With respect to 100, it would be our recommendation that you seek full funding for a reduction in caseloads and an increase in compensation. We would have to work up the actual number but it would be the counterpart to a \$23 million dollar figure that the legislature identified last session for item 1, in policy package 100. Kathryn, do you want to talk about the specifics of those numbers?
- 5:42 K. Aylward Yes. There was a work group last session the result of which was Senate Bill 411 and the information we provided to them at that time was were that we believed that the compensation needed to increase by 33 percent and that caseload needed to be reduced by 30 percent. The price tag on that measure was a little over \$37 million. The dollar amount they ended up putting in the bill roughly corresponded to reducing the caseload by 20 percent and increasing compensation by 25 percent. Now, whether or not the adjustments that were made this biennium mean that now that is the max that is needed, I don't know. It would be somewhere between the 23 million and the full 37.
- 6:40 Chair Ellis I had two areas that I wanted to discuss. One is, and this may be more cosmetic than anything, but I question whether we should be using the word "parity" as our driving force as opposed to language that would say, "funding to increase full-time public defender salaries to attract and retain qualified career providers." I have a belief that some in the legislature aren't going to resonate with the word "parity" and I don't think the goal is parity; the goal is to attract and retain good people. That would be one thing that I would like to hear discussion

on. The second subject is whether or not we should be proposing something that is incremental or proposing the full package. That is a tactical thing as much as anything else. Last session they talked about, "We will give you one-sixth of what you are seeking now," and the implication was that it was a 12 year, six biennia idea. Those who are more savvy about the legislature than I may have a view. Yesterday I had a chat with Kathryn and Ingrid and was kind of looking for an aggressive but balanced incremental approach. I think both of them are of the view that we ought to put the whole thing in there. It will probably lead to an incremental approach but that is the second topic I would like to hear discussion on. Does anyone have a reaction to the language? The parity versus quality issue?

- 8:56 J. Potter Barnes, could you repeat your language again. Attract and retain ...
- 9:02 Chair Ellis Attract and retain qualified, career providers. This would be in Item No. 1.
- 9:13 J. Potter Okay.
- 9:13 S. McCrea I am fine with your suggestion, Barnes. I think that that is really what our goal is and the idea of parity is it is a comparison and a measure against what other attorneys in other parts of the system are receiving, in other words the opponents, and that is why it is something that we can use to demonstrate that what we are requesting is fair, but the overriding goal, I agree, is to attract and retain quality public defenders.
- 9:42 Chair Ellis Part of my thinking is that we have had success, particularly the last four years, in seeking a cooperative relationship with the DA community. I just don't want them to get the feeling that we are constantly in competition with them for the same dollars.
- 10:08 S. McCrea I think that makes sense.
- 10:08 Chair Ellis Any other comment on that?
- 10:14 C. Lazenby Well, Barnes, I agree with you and unfortunately I think it is politically more palatable too. It avoids a lot of complicated arguments and really keeps the focus on quality service provision.
- 10:28 Chair Ellis I don't know if we need a motion or just a consensus direction to Ingrid and Kathryn? Anyone disagree with this?
- 10:37 J. Potter I am not going to disagree, Barnes, but do want to make sure that we understand by saying "attract and retain" that we may take a chance on legislators saying, "You have attracted and you have retained. The system is running and working so that standard is being met." Then we will have to go into an explanation of the Juvenile Rights letter that was sent to us and other contractors saying, "Well, we have lost two people to the DA's office in Lane County or we have lost such and such to somebody else." I don't mind putting it in there but there will be legislators that are going to say, "I don't see the problem. You have attracted people and you have retained them and how long do you want to retain them? Do you want to retain them for their careers and is that a goal that we legislators want to embrace?" I think it is okay to do that, Barnes, I am just cautioning that there will be other battles to fight with it.
- 11:46 Chair Ellis Anyone else?
- 11:48 G. Hazarabedian My interest, of course, is to do what is the most effective. I can see arguments on both sides of this issue so I really don't know what is more effective, but we are all trying to do what is most effective so I will defer to those who have a better handle on the legislative process.
- 12:12 K. Aylward Can I just comment, a sort of technical point here, that all that needs to be in the system by July 31 is the title of the policy option package and the dollar amount. Sorry. All that we have to have by July 31 in the system is the name of the policy option package and the total

dollar amount. How we describe it and discuss it would be in the budget narrative which is due September 1 and will be presented to the Commission for discussion at its August meeting.

- 12:51 Chair Ellis Okay.
- 12:51 K. Aylward So you can defer it for now is what I am saying.
- 12:56 Chair Ellis That is fine. You have a sense of what we are thinking. In terms of the dollars here, if I understand correctly, our best estimate of what Kathryn calls the full package is a \$21million dollar number. Am I right?
- 13:15 K. Aylward That is correct on that policy option package.
- 13:18 J. Potter On 102?
- 13:18 K. Aylward Yes.
- 13:21 Chair Ellis Now the question, I think, we ought to have discussion on is do we seek the full dollar amount or do we propose some incremental approach? Now to summarize I was kind of thinking yesterday that in keeping with the way the legislature dealt with it last time maybe we should propose an incremental approach. I think both Kathryn and Ingrid are of the view that we ought not to do that, that we ought seek the full package knowing that it is probably going to lead to an incremental approach by the legislature, so that is my question.
- 14:07 J. Potter Barnes, may I ask for further clarification? The \$21 million dollars for 102 includes all three elements of that package?
- 14:12 Chair Ellis That is my understanding.
- 14:13 K. Aylward That is correct.
- 14:22 Chair Ellis Let me add one other fact that Kathryn and Ingrid put out to me yesterday. There are many fewer providers on the hourly pay now than there used to be because MCAD has converted, so the major weight of this is in one, with less on two and three than there used to be.
- 14:51 I. Swenson Excuse me Barnes, I think someone may have joined our conference. Did anybody join the conference call?
- 14:59 J. Potter I think they hung up.
- 15:01 Chair Ellis Any reaction on this incremental versus full?
- 15:10 K. Aylward Could I just give one little example of maybe why the incremental approach is difficult? In this package when we submitted it last session Item No. 1, the public defender salary parity piece, required \$6.2 million. This time, even though there were salary increases and additional funding was provided, it requires \$6.7 million so we are losing ground on that one even with the little amount that we got. My concern is with saying, "Here is the total amount and now we have one-sixth, and now we have two-sixths," is that the amount keeps changing.
- 15:51 Chair Ellis If you use parity as the goal post.
- 15:55 G. Hazarabedian Barnes, I am also concerned that we not be misinterpreted to be heard to say we need less than we really need to solve the problem. We are realistic and when our people go in there they understand that we are not necessarily going to get everything that we asked for, but I think a

policy package ought to be stating what the need is and what it takes to fill it. I am a little concerned that we will be held to a lower number if we come up with a lower number.

- 16:24 Chair Ellis I have come around to that point of view so I am not advocating incremental but I want to make sure everybody thinks about it. There is an old golf expression about “Never up, never in” meaning you have to hit the green or you will never get in the cup. Anyone else have a thought on this?
- 16:51 S. McCrea I think we ask for the whole thing.
- 16:55 Chair Ellis Anyone disagree with that?
- 16:59 Hon. Elizabeth Welch No.
- 16:59 Chair Ellis Anything else that anybody wants to discuss on 102?
- 17:09 G. Hazarabedian Well, this is Hazarabedian again and I hate to keep dominating. At some point I wanted to raise the caseload issue and I don’t know whether it is appropriate to talk about that with relation to PDs in 102 or whether it is more appropriate to propose a separate policy package dealing with caseloads.
- 17:37 Chair Ellis That is a very valid point. Any reaction to that Ingrid or Kathryn?
- 17:42 I. Swenson Well, we certainly felt like the first place to go with that was juvenile representation. That is where we hear continued reports of caseload overload. We hear it occasionally on the criminal side but less often. Of course as Kathryn and her group negotiate contracts with people they talk about their needs and use the funds they receive in the direction that they think they need to go. Sometimes that may be towards caseload relief rather than toward increased compensation. There is no telling, across the board, but I think this time around I personally would like to see an emphasis on juvenile representation. We have pretty dramatic information there to talk about. We have been told in the past, and Sally La Joie will remember this since we had a work group at the bar last interim to talk about what our message to the legislature should be, that caseloads should not be the focus, that caseloads was not a topic of interest to legislators, so I would be a little nervous about emphasizing that at this point except to introduce it in the juvenile context.
- 19:04 Chair Ellis Any other comments?
- 19:09 K. Aylward Barnes, I just have one question since I have to put a number in the system by July 31. For Item No. 1, the way that that number is calculated is by comparing with Deputy DAs’ salaries. I understand what you are saying about describing it and phrasing it, but you aren’t talking about a different way of coming up with the number are you?
- 19:31 Chair Ellis No, I am not.
- 19:36 K. Aylward Okay. Thank you.
- 19:39 Chair Ellis Okay. I am sensing consensus on 102. Is there any further discussion on 102? Why don’t we do a voice vote to submit 102 as revised in our discussion here. I will call out the roll otherwise we will never know who is doing what. McCrea?
- 20:05 S. McCrea Aye.
- 20:04 Chair Ellis Lazenby?

20:07 C. Lazenby	Aye.
20:07 Chair Ellis	Potter?
20:08 J. Potter	Aye.
20:09 Chair Ellis	Welch?
20:10 Hon. Elizabeth Welch	Aye.
20: 12 Chair Ellis	And Ellis is Aye. Let's got to 101 because I believe this is pretty straightforward. Any discussion on the PCR? Let me call the roll then. McCrea?
20:31 S. McCrea	Aye.
20:33 Chair Ellis	Lazenby?
20:33 C. Lazenby	Aye.
20:34 Chair Ellis	Potter?
20:35 J. Potter	Aye.
20:35 Chair Ellis	Welch?
20:37 Hon. Elizabeth Welch	Aye.
20:37 Chair Ellis	And Ellis is an aye. Okay, juvenile. Ingrid and Kathryn, maybe you can flesh this out a little bit more. I get the sense from what you have said that Item 1 is the one that you are particularly focused on?
21:01 I. Swenson	That is correct and I think it incorporates the others. The others were sort of options, less expensive options, and approaches to reaching some of these same results.
21:18 Chair Ellis	Would you rather keep it just simple and not call them options, but just call it full funding to reduce caseloads and improve compensation?
21:26 I. Swenson	Yes.
21:32 Chair Ellis	And the price tag on that is what?
21:37 I. Swenson	Somewhere between \$23 million and \$37 million. The calculation I think that Kathryn would have to do is to assume that package 102 – well, figure out where we are in relation to where we were last biennium and then think about what effect 102 would have on the numbers in 100.
22:01 K. Aylward	The tricky part is that you have to put your budget together as a whole. In other words, you assume that the entire budget would get approved when you calculate the numbers, but in reality if 102 isn't approved then the funding necessary for 100 is greater. I will have to talk LFO about how to put those in. Do you have them as stand alone packages where you can chose one from column A, one from column B, or not?
22:38 Chair Ellis	Are you able to give us numbers on the assumption 102 is implemented or on the assumption that 102 is not implemented?

22:47 K. Aylward Not today.

22:52 Chair Ellis I guess I am a little uncertain. I had assumed that 100 was focused on providers that are full-time in juvenile dependency and are you saying there is redundancy that the funding we are proposing in 102 would pick those up already?

23:14 K. Aylward Some of it would. If you were a full-time public defender that did juvenile dependency representation then there is some overlap. If 102 passes then there is a less of an issue with salary discrepancy.

