

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 Thomas Balmer

Executive Director

Nancy Cozine

PUBLIC DEFENSE SERVICES COMMISSION

PUBLIC DEFENSE SERVICES COMMISSION MEETING

Friday, October 19, 2012
12:30 p.m. – 4:00 p.m.
Oregon Gardens,
879 W Main St., Silverton, OR 97381

AGENDA

- | | |
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| 1. Action Item: Approval of minutes - PDSC meeting held on September 12, 2012 (<i>Attachment 1</i>) | Chair Ellis |
| 2. Representing Clients as a Court Appointed Attorney; Perspectives from around the state | Invited Guests |
| 3. Budget Update <ul style="list-style-type: none"> • September Emergency Board Request • Action Item: Discussion and Approval of PDSC '13-'15 Budget Narrative (<i>Attachment 2</i>) | Nancy Cozine
Kathryn Aylward
Barnes Ellis
Commissioners |
| 4. Action Item: PDSC Personnel Rules Regarding Reemployment (<i>Attachment 3</i>) | Nancy Cozine |
| 5. Action Item: PDSC policy regarding disclosure of billing records; ORS 135.055(9) (<i>Attachment 4</i>) | Paul Levy |
| 6. Request for Input Regarding PDSC Agenda for 2013 (<i>Attachment 5</i>) | Chair Ellis
Commission Members
Provider Comments |
| 7. OPDS Monthly Report | OPDS Management Team |
| 8. Thank you to Peter Ozanne | Chair Ellis |

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

The meeting location is accessible to persons with disabilities. Please make requests for an interpreter for the hearing impaired, or other accommodation for persons with disabilities, at least 48 hours before the meeting, to Laura Kepford at (503) 378-3349.

Next meeting: December 14, 2012, 9:00 a.m. – 2:00 p.m. in Albany, Oregon, specific location to be announced. Meeting dates, times, and locations are subject to change; future meetings are posted at: <http://www.oregon.gov/OPDS/PDSCagendas.page>

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Wednesday, September 12, 2012
10:00 a.m. – 2:00 p.m.
Office of Public Defense Services
1175 Court St. NE
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis
Chip Lazenby
Peter Ozanne
John Potter
Janet Stevens
Hon. Elizabeth Welch

STAFF PRESENT: Nancy Cozine
Kathryn Aylward
Paul Levy
Peter Gartlan
Shawn Wiley
Billy Strehlow

The meeting was called to order at 10:00 a.m.

Agenda Item No. 2 Approval of minutes – PDSC meeting on August 16, 2012

Chair Ellis requested one change to the minutes, specifically, on page 7: "...without an agreement on the death sentence is presumptively ineffective lawyering – however, presumptively a rebuttable presumption." The Chair proposed insertion of the word "implies" a rebuttable presumption. **MOTION:** Hon. Elizabeth Welch moved to approve the minutes as amended. **VOTE 6-0.**

Agenda Item No. 3 Emergency Board Request – Update

Ms. Cozine indicated that OPDS will appear before the Emergency Board a little after 2 p.m., and it seems likely that the committee will follow LFO's recommendation to appropriate \$2 million from the special purpose appropriation to the PDSC. Ms. Cozine expressed appreciation for the efforts of the new LFO analyst, Mr. Bender, who spent time getting to know the agency and its budget challenges. Chair Ellis asked whether the PDSC was expecting to request additional resources at the start of the 2013 session. Ms. Cozine confirmed that timing. Commissioner Potter pointed out that the funds would no longer be in a special purpose appropriate for the PDSC. Ms. Aylward explained that the amount needed to cover the remaining costs for the biennium should be costs that are actually submitted to the agency after July 2012, but are in fact 2011-13 expenses.

Agenda Item No. 4 Death Penalty Filings & Capital PCR Opinions

Mr. Levy started by noting two remarkable trends – a spike in new death penalty filings, and seven capital post conviction cases issued over the last three or four years in which relief has been granted.

Mr. Strehlow explained that from 1997 through about 2010, there were about 25 to 30 trial level aggravated murder cases with the possibility of death, filed each fiscal year. In fiscal year 11 and 12, that number dropped significantly to 16 and then 14. In fiscal year 2013, which includes July and August of 2012, there are nine cases already filed, which is a big increase.

Commissioner Potter asked whether filings were greater in any particular county, and Mr. Strehlow responded that Lane County had several, but not all. He further explained that the current caseload is about 41 at the trial level; an increase from the usual average of high twenties to low thirties over the last several years.

Commissioner Lazenby asked whether this was a political trend, and whether there had been any policy conversations happening as a result of the decision in the Haugen case, finding that Mr. Haugen must accept the Governor's reprieve before the execution can be further delayed. Mr. Levy suggested that Mr. Ellis would be the person to address that question.

Mr. Ellis indicated that he would begin by focusing on the post conviction world, then get back to questions about the death penalty experience in Oregon. Mr. Ellis explained that it is always difficult to talk about a trend in terms of how cases are being decided because each case is unique and rises or falls based on the particular facts of that case. But that to the extent talking about trends is valuable, there certainly has been a change because before these seven cases, there was nearly a decade of no reversals at the post conviction level.

Mr. Ellis reviewed the factors that demonstrate the change. He noted that when he started in his position about two and a half years ago, the majority of death penalty cases were at the front end, pending trial, but that there seemed to be a disproportionate number of cases that were at the post conviction trial level. Some of that was because that system was moving very slowly. Chief Justice De Muniz, about a year ago, urged that the system speed up. When there was a push to move more quickly, the lawyers doing the work needed help. Ultimately, the attorneys who represented those defendants in post conviction did a stellar job - they reinvestigated the cases, both the facts of the case and the trial team's approach, and they came up with very significant information that had not been presented at the time of trial. Mr. Ellis explained that the standards of practice for the death penalty cases require that the investigation be done, first at the trial level, and then at the post conviction, in a way that is unprecedented in terms of its scope and depth. He shared his view that a PCR reversal is not a matter of the trial lawyer being a bad lawyer; it is a matter of their investigation stopping too short. That burden then falls on the post conviction team to identify what wasn't done, to do it and to present it in a way that is compelling. Historically, there was an approach which made some sense before habeas corpus law changed dramatically. Lawyers presented these cases on paper, through affidavits, and gave those affidavits to the judge and let the judge decide based on affidavits. Lawyers would then have an evidentiary hearing, if necessary, in federal court. Now lawyers don't get evidentiary hearings in federal court. Consequently, lawyers now must present live witnesses to a judge to persuade that judge that the case is worth granting relief. Mr. Ellis proffered that this is another salient change - Oregon has moved from a system of trial by affidavit to trial by live witnesses. He concluded by saying that while this is one of a variety of very complicated reasons for the changes, ultimately the change really is due to the very good work of post conviction teams.

Chair Ellis asked which lawyers were handling capital PCR cases; Mr. Levy provided some names, and explained that there are always at least two lawyers on each case. He also noted that three cases settled while Hardy Meyers was the Attorney General.

Commissioner Lazenby expressed concern about PDSC paying for both trial and PCR phases of the case, and the idea that lawyers are trying the case more thoroughly the second time around, in a PCR context. Mr. Levy suggested that in most of the seven cases being discussed, the trial level representation was not very good. Lawyers weren't paid much for the representation, and it wasn't quality representation. He also clarified that OPDS doesn't contract with those lawyers. Commissioner Lazenby asked, and Mr. Levy confirmed, that the trial level representation in those seven cases predated the PDSC – they were all at least ten years ago.