23:32 I. Swenson For example, Juvenile Rights Project, Barnes would be affected by either one of those packages.

23:46 Chair Ellis In terms of, you know, from the Commission's point of view, what do we desire? I think there is probably going to be unanimity. In terms of being accurate in our presentation, that is something you will work out, Kathryn, by the time of the July 31 submission?

24:07 K. Aylward Absolutely.

24:07 Chair Ellis Any discussion on 100 would now really be focused on that paragraph one?

24:22 Hon. Elizabeth Welch John, this is Betsy. John, are you not going to bring up your suggestion from the last meeting?

24:30 J. Potter Well, Barnes you read the notes, the minutes, from the last meeting?

24:37 Chair Ellis I did and I am looking at page 13 where Mr. Potter floats an idea.

24:47 J. Potter We haven't gotten to this. Well I guess we are here now, but it does have to do with the priorities of funding things through these three policy packages. We haven't addressed that yet and I am assuming we will, but beyond that I was trying to integrate 102, Policy Package 102, and take the component out of 100 that dealt with reducing caseload and improving compensation in juvenile dependency cases and folding it into 102.

25:26 Chair Ellis I see that. Is there a reaction? Let me ask from staff, Ingrid and Kathryn, any reaction you have to that?

25:35 K. Aylward I think in terms of actually presenting the budget and the budget binder, I think we would be making a mistake not to capitalize on the fact that there was so much attention specifically on juvenile dependency last session. To be able to say that we had this work group, it was studied, everyone agreed, it was a big problem, and so that is why this is our number one policy option package priority, to build on that. I think that would be very useful to remind them that they already decided there was problem and they already decided money was needed. That is the only reason I would recommend that it stand alone.

26:20 J. Potter That is fair. That is a fair argument and ...

26:25 Chair Ellis Isn't there an argument the other way though that I think historically you almost never get more than something on one of our packages, so if you break them into separate packages, juvenile numbered earlier, and it does have, I think, more political appeal to some legislature, are we jeopardizing the potential of 102 when we do that?

26:53 I. Swenson Well, certainly last time, fortunately, they funded portions of two of our policy option packages. The first one was the juvenile representation piece and then a part of 102. I think

they are going to look very carefully at everything we want to do. They asked us to come back this session with 102 and propose further incremental progress with respect to parity. I think they are pretty different issues but ...

- 27:29 Chair Ellis            Except they do overlap as Kathryn has said.
- 27:38 I. Swenson            They do.
- 27:39 J. Potter              How many full-time public defender contracts do we have that have juvenile component built in that would be potentially covered by 102? You have mentioned Juvenile Rights Project. They are full-time public defenders and if 102 were funded they would receive salary increases whatever the language is going to be.
- 28:03 G. Hazarabedian      In Lane County I have three full-time juvenile lawyers in my contract.
- 28:10 K. Aylward            Actually, all of the public defenders provide juvenile representation with the exception of the Marion County Public Defender, so everybody has a little piece of juvenile, all the PDs do.
- 28:20 J. Potter              And then how many are in consortiums or other configurations that do juvenile dependency representation?
- 28:25 K. Aylward            How many attorneys?
- 28:30 J. Potter              If it is easier, what percentage of the cases in juvenile dependency are represented by consortium contracts versus public defender contracts?
- 28:39 K. Aylward            I made an estimate last time that probably 80 percent were non-PD covered cases. I haven't confirmed the accuracy of that estimate but it is close.
- 28:57 G. Hazarabedian      What percentage of the overall caseload of ODPS is juvenile versus criminal? Do you have a sense of that?
- 29:02 K. Aylward            Do you mean juvenile dependency or juvenile altogether?
- 29:07 G. Hazarabedian      I guess dependency since that is what we are talking about.
- 29:09 K. Aylward            Twenty-five percent.
- 29:13 G. Hazarabedian      Five percent?
- 29:13 K. Aylward            No. Twenty-five percent. It is twenty-five percent in terms of expenditures and it is thirty percent in terms of case numbers.
- 29:27 G. Hazarabedian      Got it.
- 29:30 I. Swenson            This is Ingrid again. I just want, as I envision what our legislative hearings are going to look like, I would really like to do a separate day on juvenile representation no matter how it is presented in this document. I do think the caseload piece will be important and we may decide not to talk about that this time around in criminal representation, but it is critical in juvenile, and as you know, having just been to Jackson County, there are some extreme examples there that are, I think, going to be important to legislators. It is just a different kind of presentation. What was effective last time for criminal providers, and general providers, was talking about retention - recruitment and retention. I like the idea of putting that in the title of the package. That is the main thing that concerned people and, of course, juvenile representation, but I think they are different.

30:40 G. Hazarabedian This is Greg again. Let me say that in as much as the Commission is interested in the interplay between the various packages, if, for example, package 100 passes but 102 does not, I am not going to be in a position of giving big raises to my three juvenile lawyers above and beyond what anyone else in the office gets of similar seniority and tenure with the office. That is just not a political reality. In a JRP situation it would accomplish the same thing. Everybody would get a big raise. In my situation it would be a little more that I would have to distribute amongst everybody. I can't have three lawyers getting paid more money because they do different work than other people.

31:28 G. Scholl I would echo that point. This is Greg Scholl calling from Metropolitan Public Defender. We have 60 attorneys total here. We do have attorneys who do nothing but juvenile caseloads. We can't justify giving them a raise that is not going to be echoed among the other attorneys.

31:50 I. Swenson Just one comment, if I may, and that is of course it can look very different this time around but the hearings on Senate Bill 411 were pretty clear. The expectation would be that if they allocated money for that purpose that attorneys would agree to reduce caseloads and increase compensation specifically in order to see an impact on quality of representation. Among the documents that we prepared for the legislators were some descriptions of what the expectations would be and that providers who were interested in receiving enhanced compensation would make some kind of commitment about those particular goals, so it can look very different this time around but that is the message we got from the work groups last time and from the legislators that that was the kind of thing they wanted to fund.

32:55 Chair Ellis I think the question is do we want to present it separately or as part the general compensation? Let me take a straw vote. A "yes" vote is to present it separately. McCrea?

33:24 S. McCrea I am still trying to decide.

33:30 Chair Ellis Lazenby?

33:30 C. Lazenby I'm with Shaun.

33:34 Chair Ellis Potter?

33:35 J. Potter I'm with Shaun.

33:39 Chair Ellis Welch?

33:40 Hon. Elizabeth Welch Unanimous.

33:44 Chair Ellis Unanimous on the fence.

33:47 S. McCrea Yeah. It seemed easier when we were talking about it at the Commission meeting.

33:52 I. Swenson We have had to submit a list of policy packages already and in an order of priority and so that has gone in. Now maybe what you could choose to do is say, "Fine. We have got place holders and that is there," but we can refine this down the road if you want more time to think about it. We could talk about these numbers and put somewhere in the budget proposal, but as we prepare the narrative we could blend them in a different way if that is what you decide to do. What has gone in so far, Kathryn? Just the name of the package and the number?

34:39 K. Aylward Yes.

34:39 Chair Ellis What if we did this - and I am very mindful that a juvenile only compensation increase doesn't really fit the way our system is structured. Greg has already mentioned that at MPD

that really would not work that well. What if we focus the dependency package on caseload reduction and not on the improved compensation so that the compensation piece comes in for everybody, juvenile and criminal on 102, but the focus on the juvenile is caseload reduction. Does that work?

35:25 Hon. Elizabeth  
Welch

I really agree with that. It actually makes sense in one of the other aspects of this discussion because of the possible overlap. Putting caseloads and compensation in the same sentence is really, under the sort of unique circumstances perhaps, kind of two very different issues. The capacity building may be another way to describe it.

35:53 K. Aylward

It also solves the problem of having to have sort of two versions of 100 depending on whether or not 102 is funded.

36:05 Chair Ellis

That has bothered me as the discussion has unfolded. Any other reactions to that thought?

36:09 J. Potter

I like the idea.

36:13 I. Swenson

Me too.

36:13 K. Aylward

So that puts it at about \$17 million.

36:21 Chair Ellis

Alright. I think we are approaching consensus here. Let me try a vote, this won't be a straw vote, this will be a real vote to approve the 100 package with it being paragraph one, reducing caseloads. McCrea?

36:46 S. McCrea

Aye.

36:48 Chair Ellis

Lazenby?

36:48 C. Lazenby

Aye.

36:48 Chair Ellis

Potter?

36:52 J. Potter

Aye.

36:52 Chair Ellis

Welch?

36:52 Hon. Elizabeth  
Welch

Aye.

36:52: Chair Ellis

I am aye. Does that provide the direction, Ingrid, that you and Kathryn need.

37:04 I. Swenson

I think so.

37:04 K. Aylward

I think it is excellent and then just so you have a notion of where you are in the scheme of things, compared to the current biennium, the 09-11 essential budget level will be 9.6 percent more, and if you include the policy option packages that we have just settled on today it is an increase of 27.7 percent, which sounds reasonable to me.

37:32 Chair Ellis

Well, if Blue Cross can do it why can't we? Anything else that we should consider today?

37:51 J. Potter

May I ask for clarification again? The policy packages then with this amendment have already been submitted and the assumption is that Policy Package 100 was the number one, and Policy Package No. 101 was number two, and 102 was number three in priority order. Is that the assumption?

38:06 K. Aylward That is correct.

38:11 Chair Ellis Do we have to do that? It is the old Sophie's choice issue. Do we have to say which is first, second and third?

38:22 K. Aylward It is a technical aspect. They have to be entered into the budget system assigned a priority, so even if we said they are all equal the system requires prioritization.

38:37 G. Hazarabedian Are they now listed in the order you would like to prioritize them?

38:44 K. Aylward That is the order they have been entered into the system already.

38:47 S. McCrea But my understanding was that it didn't really make a difference?

38:51 K. Aylward That is how I see it. They will fund what they want to fund regardless of what we say is the biggest priority.

38:56 I. Swenson And we need not talk about them in those terms from hereon out. We simply had to designate them for purposes of submission in some order. Kathryn selected the order you supplied last time.

39:12 K. Aylward And in addition, the Secretary of State, when they were about to do an audit and then they did a management letter instead, those two areas were identified as the highest risk. It sort of seemed logical that an agency being warned that this was a high risk area would certainly put in a policy option package to minimize that risk.

39:39 Chair Ellis So let me see if I understand. It has already been done and it doesn't matter?

39:46 K. Aylward And please don't change it.

39:51 Chair Ellis That's good. Okay. Anything else? I would entertain a motion to adjourn.  
**MOTION:** Shaun McCrea moved to adjourn the meeting; John Potter seconded the motion; We had better do it verbally. McCrea?

40:01 S. McCrea Aye.

40:02 Chair Ellis Lazenby?

40:03 C. Lazenby Aye.

40:04 Chair Ellis Potter?

40:04 J. Potter Aye.

40:05 Chair Ellis Welch?

40:06 Hon. Elizabeth Welch Aye.

40:06 Chair Ellis Ellis, yes. Thank you all. It went fine.

# Attachment 3

**PENDLETON**

**LA GRANDE**

**BAKER CITY**

**ONTARIO**

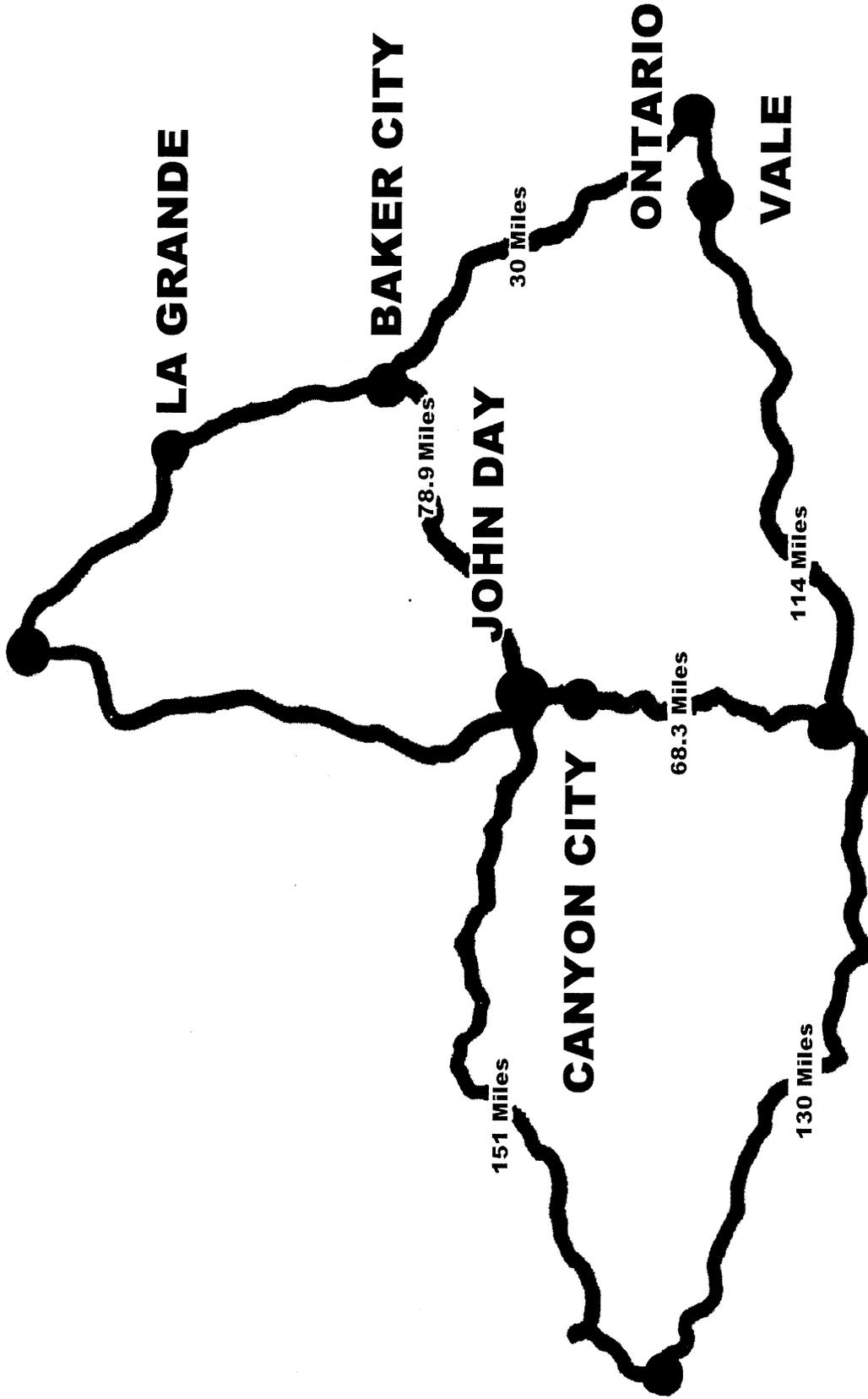
**VALE**

**BURNS**

**JOHN DAY**

**CANYON CITY**

**BEND**



# Attachment 4

**OPDS's Draft Report to the Public Defense Services  
Commission on Service Delivery in Baker County  
(July 2008)**

**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 2007, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Coos, Curry, Josephine, Lane, Lincoln, Linn, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of the public defense system in Baker County undertaken in preparation for the PDSC's public meeting in Baker City, Oregon on Wednesday, August 14, 2008.

**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 such as this, 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. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the site teams visited contractors in Douglas, Jackson, Multnomah and Umatilla Counties. In 2006, teams visited all of the juvenile contractors in Multnomah and Lane Counties and criminal and juvenile contractors in Linn and Lincoln Counties. In 2007 site teams visited the sole juvenile contractor in Clackamas County, the largest contract office in the state in Multnomah County and the sole juvenile and criminal providers in Benton County and Columbia County.

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 a new Juvenile Law Training Academy for public defense lawyers. In 2006, the Commission devoted two of its meetings to investigating the condition of juvenile law practice across the state and to develop a statewide Service Delivery Plan for representation in juvenile dependency cases.

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

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

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

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

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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).

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

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

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

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

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

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

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

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

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

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

offices tend to have more office “infrastructure” than other public defense organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

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

Due to the frequency of cases in which public defender offices have conflicts of interest due primarily to cases involving multiple defendants or former clients, no county can operate with a public defender office alone.<sup>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

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<sup>3</sup> Id.

law firms, but in which they no longer wish to practice law.

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

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

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

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

PDSC may have to rely on its assessment of the skills and experience of individual law firm members to ensure the delivery of quality, cost-efficient legal services, along with the external methods of training, standards and certification outlined above.

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

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

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

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

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

## **OPDS's Preliminary Investigation in Baker 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 this.

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.

On June 23 - 24 Commissioner John Potter and OPDS Executive Director Ingrid Swenson visited with stakeholders in Baker County. In addition to talking to four of PDSC's contractors in the county they met with District Attorney Matt Shirtcliff. Telephone interviews were conducted after the visit with the Judge Gregory Baxter, the Juvenile Department Director, the Citizen Review Board coordinator for the County and the Assistant Attorney General assigned to the area.

The preliminary draft of this report is intended to provide a framework for the testimony to be presented at the meeting of the Commission in Baker City on August 14 and to guide the Commission's discussions about the condition of the public defense system in Baker County, and the range of policy options available to the Commission – from concluding that no changes are needed in this county to significantly restructuring its delivery systems.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in Baker County's justice system could turn 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 Baker County.

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

Baker City is the county seat for Baker County. The county population in 2005 was 16,500. Although the county previously received federal timber funds, these

were used in the past for roads rather than for public safety. Although the termination of these funds will not immediately affect funding for the county's public safety agencies, ultimately the county will have to allocate more of its general fund dollars to roads, limiting the amount available for other services.

### The Circuit Court

Judge Gregory Baxter is the only circuit court judge for the county. There is a justice court which handles most misdemeanors except those involving domestic violence and non diversion eligible DUIs. It was reported that some cases that were being filed in the justice court are now being filed in the circuit court.

The county has an adult drug court that currently serves approximately seventeen high risk clients. The county is also starting a juvenile drug court targeting fourteen to sixteen and a half year olds. It expects to serve ten to twelve youth at a time. The combined drug courts are expected to have a total of approximately 50 clients when they are both at capacity. Both out-patient and in-patient drug treatment are available in the county but they generally have to use some out-of-county beds as well. Access to mental health care is limited.

### District Attorneys Office

Matt Shirtcliff is the District Attorney for Baker County. He currently has two deputy positions, one of which is open. It has been difficult to retain deputies. They generally come from elsewhere and stay for only two or three years before moving on. The office is able to offer a starting salary of \$45,00 to 48,000. Baker County contracts with the District Attorney to provide a deputy to handle justice court cases.

### Criminal Case Processing

In-custody criminal arraignments are generally handled by video. Attorneys are not present for arraignments. Plea hearings are scheduled four to six weeks after arraignment. Unless there is going to be a guilty plea defendants generally appear at the plea hearing by video as well. The defense attorney is generally in the courtroom rather than with the defendant in the jail. Sentencing usually occurs at the same time as the plea. Trials are set approximately six months after arraignment. Motion hearings are scheduled as needed.

The manager of the parole and probation department is Will Benson. Two of the special programs offered by the department are the "Mile Program" – the Managing Independent Living Effectively Program, which offers classes to assist offenders in avoiding recidivism. The second program is a grant funded transitional housing program for persons released from jail or prison. Rent is waived while the individual finds employment and longer term housing. Probationers may also use the residence for a minor daily or monthly fee.

## Juvenile Case Processing

### Dependencies:

The Juvenile Department in Baker County prepares most of the documents in dependency cases. They draft petitions that are then reviewed by the district attorney. Parents in dependency cases are notified to appear for shelter hearings a half an hour early in order for them to be able to confer with counsel before the hearing. Attorneys are appointed in virtually all juvenile dependency cases but there are not many dependencies filed, usually only one or two a month. The county had a Juvenile Court Improvement Project (JCIP) model court program but it was recently discontinued because the judge and the other members of the team, including the attorneys, felt that they had done everything they could to accelerate case processing and although the average period is still more than 90 days, they don't believe they can improve significantly on that number.

### Delinquencies:

Delinquency preliminary hearings occur on Mondays unless the youth is in custody. Youth are summonsed to court with their parents. Attorneys are not present for these hearings. The Juvenile Department does not generally meet with youth or their parents until after counsel has been appointed and can be present. Some parents contact the department before the preliminary hearing and sometimes resolve cases at that stage, without the involvement of counsel. There is no detention facility in the county. Youth must be transported to Pendleton if they are held. Formal petitions are not usually filed against youth under 12. Even cases involving alleged sexual misconduct are diverted if parents are supportive of appropriate treatment. The District Attorney generally decides which youth will be treated informally. In alleged sex abuse cases involving youth between fourteen and sixteen formal petitions are generally filed.

There is reported to be no gang involvement by youth in Baker County.

The District Attorney serves as the Juvenile Department Director but Stacy Erickson manages the day-to-day operations of the department. She and two other counselors supervise youth offenders and prepare most of the petitions, summonses and other documents. She reports that her department handles a lot of cases informally, rarely filing a petition in first-time misdemeanor or non-person felony cases.

### PDSC Contract Providers

Two providers contract to handle public defense cases only in Baker County. **Dan Cronin** contracts for 122 juvenile and drug court cases per year in Baker

County. His office is in John Day and he used to be the primary public defense provider there but because the only circuit court judge in the county is his brother-in-law he now contracts with PDSC for cases in Baker County. He also handles conflict cases in Malheur County. In the past he handled mostly criminal cases but his current contract provides only for juvenile and drug court cases. He reports that the rate he receives for drug court cases is not sufficient to cover the many appearance that are required in these matters, over what is often an eighteen month period.

Mr. Cronin is concerned that public defense in the area is “disintegrating.” He has been trying to hire an associate for ten years but can’t compete with the district attorney’s salary. He has seen a gradual reduction in the number of attorneys willing to practice in the area. Travel is a problem; maintaining adequate contact with in-custody and juvenile clients is also a problem. Ideally each of the eastern Oregon counties would have an additional full time defender.

The **Baker County Consortium** is a new consortium. It contracts for a total of 530 criminal and juvenile cases per year. Consortium members are Ken Bardizian, Gary Kiyuna, Charles Simmons (PCR cases only), Krishelle Hampton and Bob Whitnah.

Ken Bardizian, although part of the consortium, also handles cases in Grant, Malheur and Union Counties. Mr. Bardizian finds that there are some disadvantages to consortium membership including being paid only once a month for consortium cases and being entitled to payment only once when conflicts require substitution. He thinks Baker County is better served by the current system with resident attorneys handling most of the cases. Mr. Bardizian also contracts with Baker County to handle justice court cases. He would like to be able to hire a half-time associate.

Three other providers contract for cases in both Baker and Malheur Counties. **Michael Mahoney** handles mainly PCR cases (78 per year) in both counties. **David Carlson** handles criminal and juvenile cases in both counties. He contracts for a total of 501 cases per year. **Coughlin Leuenberger and Moon** contract for a total of 196 cases per year in the two counties. In Baker County Chris Zuercher handles most of the public defense representation for the firm. Mr. Zuercher was a deputy district attorney in the county before being hired by Coughlin, Leuenberger and Moon.