Chair Ellis asked Mr. Ellis how the court could order the state to proceed with an execution that a governor doesn't want to do. Mr. Ellis explained that Judge Alexander found that the Oregon Constitution's clemency power was such that the Governor could extend the offer of clemency, in this particular case a reprieve, but that the inmate needed to accept. He noted that the idea came out of conditional commutations, where a Governor would say, "I am going to let you out of prison early, but I want you to do these five things," and a doctrine developed that said where a prisoner is required to do affirmative things in response to an offer of commutation, the prisoner has a right to refuse. Mr. Ellis said that in his opinion Judge Alexander's decision in the case extended the ruling to a situation that didn't involve any conditions on the reprieve, and that he believes it is a dangerous position to say that the Governor's clemency power is equally shared with each inmate. He views the Governor's clemency power, and believes the framers of the Oregon Constitution viewed it, as being something that is done for the good of the people. He is hopeful that the Oregon Supreme Court will view the Constitution in that same way. Chair Ellis asked who is providing representation for the parties in this dispute. Mr. Ellis answered that the Attorney General's office, who previously sought Mr. Haugen's execution, is now seeking to uphold the power of the Governor to grant the reprieve, and that Mr. Haugen is being represented by a lawyer, Harry Latto, on a *pro bono* basis.

Chair Ellis asked whether the disparity between capital cases in Oregon and Washington continues. Mr. Ellis said that it does; Washington State is at a recent high water mark because they have five cases pending. Oregon now has 41. Washington has about double the number of murders that Oregon has. Mr. Ellis explained that the disparity comes about because in Washington State prosecutors are obliged, early in the case, after aggravated murder is filed, to declare whether it is a death penalty case. He noted that in Oregon, the state pays death penalty costs for cases when the vast majority turn into non-death penalty cases on the eve of trial. One of the reasons for that is because Oregon doesn't have a formalized mechanism, like Washington's.

Commissioner Lazenby asked whether another factor is that Washington requires individual counties to share the costs of prosecuting death penalty cases. Mr. Ellis indicated that this is absolutely true; that here in Oregon a county prosecutor is using state monies, at least on the defense side.

Mr. Ellis concluded by saying that there are still talks going on about abolishing the death penalty in Oregon. It is in the Constitution, so would take a vote of the people. He notes that this has happened seven times in the last century in Oregon. California has abolition of the death penalty on their ballot, but they are a much different state in many ways. They have more than 700 people on their death row - by far the largest in the United States right now. He notes that it is a complicated issue; that there are issues about whether reforms could take place, which raises a question about whether people are trying to reform the death penalty in Oregon, or trying to replace the death penalty in Oregon.

Agenda Item No. 5

PDSC delegation of authority to OPDS

Ms. Cozine provided background information regarding the requested delegation of authority, which allows the Executive Director to make changes to the payment and personnel policies

when there is a change in federal or state law, or when the change allows OPDS to be more efficient. The change must be brought to the Commission at the next regularly scheduled meeting. Ms. Cozine explained that when the Commission discussed the concept in December of 2011, it was with the thought that there would be an annual report of changes, rather than changes reported at the following meeting, but that the management team decided it was better to start with a shorter period of time, and consider extending it, if desirable, in the future. Ms. Cozine and Ms. Aylward reminded Commission members of the two examples brought to the Commission's attention in December – one was a mileage rate reimbursement change, the other was a change to the personnel rule requiring employees to collect the jury service fee, which cost more to process than it yielded for the agency. Ms. Cozine reminded Commission members that this has been a topic of conversation for the Commission at several meetings, and expressed the view that having it documented in writing would create clarity for everyone.

Commissioner Ozanne asked Ms. Cozine whether an email would be sent notifying Commission members of interim changes, and Ms. Cozine indicated that she would be happy to send such an email. Commissioner Lazenby noted the value that a clear delegation can bring to any claim of lack of authority in an employee dispute.