#### Comments regarding structure and number of public defense contractors

Judge Baxter reported that, structurally, the current system is working well. He likes to have providers from the immediate area if possible. He is concerned when a large volume of cases is moved from the justice court to the circuit court as has been happening recently. Other members of the court staff indicated that

they do not have enough local attorneys and need more due to the high number of conflicts in juvenile cases. The district attorney said that he believes clients would benefit if the lawyers didn't have to handle civil cases since these cases limits the time they have available for their public defense clients.

The CRB coordinator said that a major issue for attorneys is the distance they have to travel within the county to visit with their clients (or clients must travel to visit with them.) A lot of attorneys appear for review hearings by telephone.

One commentator said a lot of matters are handled by phone in Baker County and that it is never the equivalent of having people actually present in the courtroom.

#### Comments regarding quality of representation

Judge Baxter said he is very satisfied with the quality of representation being provided. Some of the attorneys do excellent work, others very good. He has confidence in all of them. He was pleased to see that more experienced lawyers are making themselves available to advise the newer attorneys.

The defense and prosecution are said to work well together and the district attorney had very positive comments about the work of the public defense providers.

According to the Citizen Review Board (CRB) coordinator attorneys have recently started meeting with clients before CRB hearings. Some attorneys are excellent advocates, others provide minimal representation but, unlike what occurs in other parts of the state, all of the attorneys participate in CRB hearings and have had contact with their clients beforehand. They still need training about how to conform to the Oregon State Bar's Performance Standards<sup>4</sup>. On the whole she believes Baker County attorneys are stronger advocates than attorneys in the other counties with which she is familiar.

In juvenile delinquency cases lawyers are properly challenging competency to proceed in some matters. It was reported that in some alleged sex abuse cases they provide copies of psycho-sexual evaluations to the state even when they are harmful to the client. It is not clear whether such disclosure is made with the client's approval and in furtherance of the client's expressed wishes or as part of a best interest approach to representation.<sup>5</sup> A couple of the attorneys are so overwhelmed that they usually meet with their clients only 10 minutes before

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<sup>4</sup> Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases, Oregon State Bar Indigent Defense Task Force, adopted by the Board of Governors September 15, 1996, revised May 2006.

<sup>5</sup> A "best interest" approach to representation in delinquency cases has been specifically disapproved by OPDS in the "Role of Counsel" document sent to all contractors in 2007, and attached as Exhibit A to this report.

court. Even if the case is resolved after these brief meetings, disposition cannot occur until a later date.

Attorneys do appear to be meeting with their dependency clients before court, including child clients.

One commentator said that most of the attorneys do not specialize in juvenile law and do not have the training or resources to do the same quality of work seen in other counties.

In OPDS's 2007 statewide quality of representation survey, respondents rated contractors fairly high in terms of legal knowledge, skill and training but lower when asked if their caseloads allowed them to devote appropriate time and resources to their clients. Overall respondents rated the quality of representation provided by one contractor as fair, one as good and two as excellent. In juvenile cases two were rated as fair and two as excellent. (The work of the attorney who handles only PCR cases was not addressed in the survey.)

OPDS's Recommendations for Further Inquiry at PDSC's  
August 14, 2007 Meeting in Baker City

Based on the information provided to OPDS during its visit to Baker County in June 2008, OPDS recommends that the Commission consider the following in developing a service delivery plan for Baker County.

The structure:

The structure of the current system appears to be working satisfactorily for the court and for OPDS although at least one member of the newly formed consortium is dissatisfied with particular terms of the contract. The system combines maximum flexibility in the management of conflicts with the benefits of fewer contracts to manage and added oversight.

While the county lacks a public defender office to provide initial training for attorneys,<sup>6</sup> it does appear that experienced Baker County attorneys have been willing to provide information and advice to newer attorneys. OPDS's General Counsel is also available to assist new attorneys in all parts of the state to access the training that is currently available and to help plan new approaches to local and regional training.

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<sup>6</sup> The principal obstacle to the creation of a public defender office in a county the size of Baker is the firm unit rule that would prevent attorneys in the office from representing more than one party in a juvenile case.

### Need for Additional Attorneys:

A number of commentators noted a need for additional attorneys to handle public defense cases in the county. While the need may be somewhat less urgent in Baker County than in Judicial District 24 (Grant and Harney Counties), it is a region-wide problem and not a new one.

In January of 2001 the Oregon State Bar Indigent Defense Task Force III report identified a number of problems in the delivery of public defense services in Oregon. It noted that in some districts it has been difficult to attract satisfactory candidates to handle indigent defense caseloads and that “[a] few districts have reached a crisis point in recent years, finding no attorneys available to accept appointments for the compensation offered.”

The greatest concerns about adequate criminal defense representation are reported to arise with isolated sole practitioners or small offices where there is little or no direct peer interaction or oversight. .... In more remote geographic areas, where there are fewer experienced attorneys with whom newer attorneys can consult, and firms providing indigent defense services often have small offices spread across vast multi-county judicial districts, the problem is exacerbated. In these situations, the combination of inadequate office funding and geographic remoteness limits training opportunities and makes peer review difficult to obtain. In turn, when problems with a particular provider do develop, replacements can be difficult to locate.

At its September 2003 retreat, the Commission identified a number of possible strategies for addressing the problem: offering longer contracts to providers who are willing to locate in or serve remote areas; supplementing insufficient trial-level caseloads with appellate work; law school recruitment and specialized apprenticeship training for new lawyers interested in relocating; and assisting with access to office space and initial capital needs.

The commission may want to review these recommendations and determine whether there are other strategies available to address the need for additional attorneys in the area. The Commission could consider, for example, whether it should issue an RFP for attorneys willing to relocate to the area for a specified period of time with a guaranteed income as an added incentive.

# Exhibit A

## **ROLE OF COUNSEL FOR CHILDREN AND YOUTH**

During the course of numerous site reviews over the last four years, OPDS has noticed significantly inconsistent practices regarding the role of appointed counsel for children in both dependency and delinquency cases.

For example, some attorneys believe that it is not necessary to meet and confer with child clients.

It is hoped that this statement will clarify what OPDS believes to be the role of counsel for children in dependency cases and youth in delinquency cases. The statement is being sent to all public defense providers. If you have questions about the role of counsel as outlined in this statement, please contact OPDS's General Counsel, Paul Levy at (503) 378-2478.

### **Role of Counsel in Dependency Cases**

In juvenile dependency cases, the role of the attorney appointed to represent a child will depend on the age of the child and the child's capacity for considered judgment.

An attorney for a child capable of considered judgment must advocate for the child's expressed wishes. The attorney for a child not capable of considered judgment must advocate for the child's best interest as determined by the attorney's independent investigation and exercise of sound judgment. Some children are capable of considered judgment with respect to some decisions that need to be made in the case but not with respect to others. Standard 3.4 of the Specific Standards for Representation in Juvenile Dependency Cases of the Oregon State Bar's Principles and Performance Standards<sup>1</sup> outlines the analysis to be used in deciding the appropriate type of advocacy in a given case.

Regardless of that ultimate determination, the child is a "client" and OPDS contracts require the contractor to speak to and conduct initial interviews, in person, with clients who are in custody within 24 hours of appointment whenever possible; and to arrange for contact, including notification of a scheduled interview time, within 72 hours of appointment for all clients who are not in custody. Children are not excepted from this rule.

In addition, Rule 1.14 of the Oregon Rules of Professional Conduct (ORPC) requires counsel for persons with diminished capacity (which includes children not capable of considered judgment) to maintain, as far as reasonably possible, a normal client-lawyer relationship with the client. The ORPC require attorneys to

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<sup>1</sup> The full text of the 2005 version of the Principles and Standards for Counsel in Criminal, Delinquency and Dependency Cases can be found on the bar's website at [http://www.osbar.org/surveys\\_research/performancestandard/index.html](http://www.osbar.org/surveys_research/performancestandard/index.html).

**maintain contact** with their clients, **to keep them reasonably informed** about the status of their cases (ORPC Rule 1.4), **to promptly comply** with reasonable requests for information (*Id*), **to explain** matters to the extent reasonably necessary to permit the client to make informed decisions about matters regarding which the client is capable of exercising considered judgment (*Id*), **to abide by** the decisions of a client who is capable of considered judgment concerning the objectives of representation (ORPC Rule 1.2), and **to consult** with the client regarding the means by which the objectives of representation are to be pursued (*Id*). These rules apply regardless of the client's age or capacity.<sup>2</sup>

### **Role of Counsel in Delinquency Cases**

Attorneys for youth in juvenile delinquency proceedings are bound to advocate for the expressed wishes of the youth. While the attorney has a responsibility to advise the youth of legal options that the attorney believes to be in the youth's best interest and to identify potential outcomes of various options, the attorney must represent the expressed wishes of the juvenile at every stage of the proceedings. The attorney owes the same duties to a juvenile under the Rules of Professional Conduct as an attorney owes to an adult criminal defendant.

If an attorney determines that a youth is not capable of aiding and assisting in the youth's defense, the attorney shall move the court to dismiss or amend the petition, as discussed in Standard 2.8(2) of the Specific Standards for Representation in Criminal and Juvenile Delinquency Cases.

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<sup>2</sup> For those attorneys who lack the information or skills to have an age appropriate discussion with a young or disabled client, an online training will be available beginning in November, 2007 at the following link: <http://www.cwpsalem.pdx.edu/teen/>.

# Attachment 5

**OPDS's Draft Report to the Public Defense Services  
Commission on Service Delivery in Malheur County  
(July 2008)**

**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 2007, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Coos, Curry, Josephine, Lane, Lincoln, Linn, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of the public defense system in Malheur County undertaken in preparation for the PDSC's public meeting in Baker City, Oregon on Wednesday, August 14, 2008.

**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 such as this, 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. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the site teams visited contractors in Douglas, Jackson, Multnomah and Umatilla Counties. In 2006, teams visited all of the juvenile contractors in Multnomah and Lane Counties and criminal and juvenile contractors in Linn and Lincoln Counties. In 2007 site teams visited the sole juvenile contractor in Clackamas County, the largest contract office in the state in Multnomah County and the sole juvenile and criminal providers in Benton County and Columbia County.

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 a new Juvenile Law Training Academy for public defense lawyers. In 2006, the Commission devoted two of its meetings to investigating the condition of juvenile law practice across the state and to develop a statewide Service Delivery Plan for representation in juvenile dependency cases.

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

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

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

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

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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).

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

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

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

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

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

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

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

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

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

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

offices tend to have more office “infrastructure” than other public defense organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

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

Due to the frequency of cases in which public defender offices have conflicts of interest due primarily to cases involving multiple defendants or former clients, no county can operate with a public defender office alone.<sup>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

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<sup>3</sup> Id.

law firms, but in which they no longer wish to practice law.

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

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

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

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

PDSC may have to rely on its assessment of the skills and experience of individual law firm members to ensure the delivery of quality, cost-efficient legal services, along with the external methods of training, standards and certification outlined above.

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

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

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

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

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

## **OPDS's Preliminary Investigation in Malheur 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 this.

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.

On June 24 Commissioner John Potter and OPDS Executive Director Ingrid Swenson visited with stakeholders in Malheur County. In addition to talking to two of PDSC's contractors in the county they met with Judge Patricia Sullivan. Telephone interviews were conducted after the visit with the District Attorney Dan Norris, with the Juvenile Department Director, the CASA director, the Citizen Review Board coordinator and the Assistant Attorney General assigned to the area.

The preliminary draft of this report is intended to provide a framework for the testimony to be presented at the meeting of the Commission in Baker City on August 14 and to guide the Commission's discussions about the condition of the public defense system in Malheur County, and the range of policy options available to the Commission – from concluding that no changes are needed in this county to significantly restructuring its delivery system.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in Malheur County's justice system could turn 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 Malheur County.

## OPDS's Findings in Malheur County

Malheur County is the second largest county in Oregon with 9,926 square miles. The total population of the county in 2005 was 31,800. It has three principal cities: Vale which is the county seat, Ontario which is the population center, and Nyssa. The principal industries are agriculture and ranching. The county has a large Hispanic population. In 2004 it was one of four counties in the state in which the Hispanic population exceeded 20% of the total population.<sup>4</sup>

### The Circuit Court

There are two circuit court judges in Malheur County, Presiding Judge Burdette Pratt and Judge Patricia Sullivan. There is a justice court in the county but it handles only violations. The county also has a mental health court (located in the justice court) and a drug court. There are actually three drug courts – a small one for juveniles (three or four youth), a men's drug court and a women's drug court. Women's drug court clients often have open dependency cases as well. Clients in all of the drug courts are represented by counsel. There is also a deferred sentencing program in domestic violence cases. Clients in this program report monthly unless excused. They are not represented by counsel since no sanctions are imposed. A show cause order is issued if sanctions for non-compliance are being considered.

According to court staff approximately half of the persons who come before the court are Hispanic. Most of them are citizens and fluent in English but some are migrant workers who do not speak English and who may be undocumented. Only about 10% of the criminal cases require interpreters. There is a high percentage of court staff, of local agency staff and attorneys and their staffs who provide linguistically and culturally competent services to Hispanic clients. When Judge Sullivan was the district attorney for the county she obtained a grant to staff a diversion program for Spanish speaking defendants. The program significantly increased the success rate for Spanish speakers before the funding expired.

### District Attorneys Office

Dan Norris is the District Attorney of Malheur County. Mr. Norris has four deputies. One deputy handles only juvenile dependency and delinquency cases. He does not have a retention problem because the county is able to provide adequate compensation. The starting salary is \$53,000 plus benefits. Mr. Norris indicated he can recruit defense attorneys to a position in his office "at will."

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<sup>4</sup> "Demographic and Economic Profile, Oregon," updated May 2006, Rural Policy Resource Institute.

## PDSC Contractors

The Rader, Stoddard and Perez firm contracts for 1,476 criminal and juvenile cases per year.<sup>5</sup> There are currently four attorneys handling cases under this contract. Mark Rader is also a PDSC death penalty contractor. Manuel Perez is Spanish speaking and Steve Stoddard speaks some Spanish. The firm also has a Spanish speaking investigator.

Mr. Rader indicates that prison cases take more time than other cases and that a special rate of compensation might be in order. He also noted that passage of either of the ballot measures on the November ballot relating to property offenses would significantly increase the number of women in prison and might result in a corresponding increase in dependency cases.<sup>6</sup>

The firm is pleased to have found two new associates recently but is still seeking a third. It is difficult to compete with the district attorney and the State of Idaho for attorneys.

David Carlson is an attorney in private practice who contracts to handle 501 criminal and juvenile public defense cases a year in Baker and Malheur Counties. His office is in Vale.

Coughlin Leuenberger & Moon is a Baker City lawfirm that contracts for 196 criminal and juvenile cases per year in Baker and Malheur Counties. The principal attorney assigned to public defense cases in Malheur County is Doug Rock.

Mike Mahoney is an attorney in private practice who contracts with PDSC to handle 78 cases per year, 18 of which are juvenile cases and 60 post conviction relief cases.

Gary Kiyuna is a member of the Baker County Consortium but also handles cases on an hourly basis in Malheur County. His office employs a Spanish speaking investigator. He reported that cases arising in the prison consume a lot more resources than other criminal matters. He explained that everything takes longer, including just getting into the prison to see the client.<sup>7</sup> Travel between

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<sup>5</sup> The contract also includes post conviction and habeas corpus cases in Umatilla County.

<sup>6</sup> Ballot Measure No. 61 would provide mandatory minimum prison sentences for certain theft, identity theft, forgery, drug and burglary cases. Ballot Measure No. 57, referred by the legislature as an alternative to Ballot Measure No. 61, would provide for enhanced sentences for drug trafficking, theft from the elderly and specified repeat property and identity theft crimes and would require addiction treatment for certain offenders. While the statewide prison population would grow substantially under either measure (but far more dramatically under Measure 61) it would not be likely to have a significant impact on the Snake River Correctional facility since it is currently at capacity and according to the district attorney not under consideration for expansion.

<sup>7</sup> Mr. Kiyuna did note that access greatly improved when Jean Hill became the superintendent and has remained good under succeeding administrators. Nevertheless, it simply takes more

Eastern Oregon communities also takes a significant amount of time. He put 25,000 primarily business-related miles on his vehicle last year. He has ceased taking cases in Harney County because of the distance.

### Criminal Cases

Attorneys are required to be present for arraignment in criminal cases in Malheur County but may appear by telephone. Plea hearings are held 21 days after arraignment for persons in custody and 35 days for those who are not. If a not guilty plea is entered, further negotiations are prohibited except in complex cases. Continuances are permitted, if needed, before a plea is entered.

According to Mr. Norris, although there has been a slight drop in the number of law enforcement referrals recently, the number of cases filed by his office has remained relatively constant because of the fixed population at the Snake River Correctional Facility. The 3000 inmates in the institution generate a significant percentage of the felony caseload. Most of the prison cases go to trial. Mr. Norris estimated that 90% of the non-prison criminal cases settle but only about 10% of the prison cases do. The prison cases are all felonies since the prison handles misdemeanors through administrative procedures within the institution.

### Juvenile Cases

Delinquencies:

Thursdays are delinquency days in Malheur County. The police cite youth to appear in court on this day. By the time of the first appearance, the juvenile department and district attorney will have decided whether they intend to proceed formally or not. The court will not proceed if the youth's parents are not present. The judge questions the youth and her parents before allowing them to waive counsel for the youth and strongly encourages them to accept appointed counsel in felony cases. If an attorney is appointed the case is set for a pre trial conference at which the youth and her parents, the juvenile court counselor and the attorney are present. Most cases in which a plea is entered at the pre trial conference can proceed immediately to disposition because juvenile department staff are assigned to the schools and are there every day so they generally know all of the students and are familiar with their circumstances.

Linda Cummings is the Director of the juvenile department. There is also an assistant director who oversees the court process, five probation officers and one diversion specialist. The assistant director and the deputy district attorney assigned to the juvenile department share an office and jointly review new referrals. As of July 1, 2008, the court, rather than the juvenile department, assumed responsibility for docketing juvenile matters and contacting counsel.

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time to see clients, investigate crime scenes, and interview witnesses within the institution. In addition, as indicated below, more of these cases go to trial.

The county has a short term juvenile holding facility. It is the former county jail. The county received a federal grant to remodel the facility into offices and a short term holding facility. It has five beds. Youth are generally held there for only a couple of hours. If the county wishes to detain a youth (or hold a 15 year old accused of a Measure 11 offense) it must transport him to Umatilla County (3 hours one way) or to Ada County, Idaho (an hour away). Depending on a youth's age and delinquency history, Measure 11 charges may be resolved with a juvenile court disposition. The county uses formal accountability agreements, rather than formal adjudication, in most misdemeanor cases.

The District Attorney anticipates that delinquency cases will become more difficult as the percentage of gang-related offenses, which generally involve serious firearms violations, increases. According to the court there is an increasing number of youth involved with three local gangs.

Dependencies:

Attorneys are present at shelter hearings in Malheur County. It was reported that although the court encourages them to seek appointed counsel many parents waive counsel because of the cost. A pretrial conference is set for 30 days after the shelter hearing. An "admit/deny" hearing is set a couple of days later. Contested hearings are generally scheduled within a couple of months after the admit/deny hearing.

Attorneys noted that review hearings are sometimes set without notice to them and may conflict with other scheduled court hearings.

Tammy Burt is the CASA supervisor for Malheur County. Her program has been able to provide a CASA for every child who is the subject of a dependency case. CASAs see the children at least once a month.

DHS was reported to have experienced a lot of staff turnover in Malheur County, with all of the current supervisors being new to supervisory work.

The local Juvenile Court Improvement Project team is instituting a number of procedural changes in the way juvenile dependency cases are handled.

Comments regarding the structure of the public defense system  
and the need for more attorneys

Judge Sullivan said that there is a need for more attorneys, particularly in juvenile dependency cases. On one recent occasion it was necessary to draft a private attorney to represent a party in a juvenile case. OPDS can always identify an attorney from another county but out-of-town attorneys are not as available. Attorneys try to be physically present in court but are forced to rely on telephone

and video appearances in many cases. She believes that ordinarily the attorney should be in the same place as the client. In addition, the court's telephone and video systems don't have the capacity to permit confidential communication between attorneys and their clients. In order to permit a client to confer with counsel in private it is necessary to use cell phones or to have everyone else leave the courtroom.

It is difficult to attract more attorneys to public defense work in Malheur county because of the proximity to Idaho where attorneys and even investigators receive a higher hourly rate than attorneys do in Oregon.

#### Comments regarding the quality of representation in criminal cases

Malheur County public defense attorneys were described as being very good at what they do, very professional and hard working. It was reported that "past problems" have been completely resolved. It was also reported, however, that workload interferes with their ability to be prepared. In-custody clients are not seen in a timely way. Inmates report at their arraignments on grand jury indictments that they still have not met with their attorneys. Plea discussions are not occurring as promptly as they should.

#### Comments regarding representation in juvenile cases

##### Delinquency cases:

Although some of the attorneys meet with their delinquency clients well in advance of court hearings, others do not see them until minutes before the court hearing. One attorney uses investigators more often than others but the use of investigators in delinquency cases lags significantly behind their use in criminal cases. Some attorneys have challenged a youth's capacity to proceed but there is otherwise not a lot of motion practice in these cases. It was reported that attorneys do their best work in sex abuse cases. In some cases the court has allowed youth to admit to non-registrable offenses while acknowledging behavior which would constitute a registrable offense. Should the youth fail to engage in appropriate treatment, the court can then amend the petition to adjudicate the youth on the registrable offense. The county generally uses the services of a local psycho-sexual evaluator to assess a youth's risk level but some attorneys are obtaining independent evaluations which allows them to review the results before deciding whether to provide the evaluation to the state.

##### Dependency cases:

It was reported that attorneys appear to be in good contact with their dependency clients, including at least older child clients. They work cooperatively with the CASA volunteers and respond promptly to telephone and email communications

with other parties to the juvenile case. Attorneys frequently contest changes in the permanent plan. A recent permanency hearing was litigated for a day and a half. Although there are not a lot of termination trials the lawyers do good work in these cases. Lawyers for children are very engaged and often participate in a team effort with DHS and the CASA. Lawyers for children sometimes file petitions to terminate. Two attorneys were identified as providing particularly strong advocacy. Nevertheless many appearances are handled by telephone and from at least one participant's point of view actual presence is always more effective. The same observer noted, however, that the judges in Malheur County do an especially good job of handling telephone appearances and don't "forget" the phone participants. The same person said that there is a need for additional training and resources for some of the attorneys in this county. She was pleased to see a senior member of one firm accompanying a newer member to his court hearings. One contractor expressed particular pride in the representation his office provides in juvenile dependency cases.