MOTION: John Potter moved to adopt this proposed delegation of authority. Chip Lazenby seconded the motion, hearing no objection, the motion carried: **VOTE 6-0.**

Agenda Item No. 6

PDSC policy regarding disclosure of billing records; ORS 135.055(9)

Mr. Levy introduced the topic by summarizing the discussion at the August PDSC meeting, and explained that the PDSC's current policy is out of date. It is almost identical to the policy used by the OJD's Indigent Defense Services Division back in 1992. A policy revision was presented to the Commission in 2006, but no action was taken. Mr. Levy, at the Commission's request, drafted a revised policy. Subsequently, he found the language that had been submitted to the Commission in 2006, which is substantially similar, but states: "OPDS shall disclose information regarding the cost of representation as required by law." Mr. Levy noted that the revision doesn't attempt to define when a case concludes, and that in the recent litigation, the question was whether a case is "concluded" when it is in PCR litigation. Mr. Levy asserted that there is good reason to think that a case should not be considered "concluded" while there is still litigation pending, or a possibility that it would result in a retrial, due to concerns about the prosecutor or the state having access to the detailed requests that were made in support of funds on a case.

Chair Ellis noted his concern that the proposed policy in the death penalty area means OPDS would never disclose costs, and asked why there isn't a public interest in revealing the costs in those cases so that people know where the money is going. Mr. Levy responded by pointing out that the 2003 legislation said, "At the conclusion of a trial, [OPDS] shall disclose to the prosecutor the costs of the defense in a case." OPDS is clearly not authorized to disclose the requests for the costs and the individual breakdown of those costs, but the legislature has obligated OPDS in death penalty and any other case type, to give information about the cost of the trial in a case.

Chair Ellis asked when OPDS would usually receive a request for costs. Mr. Levy explained that, typically, it comes from the court, when they are preparing the judgment and wish to impose court appointed attorney fees (recoupment), which would be an aggregate number. Chair Ellis summarized his understanding of the proposed new language: staff is authorized to disclose aggregate costs at the conclusion of a trial, but OPDS would resist any disclosure of disaggregated amounts where there is PCR pending or a potential for further litigation. Mr. Levy confirmed this interpretation, noting that OPDS would disclose if ordered to do so by a court. He explained that the court order is important because the attorney-client privilege applies to attorney communications to OPDS in connection with expense requests, and OPDS

is not in a position to determine that a client has waived that privilege by filing a post conviction relief petition. It is safer for OPDS to have a court, or the lawyers, or the petitioner's lawyer, make that decision. Chair Ellis asked about the situation in which a journalist wants to write about costs, noting that even if expenses are well justified in the view of OPDS, somebody might think otherwise. Mr. Levy explained that OPDS tells the provider community to divulge secrets - confidential, protected information about their case and their client. OPDS promises to protect it, but requires the information. The providers do give confidential information on the assurance from OPDS that it will be kept confidential, on the assurance of the statute and proper interpretation of the statute and the case law, that it will be kept confidential. OPDS must honor that. Commissioner Lazenby commented that there is a balance between the public's need to know and trial strategy for the benefit of the defendant. Commissioner Stevens expressed concern that breaking down the total numbers into smaller categories should still adequately protect clients' interests. Mr. Levy and Ms. Aylward acknowledged that OPDS does provide attorney and non-attorney costs. Commissioner Lazenby supported the notion that a person with public defense representation should not have attorney work product available for public scrutiny when a person who retains counsel does not; that there is something of an equal protection issue in the access to justice.

Chair Ellis asked about using the language that had been proposed to the Commission in 2006, expressing concern regarding the last sentence in the version proposed by Mr. Levy, which tacks on that the whole period that PCR either is possible or pending. Mr. Levy agreed that the language presented in 2006 was quite adequate, then read aloud the language from the 2006 version.

Commission members requested that Mr. Levy provide an updated version, with the language from 2006, for the Commission's consideration at the next meeting.

Agenda Item No. 7

Executive Director Review Process

Ms. Aylward reported to the Commission that, in response to a request from the Chair at the July meeting, she had looked into the process used in prior reviews of the Executive Director. She found that there had been a one-question survey monkey sent by Mr. Levy to OPDS staff. Staff members were also invited to send an email with their comments to Chair Ellis. Commissioner Potter, using OCDLA's mailing list, sent a question to providers asking for input. The Commission had previously considered asking for feedback from legislators, and decided against it.