Responses to OPDS's 2007 statewide quality survey:

Respondents to OPDS's 2007 statewide quality of representation survey rated the quality of services provided by contractors in both criminal and juvenile cases in Malheur County as good to very good, noting that contract attorneys possess the legal knowledge, skill and training necessary for effective representation in most cases, although due to heavy caseloads they sometimes are not able to devote appropriate time and resources to each of their clients. Specific comments noted that a least one contractor was having difficulty keeping up with the caseload, and was failing to maintain contact with clients and prepare in advance for some hearings, especially in cases arising in the prison. The principal barrier to improvement identified in the survey responses was that lawyers were forced to take more cases than they could handle in order to receive adequate compensation. Attorneys were said to be especially "unprepared or overwhelmed" in dependency cases."<sup>8</sup>

#### OPDS's Recommendations for Further Inquiry at PDSC's August 14, 2007 Meeting in Baker City

Based on the information provided to OPDS during its visit to Malheur County in June 2008, OPDS recommends that the Commission consider the following in developing a service delivery plan for Malheur County.

#### The structure

The structure of the current system which includes three independent law offices appears to be working satisfactorily for the court and for OPDS although the

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<sup>8</sup> In interviews conducted in June of 2008 the degree of concern about preparation in dependency cases appears to have declined substantially. Additional resources allocated under the 2008-2009 contracts may have helped address some of this need.

court points to a need for additional attorneys. Although the Rader firm may be seeking an additional associate, the principal area of need is in juvenile dependency cases and, for purposes of avoiding conflicts a fourth local contractor might be needed. If another independent contractor were added, OPDS might wish to explore the creation of a consortium including all of these providers. Since they represent a scarce resource in this part of the state, however, the provider's individual needs must be understood and addressed in order to ensure their continued ability to handle public defense cases.

While there is no public defender office to serve as the principal trainer of new attorneys in the area, Rader Stoddard and Perez is the largest contractor and is currently training two new associates. OPDS's General Counsel is also available to assist new attorneys in all parts of the state to access the training that is currently available and to help plan new approaches to local and regional training.

### Need for Additional Attorneys

Judge Sullivan and others noted a need for additional attorneys to handle public defense cases in the county. While the need may be somewhat less urgent in Malheur County than in Judicial District 24 (Grant and Harney Counties), it is a region-wide problem and not a new one.

In January of 2001 the Oregon State Bar Indigent Defense Task Force III report identified a number of problems in the delivery of public defense services in Oregon. It noted that in some districts it has been difficult to attract satisfactory candidates to handle indigent defense caseloads and that "[a] few districts have reached a crisis point in recent years, finding no attorneys available to accept appointments for the compensation offered."

The greatest concerns about adequate criminal defense representation are reported to arise with isolated sole practitioners or small offices where there is little or no direct peer interaction or oversight. .... In more remote geographic areas, where there are fewer experienced attorneys with whom newer attorneys can consult, and firms providing indigent defense services often have small offices spread across vast multi-county judicial districts, the problem is exacerbated. In these situations, the combination of inadequate office funding and geographic remoteness limits training opportunities and makes peer review difficult to obtain. In turn, when problems with a particular provider do develop, replacements can be difficult to locate.

At its September 2003 retreat, the Commission identified a number of possible strategies for addressing the problem: offering longer contracts to providers who are willing to locate in or serve remote areas; supplementing insufficient trial-level

caseloads with appellate work; law school recruitment and specialized apprenticeship training for new lawyers interested in relocating; and assisting with access to office space and initial capital needs.

The commission may want to review these recommendations and determine whether there are other strategies available to address the need for additional attorneys in the area. The Commission could consider, for example, whether it should issue an RFP for attorneys willing to relocate to the area for a specified period of time with a guaranteed income as an added incentive.

#### Compensation in Prison Cases

PDSC may want to consider whether, locally or statewide, cases arising in prisons require more resources than other cases and, if so, may want to direct OPDS to apply an increased rate to such cases in 2010-11 contracts.

#### Expanded use of video and audio communication

Since many judicial districts, including all of the eastern Oregon ones make extensive use of video and audio systems, OPDS and affected contractors should request a meeting with Oregon Judicial Department staff and other affected agencies such as the Department of Corrections, the county sheriffs and others to discuss (1) existing systems and their limitations, and (2) currently available technology which could enhance the quality of participation in court hearings and expand the use of such technology for attorney-client contacts. The group could then explore the feasibility of upgrading the technology as a means of making more efficient use of court and attorney time and of improving the quality of interaction between the court and the parties and between the attorneys and their clients.

# Attachment 6

**OPDS's Draft Report to the Public Defense Services  
Commission on Service Delivery in Judicial District No. 24  
(July 2008)**

**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 2007, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Coos, Curry, Josephine, Lane, Lincoln, Linn, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of the public defense systems in Grant and Harney Counties undertaken in preparation for the PDSC's public meeting in Baker City, Oregon on Wednesday, August 14, 2008.

**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 such as this, 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. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the site teams visited contractors in Douglas, Jackson, Multnomah and Umatilla Counties. In 2006, teams visited all of the juvenile contractors in Multnomah and Lane Counties and criminal and juvenile contractors in Linn and Lincoln Counties. In 2007 site teams visited the sole juvenile contractor in Clackamas County, the largest contract office in the state in Multnomah County and the sole juvenile and criminal providers in Benton County and Columbia County.

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 a new Juvenile Law Training Academy for public defense lawyers. In 2006, the Commission devoted two of its meetings to investigating the condition of juvenile law practice across the state and to develop a statewide Service Delivery Plan for representation in juvenile dependency cases.

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

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

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

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

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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).

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

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

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

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

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

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

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

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

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

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

offices tend to have more office “infrastructure” than other public defense organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

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

Due to the frequency of cases in which public defender offices have conflicts of interest due primarily to cases involving multiple defendants or former clients, no county can operate with a public defender office alone.<sup>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

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<sup>3</sup> Id.

law firms, but in which they no longer wish to practice law.

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

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

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

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

PDSC may have to rely on its assessment of the skills and experience of individual law firm members to ensure the delivery of quality, cost-efficient legal services, along with the external methods of training, standards and certification outlined above.

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

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

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

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

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

## **OPDS's Preliminary Investigation in Judicial District 24**

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 this.

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.

On June 23 - 25 Commissioner John Potter and OPDS Executive Director Ingrid Swenson visited with stakeholders in both Grant and Harney Counties. In addition to talking to PDSC's contractors in the district, they met with the Circuit Court judge and the two district attorneys. Telephone interviews were conducted after the visit with the Grant County Juvenile Department Director, a DHS representative from Grant County, Christie Timko, the CASA Director for Grant and Harney Counties, a Grant County Deputy District Attorney, two Assistant Attorneys General and the CRB coordinator for both counties.

The preliminary draft of this report is intended to provide a framework for the testimony to be presented at the meeting of the Commission in Baker City on August 14 and to guide the Commission's discussions about the condition of the public defense systems in Grant and Harney Counties, and the range of policy options available to the Commission – from concluding that no changes are needed in these counties to significantly restructuring their delivery systems.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in Judicial District 24's justice systems could turn 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 Grant and Harney Counties.

## **OPDS's Findings in Judicial District No. 24**

### Judicial District 24

Judicial District No. 24 is comprised of Grant and Harney Counties. In 2005 the population of Grant County was 7,685 and the population of Harney County was 7,660. There are two courthouses in the district, one in Canyon City, just south of John Day (Grant County), and one in Burns (Harney County). The distance between the two courthouses is 68.3 miles. Video appearances by attorneys and in custody clients are common.

Judge William D. Cramer is the sole Circuit Court Judge in the district. Each county also has a justice court.

The two public defense contract providers in the district are Markku Sario and John Lamborn, of Mallon and Lamborn. Ken Bardezian from Baker County and other attorneys handle conflict cases in the district on an hourly basis.

Both counties were preparing to initiate drug courts beginning in July 2008.

### Grant County

Canyon City is the county seat of Grant County. The primary industries in the county are forest products, agriculture, hunting, livestock and recreation. More than 60% of the land is publicly owned. Grant County was not an "O&C" county but did receive federal forest payments. The loss of those payments represented a 22% reduction in the county general fund and a 73% loss in its road fund.

Ryan Joslin is the District Attorney. His only deputy left at the end of July when the domestic violence grant that helped fund his position expired<sup>4</sup>. In general, he expects the caseload to remain flat even though, over time, the population of the area continues to decline. Recently Mr. Joslin has been filing more misdemeanor cases in the Justice Court and fewer in the Circuit Court<sup>5</sup>.

The Grant County drug court will have a capacity of 12 clients and will focus on persons charged with drug offenses and other felonies motivated by drug use. It is intended to be a court for high-risk offenders.<sup>6</sup> Although only out-patient drug

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<sup>4</sup> He has been hired as a deputy district attorney in Morrow County.

<sup>5</sup> OPDS funds public defense representation at the trial level only in Circuit Court matters. ORS 135.055. Attorneys reportedly receive \$60 per hour for justice court public defense representation.

<sup>6</sup> The DA will extend a plea offer to drug court candidates instead of requiring admissions to all the pending charges as is done in Umatilla County.

treatment is available in the county, the drug court has received a grant which will enable it to provide funding for residential treatment outside the county.<sup>7</sup>

Mr. Joslin noted that there is no early disposition program in his county because there is no lack of jail space. The county had previously rented beds to the state and to the federal government but these contracts are expiring.

Mr. Joslin said that his office tries a couple of criminal cases a month.

Ken Boethin has been the Director of the Grant County Adult and Juvenile Parole and Probation Services Department for many years. He would like to retire but the county has been unable to find a replacement so he agreed to stay on. He supervises one adult probation officer, a part time juvenile officer and two staff persons. His office prepares all of the paperwork in juvenile dependency and delinquency cases as well as probation violation cases. There are only 14 to 20 delinquency cases filed per year. Almost all of these youth have appointed attorneys. The department handles most referrals informally. The juvenile department also prepares all the paperwork in juvenile dependency cases. The court appoints counsel in all of these cases as well, for both children and parents. According to Judge Cramer there are a lot of children-per-1000-population in the county so the juvenile caseload is demanding. Less than half the time is court staff able to advise attorneys of shelter hearings in time for them to appear.

The Department of Human Services has experienced high staff turnover in Grant County. Jan Keil is the current supervisor of that office. According to a number of reporters the agency is not held in high regard in the county as the result of events that occurred in the past and have not been forgotten. Many people feel that they have no one to go to with complaints or to get help.

Christie Timko is the CASA Director for Grant and Harney counties. She has nine CASA volunteers in Grant County. She is also the former District Attorney of Grant County. Travel time is a major issue for anyone who works in the Judicial District 24. In the winter it can take two hours to go from Canyon City to Burns and there is no cell phone service in the area to allow people to make better use of their travel time.

### Harney County

Burns is the county seat of Harney County. The primary industries in the county are forest products, manufacturing, livestock and agriculture. When the federal forest payments ceased, the county lost only 3% of its general fund revenue but 70% of its road fund revenue.

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<sup>7</sup> At a meeting in late 2008 or early 2009, the Commission will be reviewing drug court models from around the state and the role of defense counsel in those courts. Based on its review, the Commission may wish to establish guidelines for defense counsel in these cases.

Tim Colahan is the District Attorney of Harney County. He has been with the office for 21 years and has one deputy. He says the county is experiencing some growing pains with people moving in from Bend and Prineville primarily. He files all misdemeanors that don't involve domestic violence in the county justice court. When the current full time justice of the peace retires it will be appropriate to consider adding a second Circuit Court judge in the district.

Currently, there is a "minimally adequate" number of public defense attorneys who have to split their time between the counties. Even when there is pro tem judge time available the attorneys are not able to cover cases in two courts. The low number of attorneys presents a real challenge. The juvenile dependency caseload has increased in the county. The district attorney's office has always appeared in these cases. Now they are getting a small amount of compensation from the state to support them in this role. Attorneys are now appearing at CRB hearings more often and this has been a positive development.

Mr. Colahan said that funding for the Harney County Sheriff's office has been fairly stable. The sheriff also administers parole and probation services.

Public defense attorneys appear at arraignments when they are able to and at shelter hearings more often in Harney than in Grant County because the court is able to provide more timely notice in Harney County.

The Department of Human Services in the county is considered to be an effective office with experienced caseworkers who have good working relationships with the public defense attorneys.

Christie Timko has thirteen CASA volunteers in Harney County. She says the dependency caseload has been declining because DHS is removing fewer children than in the past.

Ms. Timko served as a deputy district attorney in Harney County before she became the Grant County District Attorney. She believes that another public defense attorney is needed in Harney County.

#### Public Defense Contractors

Markku Sario. Mr. Sario is an attorney in private practice with an office in Canyon City. Although he considered hiring an associate, he was not able to do so and, instead, has hired a non-lawyer assistant to attend CRB hearings and handle other tasks. He handles most case types in both counties. He receives one rate for Grant County cases (where his office is located) and a different and higher rate for Harney County cases. Since the justice court in Harney County handles most of the misdemeanor matters, the cases in the circuit court there are mainly felonies. Mr. Sario is also the defense attorney for both of the new drug

courts. His contract provides for representation in 204 Grant County cases per year and 120 Harney County cases.

Mallon and Lamborn, PC. John Lamborn handles the great majority of public defense cases in Judicial District 24 since Gordon Mallon also contracts to provide representation in death penalty cases. The firm currently has two members and maintains its office in Burns. Gordon and Mallon gets a higher rate for cases in Grant than in Harney County. The firm has contracted to handle 180 cases in Harney County and 48 in Grant.

Mr. Mallon noted that the cost of travel is a major issue for attorneys in this part of the state. He also said that as the current generation of lawyers retires new associates will need to be brought in and trained even if there are not a sufficient number of cases to provide them with full caseloads as they learn the practice.

In addition, as noted above, there are attorneys from other areas who are regularly appointed to handle cases in Judicial District 24.

#### Comments on Quality

Although the focus of this review is on the structure of the public defense system in Judicial District 24, quality of representation is an important measure of how well the system is working particular where, as here, quality is very much affected by the lack of a sufficient number of attorneys.

The following comments were provided by one or more of the persons interviewed and represent only a summary of the information provided.

One reporter said that all of the attorneys are doing a pretty good job but they do not put in the time that is needed on their cases.

Some interviewees said they had no difficulty contacting attorneys, others said they could not get them to return their calls.

Other comments were: Attorneys are always pressed for time. They are so overworked they cannot give a case the attention it needs. Some are very good trial lawyers but there are very few trials. Some attorneys are unprepared in criminal cases. Some do the best they can but are just too overworked. There is one hourly attorney from outside the county who should not be permitted to handle public defense cases. He is incompetent. There was an hourly paid attorney who appeared in Grant County recently and provided very high quality representation – he was described as “a consummate professional.” Attorneys are clearly frustrated by the number of cases they have. All are stretched thin in their criminal and juvenile practices. One attorney was said to do good work but lacked the training and resources to provide the quality of work that is the norm in other counties. One of the attorneys is prepared 99-100% of the time but

juvenile work is not his preferred area of practice. There are no juvenile law specialists in the area. Attorneys are not meeting with child clients in dependency cases or delinquency cases. One person's biggest frustration is that most of the lawyers never meet with child clients at all, even over the course of multiple years of representation. Another said that when they represent children most attorneys have done nothing but read the DHS court report and often say nothing in court. Some are not prepared to represent parents either and their clients are confused about what is happening in their cases. Juvenile dependency cases are not a priority for these lawyers.

Responses to OPDS's 2007 Public Defense Performance Survey in Judicial District 24 included similar comments by some of the same reporters. In addition, it included the following statements:

"I believe the quality of representation will increase proportionately with an increase in compensation of the defense attorneys. The dollars paid to these contractors don't allow adequate time to be spent on each case, and ethics aside, it seems unrealistic to expect adequate time to be spent on each case when the attorney is not appropriately compensated."

While compensation was increased under the current contract, the increase does not appear to have been sufficient to address the needs reported in 2007.

OPDS's Recommendations for Further Inquiry at PDSC's  
August 14, 2007 Meeting in Baker City

Based on the information provided to OPDS during its visit to Grant and Harney Counties in June 2008, OPDS recommends that the Commission consider the following in developing a service delivery plan for Judicial District 24.

1. Need for Additional Attorneys

Although not unique to Judicial District 24, the scarcity of attorney resources is probably as great in Judicial District 24 as anywhere in the state. As one person noted in response to the 2007 survey:

"I am very concerned in both counties that there is an insufficient number of attorneys to do the required work. We need the assistance of the commission in recruiting attorneys to do work here in our counties. .... I am very concerned that even the current contractors and att[orney]s won't continue to take cases unless there is a real and substantial raise in their wages. This latter point may be my greatest concern for the criminal and juvenile systems and their efficient functioning."

Judge Cramer told OPDS that the system is working now because the attorneys are experienced but the number of available attorneys continues to go down and it is very hard to bring in new attorneys. Fluctuation in the caseload, the need for attorneys to handle matters in other counties, and attorney vacations make scheduling very difficult. The court is unable to use much pro tem time because of the limited availability of the attorneys. There is probably not enough civil work to supplement another attorney's practice. The attorneys should receive enough for their public defense work so that they don't have to do other things.

The problem described by Judge Cramer and others is not new. In January of 2001 the Oregon State Bar Indigent Defense Task Force III report identified a number of problems in the delivery of public defense services in Oregon. It noted that in some districts it has been difficult to attract satisfactory candidates to handle indigent defense caseloads and that "[a] few districts have reached a crisis point in recent years, finding no attorneys available to accept appointments for the compensation offered."

The greatest concerns about adequate criminal defense representation are reported to arise with isolated sole practitioners or small offices where there is little or no direct peer interaction or oversight. .... In more remote geographic areas, where there are fewer experienced attorneys with whom newer attorneys can consult, and firms providing indigent defense services often have small offices spread across vast multi-county judicial districts, the problem is exacerbated. In these situations, the combination of inadequate office funding and geographic remoteness limits training opportunities and makes peer review difficult to obtain. In turn, when problems with a particular provider do develop, replacements can be difficult to locate.

At its September 2003 retreat, the Commission identified a number of possible strategies for addressing the problem: offering longer contracts to providers who are willing to locate in or serve remote areas; supplementing insufficient trial-level caseloads with appellate work; law school recruitment and specialized apprenticeship training for new lawyers interested in relocating; and assisting with access to office space and initial capital needs.

The commission may want to review these recommendations and determine whether there are other strategies available to address the need for additional attorneys in the area. The Commission could consider, for example, whether it should issue an RFP for attorneys willing to relocate to the area for a specified period of time with a guaranteed income as an added incentive.

## 2. Representation in Juvenile Cases

In both delinquency and dependency cases, juvenile system representatives noted significant deficits in representation being provided to youth, children, and parents in Judicial District 24. As has been noted in previous staff reports, OPDS believes the training tools needed for high quality representation are available to lawyers in all parts of the state. There are frequent CLE events, some offered without cost, that focus on juvenile representation. There are websites and list serves. There is a bi-monthly newsletter sent to all OPDS contractors devoted to developments in juvenile law. OPDS's general counsel is available to work with providers to help them identify their particular training needs and available training options. In the most recent contract negotiation period, OPDS outlined for all contractors the expectations of attorneys representing children. (See Exhibit A, "Role of Counsel for Children.") Although as one commentator noted, additional compensation is going to be necessary to achieve any improvement in the quality of representation, assuming additional funds were available, how could the commission ensure that improvement would actually occur in the representation provided in these cases? Should it consider tying future rate increases to conformance with established performance standards? Should it consider mandatory CLE credits?

# Exhibit A

## **ROLE OF COUNSEL FOR CHILDREN AND YOUTH**

During the course of numerous site reviews over the last four years, OPDS has noticed significantly inconsistent practices regarding the role of appointed counsel for children in both dependency and delinquency cases.

For example, some attorneys believe that it is not necessary to meet and confer with child clients.

It is hoped that this statement will clarify what OPDS believes to be the role of counsel for children in dependency cases and youth in delinquency cases. The statement is being sent to all public defense providers. If you have questions about the role of counsel as outlined in this statement, please contact OPDS's General Counsel, Paul Levy at (503) 378-2478.

### **Role of Counsel in Dependency Cases**

In juvenile dependency cases, the role of the attorney appointed to represent a child will depend on the age of the child and the child's capacity for considered judgment.

An attorney for a child capable of considered judgment must advocate for the child's expressed wishes. The attorney for a child not capable of considered judgment must advocate for the child's best interest as determined by the attorney's independent investigation and exercise of sound judgment. Some children are capable of considered judgment with respect to some decisions that need to be made in the case but not with respect to others. Standard 3.4 of the Specific Standards for Representation in Juvenile Dependency Cases of the Oregon State Bar's Principles and Performance Standards<sup>1</sup> outlines the analysis to be used in deciding the appropriate type of advocacy in a given case.

Regardless of that ultimate determination, the child is a "client" and OPDS contracts require the contractor to speak to and conduct initial interviews, in person, with clients who are in custody within 24 hours of appointment whenever possible; and to arrange for contact, including notification of a scheduled interview time, within 72 hours of appointment for all clients who are not in custody. Children are not excepted from this rule.

In addition, Rule 1.14 of the Oregon Rules of Professional Conduct (ORPC) requires counsel for persons with diminished capacity (which includes children not capable of considered judgment) to maintain, as far as reasonably possible, a normal client-lawyer relationship with the client. The ORPC require attorneys to

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<sup>1</sup> The full text of the 2005 version of the Principles and Standards for Counsel in Criminal, Delinquency and Dependency Cases can be found on the bar's website at [http://www.osbar.org/surveys\\_research/performancestandard/index.html](http://www.osbar.org/surveys_research/performancestandard/index.html).

**maintain contact** with their clients, **to keep them reasonably informed** about the status of their cases (ORPC Rule 1.4), **to promptly comply** with reasonable requests for information (*Id*), **to explain** matters to the extent reasonably necessary to permit the client to make informed decisions about matters regarding which the client is capable of exercising considered judgment (*Id*), **to abide by** the decisions of a client who is capable of considered judgment concerning the objectives of representation (ORPC Rule 1.2), and **to consult** with the client regarding the means by which the objectives of representation are to be pursued (*Id*). These rules apply regardless of the client's age or capacity.<sup>2</sup>

### **Role of Counsel in Delinquency Cases**

Attorneys for youth in juvenile delinquency proceedings are bound to advocate for the expressed wishes of the youth. While the attorney has a responsibility to advise the youth of legal options that the attorney believes to be in the youth's best interest and to identify potential outcomes of various options, the attorney must represent the expressed wishes of the juvenile at every stage of the proceedings. The attorney owes the same duties to a juvenile under the Rules of Professional Conduct as an attorney owes to an adult criminal defendant.

If an attorney determines that a youth is not capable of aiding and assisting in the youth's defense, the attorney shall move the court to dismiss or amend the petition, as discussed in Standard 2.8(2) of the Specific Standards for Representation in Criminal and Juvenile Delinquency Cases.