Commissioner Ozanne suggested that the review process should take place every other year, and Ms. Aylward explained that an annual review is a Commission best practice.

MOTION: Commissioner Potter moved to follow the procedures used in previous reviews. Hon. Elizabeth Welch seconded the motion.

Commission members discussed changing the December meeting date from December 12 to December 14 – all agreed. The meeting will be held in Albany, Oregon.

Agenda Item No. 8

OPDS Monthly Report

Ms. Aylward provided a CBS update, explaining that the office is in the process of upgrading the software for OPDS employees. She noted that it is a huge endeavor due to training issues, and because the Office Suite, Lotus Notes, and Adobe Acrobat all communicate with each other and must be reconfigured to work together.

Mr. Levy provided a summary of upcoming peer review plans in Clatsop County.

Mr. Gartlan provided two updates for the appellate division. First, he met with Chief Judge Hazelton regarding a proposed change in the docketing process effective in January, 2013. Currently there are three Court of Appeals panels. One panel hears 40 of AD's criminal cases each month. The proposal is to have each panel hear 20 of AD's criminal cases each month, so that the Court is addressing 60 AD cases each month. This will ensure that the backlog will not increase for the Court of Appeals. Second, in response to the Chair's and Chief Justice Balmer's comments about some sort of exchange program with trial attorneys, Mr. Gartlan met with Tom Sermak, and they have agreed to an exchange program beginning in October. Commissioner Ozanne asked whether there would be an opportunity for appellate lawyers to edit the work of trial attorneys, as part of the learning process for trial attorneys. Mr. Gartlan indicated that this was not part of the original plan, but that it could be incorporated. Commissioner Potter asked about duration of the exchange. Mr. Gartlan indicated that it would be about 24 to 30 hours over the course of about three months. Assuming all goes well, Mr. Gartlan would want to incorporate it into part of the training for new attorneys, and might want to expand the program to Portland and Eugene. Commissioner Lazenby suggested that it would also be helpful to incorporate a CLE component where trial lawyers explain what they learned, for the benefit of other lawyers in the office.

Ms. Cozine noted that she is still working with Mr. Livingston on preparing materials and information for the delinquency task force. They have been constructing a survey that will give a very broad brush look into what is happening in each county. This effort is still in progress.

Ms. Cozine continued with a request for input from Commission members regarding OPDS's personnel rules regarding reemployment, explaining that the current rule was adopted in 2003. Ms. Cozine summarized the mechanics of reemployment – an individual can work 1,039 hours within a calendar year, so if a person retires in July, they can actually work full-time because they can finish out that year and then they can work for a second six months during the second year. Ms. Cozine explained that there are retirements on the horizon and that it would be helpful to have an understanding of what Commission members think, noting that if OPDS is going to utilize a reemployment provision, there are reasons to do it. OPDS is a lean organization with employees who are performing functions that no one else performs. If OPDS were to engage in reemployment, Ms. Cozine expressed the view that it should be for transition planning and keeping continuity, for example auditing, training, and special projects that ensure consistency and accuracy during a transition. She noted a recent Statesman Journal article about an executive director who had not informed the entire board of her retirement, and requested some direction regarding notice to the Commission regarding these types of decisions.

Chair Ellis asked why a reemployment provision doesn't have the effect of creating an incentive that might be bad for the agency, for employees to retire at the earliest possible date, get reemployed, and draw two incomes. Ms. Cozine explained that it might not be bad for the agency because the agency is no longer responsible for paying the PERS contribution, or for paying the benefits. Ms. Aylward commented that it can benefit the agency because the employer will know exactly when the employee is leaving, which allows time for a transition.

Commissioner Ozanne suggested that the topic is sufficiently sensitive that the Commission might want to consider requiring that they be informed of each decision.

Commissioner Lazenby suggested that when an agency has someone with a very singular role within the organization, it can help provide transition to offer reemployment, something like a sole source contracting analysis.