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<sup>2</sup> For those attorneys who lack the information or skills to have an age appropriate discussion with a young or disabled client, an online training will be available beginning in November, 2007 at the following link: <http://www.cwpsalem.pdx.edu/teen/>.

# Attachment 7

# Summary of 2009-11 Budget Public Defense Services Commission

	TOTALS			FUND TYPE					
	POS	FTE	ALL FUNDS	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonlimited Other	Federal
<b>2007-09 LEGISLATIVELY ADOPTED BUDGET</b>									
Emergency Board Actions (through 4/2008)	64	63.25	215,489,928	214,885,309		604,619			
	4	2.60							
<b>2007-09 Legislatively Approved Budget</b>	68	65.85	215,489,928	214,885,309		604,619			
<b>Base Budget Adjustments:</b>									
Net Cost of 2007-09 Position Actions:									
Administrative, Biennialized E-Board, Phase-Out	4	5.70	1,059,500	1,010,084		49,416			
Estimated Cost of 2009-11 Merit Increase			418,908	403,215		15,693			
Base Debt Service Adjustment									
Base Nonlimited Adjustment									
Capital Construction Adjustment									
<b>Subtotal: 2009-11 Base Budget</b>	72	71.55	216,968,336	216,298,608		669,728			
<b>Essential Packages:</b>									
<b>Package No. 010</b>									
Vacancy Factor (Increase)/Decrease			80,206	74,087		6,119			
Non-PICS Personal Service Increase/(Decrease)			135,968	134,970		998			
Subtotal			216,174	209,057		7,117			
<b>Package No. 021/022</b>									
021 - Phased-In Programs Excl. One-Time Costs									
022 - Phase-Out Programs and One-Time Costs									
Subtotal									
<b>Package No. 031/032/033</b>									
Cost of Goods & Services Increase/(Decrease)			55,950	55,950					
State Govt Service Charges Increase/(Decrease)			20,773	20,773					
Subtotal			76,723	76,723					
<b>Package No. 040</b>									
Mandated Caseload Increase/(Decrease)	6	5.52	19,393,220	19,393,220					
<b>Package No. 050</b>									
Fund Shifts									
<b>Package No. 060</b>									
Technical Adjustments									
<b>Subtotal: 2009-11 Essential Budget Level</b>	78	77.07	236,654,453	235,977,608		676,845			



# Summary of 2009-11 Budget Appellate Division

	TOTALS			FUND TYPE				
	POS	FTE	ALL FUNDS	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonlimited Federal
<b>2007-09 LEGISLATIVELY ADOPTED BUDGET</b>								
Emergency Board Actions (through 4/2008)	44	44.00	9,648,117	9,648,117				
	4	2.60						
<b>2007-09 Legislatively Approved Budget</b>	48	46.60	9,648,117	9,648,117				
<b>Base Budget Adjustments:</b>								
Net Cost of 2007-09 Position Actions:								
Administrative, Biennialized E-Board, Phase-Out	5	6.40	886,445	886,445				
Estimated Cost of 2009-11 Merit Increase			306,892	306,892				
Base Debt Service Adjustment								
Base Nonlimited Adjustment								
Capital Construction Adjustment								
<b>Subtotal: 2009-11 Base Budget</b>	53	53.00	10,841,454	10,841,454				
<b>Essential Packages:</b>								
<b>Package No. 010</b>								
Vacancy Factor (Increase)/Decrease			44,539	44,539				
Non-PICS Personal Service Increase/(Decrease)			131,994	131,994				
Subtotal			176,533	176,533				
<b>Package No. 021/022</b>								
021 - Phased-In Programs Excl. One-Time Costs								
022 - Phase-Out Programs and One-Time Costs								
Subtotal								
<b>Package No. 031/032/033</b>								
Cost of Goods & Services Increase/(Decrease)			42,041	42,041				
State Govt Service Charges Increase/(Decrease)			51,591	51,591				
Subtotal			93,632	93,632				
<b>Package No. 040</b>								
Mandated Caseload Increase/(Decrease)	6	5.52	921,087	921,087				
<b>Package No. 050</b>								
Fund Shifts								
<b>Package No. 060</b>								
Technical Adjustments								
<b>Subtotal: 2009-11 Essential Budget Level</b>	59	58.52	12,032,706	12,032,706				

**2009-11 Essential Budget Level - Page 1 Subtotal**

Package No. 070

Revenue Shortfalls

**Subtotal: 2009-11 Modified Essential Budget Level**

Emergency Board Packages:

**Subtotal Emergency Board Packages**

Policy Packages:

Package 100 Juvenile Dependency Representation

Package 101 Post Conviction Relief

Package 102 Public Defense Provider Compensation

	TOTALS			FUND TYPE						
	POS	FTE	ALL FUNDS	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonlimited Other	Nonlimited Federal	
	59	58.52	12,032,706	12,032,706						
<b>Subtotal: 2009-11 Modified Essential Budget Level</b>	59	58.52	12,032,706	12,032,706						
<b>Emergency Board Packages:</b>										
<b>Subtotal Emergency Board Packages</b>										
<b>Policy Packages:</b>										
Package 100 Juvenile Dependency Representation	5	4.60	825,475	825,475						
Package 101 Post Conviction Relief										
Package 102 Public Defense Provider Compensation										
<b>Subtotal Policy Packages</b>	5	4.60	825,475	825,475						
<b>Total: 2009-11 Budget</b>	64	63.12	12,858,181	12,858,181						

Percent Change From 2007-09 Leg. Approved

33.3%

35.5%

33.3%

33.3%

0.0%

0.0%

0.0%

0.0%

0.0%

Percent Change From Essential Budget Level

8.5%

7.9%

6.9%

6.9%

0.0%

0.0%

0.0%

0.0%

0.0%

## Summary of 2009-11 Budget Public Defense Services Account

	TOTALS			FUND TYPE					
	POS	FTE	ALL FUNDS	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonlimited Other	Federal
<b>2007-09 LEGISLATIVELY ADOPTED BUDGET</b>			202,176,836	202,176,836					
Emergency Board Actions (through 4/2008)									
<b>2007-09 Legislatively Approved Budget</b>			202,176,836	202,176,836					
<b>Base Budget Adjustments:</b>									
Net Cost of 2007-09 Position Actions:									
Administrative, Biennialized E-Board, Phase-Out									
Estimated Cost of 2009-11 Merit Increase									
Base Debt Service Adjustment									
Base Nonlimited Adjustment									
Capital Construction Adjustment									
<b>Subtotal: 2009-11 Base Budget</b>			202,176,836	202,176,836					
<b>Essential Packages:</b>									
<b>Package No. 010</b>									
Vacancy Factor (Increase)/Decrease									
Non-PICS Personal Service Increase/(Decrease)									
Subtotal									
<b>Package No. 021/022</b>									
021 - Phased-In Programs Excl. One-Time Costs									
022 - Phase-Out Programs and One-Time Costs									
Subtotal									
<b>Package No. 031/032/033</b>									
Cost of Goods & Services Increase/(Decrease)									
State Govt Service Charges Increase/(Decrease)									
Subtotal									
<b>Package No. 040</b>									
Mandated Caseload Increase/(Decrease)			18,472,133	18,472,133					
<b>Package No. 050</b>									
Fund Shifts									
<b>Package No. 060</b>									
Technical Adjustments									
<b>Subtotal: 2009-11 Essential Budget Level</b>			220,648,969	220,648,969					

2009-11 Essential Budget Level - Page 1 Subtotal  
 Package No. 070  
 Revenue Shortfalls

	TOTALS			FUND TYPE					
	POS	FTE	ALL FUNDS	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonimimed Other	Federal
			220,648,969	220,648,969					
<b>Subtotal: 2009-11 Modified Essential Budget Level</b>			220,648,969	220,648,969					
<b>Emergency Board Packages:</b>									
<b>Subtotal Emergency Board Packages</b>									
<b>Policy Packages:</b>									
Package 100 Juvenile Dependency Representation			17,274,024	17,274,024					
Package 101 Post Conviction Relief			(493,824)	(493,824)					
Package 102 Public Defense Provider Compensation			21,576,514	21,576,514					
<b>Subtotal Policy Packages</b>			38,356,714	38,356,714					
<b>Total: 2009-11 Budget</b>			259,005,683	259,005,683					

Percent Change From 2007-09 Leg. Approved      0.0%      0.0%      28.1%      28.1%      0.0%      0.0%      0.0%      0.0%

Percent Change From Essential Budget Level      0.0%      0.0%      17.4%      17.4%      0.0%      0.0%      0.0%      0.0%

# Summary of 2009-11 Budget Contract and Business Services

	TOTALS			FUND TYPE					
	POS	FTE	ALL FUNDS	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonlimited Other	Nonlimited Federal
<b>2007-09 LEGISLATIVELY ADOPTED BUDGET</b>									
Emergency Board Actions (through 4/2008)	20	19.25	3,664,975	3,060,356		604,619			
<b>2007-09 Legislatively Approved Budget</b>	20	19.25	3,664,975	3,060,356		604,619			
<b>Base Budget Adjustments:</b>									
Net Cost of 2007-09 Position Actions:									
Administrative, Biennialized E-Board, Phase-Out	(1)	(0.70)	173,055	123,639		49,416			
Estimated Cost of 2009-11 Merit Increase			112,016	96,323		15,693			
Base Debt Service Adjustment									
Base Nonlimited Adjustment									
Capital Construction Adjustment									
<b>Subtotal: 2009-11 Base Budget</b>	19	18.55	3,950,046	3,280,318		669,728			
<b>Essential Packages:</b>									
<b>Package No. 010</b>									
Vacancy Factor (Increase)/Decrease			35,667	29,548		6,119			
Non-PICS Personal Service Increase/(Decrease)			3,974	2,976		998			
Subtotal			39,641	32,524		7,117			
<b>Package No. 021/022</b>									
021 - Phased-In Programs Excl. One-Time Costs									
022 - Phase-Out Programs and One-Time Costs									
Subtotal									
<b>Package No. 031/032/033</b>									
Cost of Goods & Services Increase/(Decrease)			13,909	13,909					
State Govt Service Charges Increase/(Decrease)			(30,818)	(30,818)					
Subtotal			(16,909)	(16,909)					
<b>Package No. 040</b>									
Mandated Caseload Increase/(Decrease)									
<b>Package No. 050</b>									
Fund Shifts									
<b>Package No. 060</b>									
Technical Adjustments									
<b>Subtotal: 2009-11 Essential Budget Level</b>	19	18.55	3,972,778	3,295,933		676,845			

2009-11 Essential Budget Level - Page 1 Subtotal

Package No. 070

Revenue Shortfalls

	TOTALS			FUND TYPE					
	POS	FTE	ALL FUNDS	General Fund	Lottery Funds	Other Funds	Federal Funds	Nonlimited Other	Federal
	19	18.55	3,972,778	3,295,933		676,845			
<b>Subtotal: 2009-11 Modified Essential Budget Level</b>	19	18.55	3,972,778	3,295,933		676,845			
<b>Emergency Board Packages:</b>									
<b>Subtotal Emergency Board Packages</b>									
<b>Policy Packages:</b>									
<b>Subtotal Policy Packages</b>									
<b>Total: 2009-11 Budget</b>	19	18.55	3,972,778	3,295,933		676,845			

Percent Change From 2007-09 Leg. Approved

-5.0%

-3.6%

8.4%

7.7%

0.0%

11.9%

0.0%

0.0%

0.0%

Percent Change From Essential Budget Level

0.0%

0.0%

0.0%

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