Chair Ellis expressed concern about the bad feeling among taxpayers and the public, that there is a reaction that it is double-dipping - all those years of PERS, and PERS isn't contributed by the employee, it is contributed to by the agency. Ms. Aylward offered the view that the

employee's needs should be considered, and that last year there were 10,005 retirees who were rehired. She explained that when an employee retires, their PERS payments don't start until three months later; that the first payment does include all three months, but that there is a period of time during which the employee is not paid. Several commission members expressed their concerns about the practice and appearance. Commissioner Ozanne expressed support for the "sole source" analysis, but noted concern about the organizational culture, and a practice that allows people to stay when others are ready to fulfill the responsibilities. Commissioner Lazenby followed up by stating that the framework for making an analysis must be based on what an organization needs.

Commissioner Potter questioned whether it would make a difference to have the decision affirmed by the Commission. Commissioner Stevens suggested that this would be micromanaging, and Commissioner Potter agreed, but noted that it might help for the perception of the public. Chair Ellis noted a concern that if it is allowed for anyone, there becomes an expectation by everyone, and it becomes a very slippery policy. Ms. Aylward advocated for a case-by-case analysis, said that there would be very few requests, and suggested that perhaps the Commission would want to know if it is more than 90 days. Commissioner Lazenby said that he is less concerned about the duration than about the rationale; that if specific criteria were selected and applied, he would take the heat under those circumstances, and also believes it would avoid the Chair's slippery slope concern.

Chair Ellis asked whether there was an age when an employee is required to retire; Ms. Aylward indicated that there is not. Commissioner Welch said that she used to observe terrible abuses within government organizations, and asked about the purpose of an organization keeping a very talented, capable person. Ms. Cozine expressed the view that the value is in preserving the structure - the sole source type of arrangement discussed earlier - noting that it is more expensive to build in a component of training to ensure consistency, because there are two bodies instead of one, but that the expense of having an overlap period is worth it because it creates consistency, without which there could be a loss of money down the line. Ms. Cozine noted that one of the efforts that OPDS is engaging in internally is to start documenting processes, but that it is difficult because staffing is very lean. When an employee is working every single hour just to get the work done, there is no time left for documentation. If someone retires and the agency hires into that position, you then reemploy someone to do the audit and documentation or training, and you create the consistency. Commissioner Stevens noted that under this scenario, the agency is avoiding some costs because if the agency were to hire the replacement before the person retired, then the agency is paying two PERS benefits and two health benefits and two of everything, but if you wait to hire until this person is just working for just a salary than you have saved money, actually. Commissioner Lazenby noted that this happens with people that are not particularly fungible; people who know that if you pull this, something way over there falls down. So keeping that institutional knowledge around is very, very important. It is not just as simple as plugging another body in and everything is going to work the way it has worked.

Chair Ellis asked about moving to a rule that had a little bit of everything - selective reemployment not to exceed the three month period that the cash flow is not there for the employee. Commissioner Stevens suggested that if it is viewed as single source contracting, something should be written in the record that documents the rationale. Commissioner Ozanne expressed support for the sole source analysis in individual cases, and said he is happy to have the decision made by the executive director or by the Commission.

Chair Ellis refocused the conversation on the current policy which has the last sentence, "Reemployment shall be subject to the discretion of the executive director," and asked the Commission if they wanted to change that last sentence. Commissioner Welch said that she would support a change, though felt the time period could be longer than three months, perhaps a six month period, with the executive director being able to come to the Commission to request authorization for an extension. Commissioner Potter supported Commissioner

Lazenby's suggestion for criteria, noting that he would also support formal review by the Commission.

Chair Ellis suggested the following change: "Reemployment shall be at the discretion of the PDSC upon recommendation of the executive director." Commissioner Ozanne supported the proposed language change, noting that it would retain flexibility for key employees or sole source employees. Commissioner Stevens noted that there is not a guarantee for employees who make the request. Commissioner Lazenby asked whether, if the language were adopted, the matter would be addressed in executive session as a personnel matter. Mr. Levy indicated that it would not fall within a category that allowed for executive session.

Chair Ellis requested that the item be placed on the next agenda for further review and discussion.

MOTION: J. Potter moved to adjourn the meeting, Janet Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Meeting adjourned.

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Wednesday, September 12, 2012
10:00 a.m. – 2:00 p.m.
Office of Public Defense Services
1175 Court St. NE
Salem, Oregon 97301

MEMBERS PRESENT: Barnes Ellis
Chip Lazenby
Peter Ozanne
John Potter
Janet Stevens
Hon. Elizabeth Welch

STAFF PRESENT: Nancy Cozine
Kathryn Aylward
Paul Levy
Peter Gartlan
Shawn Wiley
Billy Strehlow

The meeting was called to order at 10:00 a.m.

Agenda Item No. 2 Approval of minutes – PDSC meeting on August 16, 2012

27:51 Chair Ellis The first item is approval of the minutes of August 16, 2012. Are there any additions or corrections? I had one on page 7, it is the passage that says, "...without an agreement on the death sentence is presumptively ineffective lawyering – however, presumptively a rebuttable presumption." I would propose we insert the word "implies" a rebuttable presumption. Is that acceptable?

28:38 J. Stevens It certainly reads better.

28:39 Chair Ellis Any other additions or corrections?

28:44 P. Ozanne Who said that by the way?

28:45 Chair Ellis It was Paul Levy. Is there a motion to approve the minutes as amended?
MOTION: Hon. Elizabeth Welch moved to approve the minutes as amended. **VOTE 6-0.**

Agenda Item No. 3 Emergency Board Request – Update

29:07 Chair Ellis Nancy and Kathryn do you want to talk about the E-Board?

29:17 N. Cozine Chair Ellis and members of the Commission, I sent an email to you all yesterday with LFO's recommendation that the legislature provide \$2 million dollars of our \$3.5 million dollar request. I met with legislative leadership this morning and it sounds as though the LFO recommendation will be adopted by the legislature. We expect to testify today, a little after 2 p.m., and our expectation is that there won't be any dissenting views. We will see if there are, but we will be there and available for questions if there are.

29:54 Chair Ellis I think that is a very positive outcome and I want to congratulate you both for the way you handled that. I think it came out quite well.

30:03 N. Cozine Thank you.

30:03 K. Aylward Could I just make a comment? Together with your handout, I think, came a copy of what was our final letter. After you saw the draft at the last Commission meeting, LFO suggested some changes and I made those. It is principally the first paragraph on the last page of the letter that is different, so it is not the same letter you have seen before.

30:25 Chair Ellis Okay.

30:25 N. Cozine I would also like to acknowledge that we spent a lot of time, Kathryn and I, working with our new LFO analyst and it was very helpful. He was very gracious with his time, and in his willingness to listen to what we had to say and to look at all the documentation that Kathryn does so well.

30:43 Chair Ellis Is the assumption that if we need the remaining 1.5, that will occur sometime after the next session is up and going?

30:53 N. Cozine It will. The expectation is that if we need resources we will have to go once session has started. Part of the reason they wanted to hold off is that they expect we may need more than the 1.5 based on our current projections.

31:09 J. Potter But that 1.5 is not held, earmarked for us anymore?

31:15 N. Cozine Correct. All the conversations that I have had lead me to believe that that should not pose a problem when we return during the session.

31:25 K. Aylward Just so it is clear how the figure of \$2 million was arrived at. The issue was, as I said before, we have what we call the tail, which is using this biennium's money to pay bills that come in afterwards, and the amount of the tail is about \$3 million. So the notion is that if we have \$2 million hopefully we know for sure we can make it to June 30, and yes, we should get the other \$3 million to properly pay those expenses. If we don't, at least there is an option to push them to the next biennium. We kind of hoped that this would be something to give our contractor community a little bit of assurance that we are not going to have to pull the plug on anything. Then it will just be an issue of whether next biennium gets dinged for that missing \$3 million or how it gets recovered. It is good news.

Agenda Item No. 4 Death Penalty Filings & Capital PCR Opinions

32:19 Chair Ellis Okay. Item no. 4 is Death Penalty Filings and Capital PCR Opinions. Billy, Jeff, and Paul are the presenters.

32:32 P. Levy Yes. Thank you, Mr. Chair. I have Jeff Ellis here and Billy Strehlow. I am just going to introduce and set up a short discussion, I think, of two remarkable trends or developments. One Billy will talk about, where the caseload has been with new death penalty cases in the trial court, which as he will tell you has spiked dramatically recently. The other is a trend that has been longer in the development and is really a much more complicated issue. That is over

the last three or four years we have seen in seven capital post conviction cases that have been resolved. In each one of them relief has been granted. The death sentence has been set aside. Jeff will talk about why that has happened and what it means, and just sort of bring you up to date on that development. We will start with Billy.

- 33:44 B. Strehlow Chair Ellis, members of the Commission, there has been a trend of trial level aggravated murder cases with the possibility of death since going back to 97 through about 2010, the average on a fiscal year is about 25 to 30 a year has been filed. Starting in fiscal year 11 and 12, we saw that number drop significantly to 16 and then 14. Fiscal year 2013, which is just July and August, we have nine cases that have been filed. So I am not sure how that is going to trend out, but it certainly is a jump.
- 34:31 J. Potter Are they coming out of any particular county?
- 34:33 B. Strehlow Lane County certainly had a number of those, but not all of them. The caseload is about 41 right now at trial level. That, of course, has risen with these nine. It was usually in the high twenties, low thirties for the last several years.
- 34:57 C. Lazenby Is your sense that it has had something qualitatively to do with the charges, or is it more of a political trend?
- 35:10 B. Strehlow I don't get the sense that it is a political trend. I look at the charges and it seems to me and I am not a lawyer, a reasonable charging of those particular cases. I don't necessarily see – one way or another where I see an agg murder and think that doesn't make sense. Just from what I am reading in the paper.
- 35:32 J. Stevens But the paper is always right.
- 35:35 C. Lazenby I am maybe sort of jumping ahead in the conversation, and maybe I will just shut up after this, but what sort of policy conversations are starting to happen in this town as a result of what is happening with the case of the inmate who just won his motion in state court saying we can ignore the Governor and go ahead with the execution that you want to have. I know that before when we talked about that when the Governor first announced that he was going to grant reprieves in all these matters as long as he was in office that there were some policy conversations going on about possibly changing the death penalty. Is that all sort of just dead now?
- 36:16 P. Levy I think Jeff can speak to this. I think the answer is “no” it is not. It is probably a little early to know how that conversation is going to go. I want to transition to Jeff and not answer your question right now.
- 36:34 C. Lazenby Well it is just another day in politics.
- 36:40 P. Levy This caseload spike that Billy has described is certainly taxing on our contractors. All of those cases potentially are Jeff's because we ask those lawyers to come to him, or him to go to them, to help with those cases. He might talk about that but we will ask him to talk about what has been going on in the post conviction world.
- 37:04 J. Ellis Thanks. Chairman Ellis and members of Commission let me focus on the post conviction world and I will try to get back to your question and other questions that you all may have about the death penalty experience in Oregon. First of all it is always difficult to talk about a trend in terms of how cases are being decided because each case is unique and rises or falls based on the particular facts of that case. But to the extent that talking about trends is valuable, we certainly have seen a change because before these seven cases, we saw nearly a decade of no reversals at the post conviction level. I think it is appropriate to ask what is happening that demonstrates this change. First of all when I came to this position one of the

things that I looked at was, “where are the Oregon death penalty cases?” Many of them, as Billy just pointed out, are at the front end pending trial. We now have over 40 cases at that level, but we seem to have a disproportionate number of cases that were at the post conviction trial level. Some of that was because that system was moving very slowly and Chief Justice De Muniz, now about a year ago, urged that that system speed up. One of the things that I wanted to do coming into this job two and a half years ago was really focus some attention at that level. I felt we could win cases and because the system had moved so slowly, and because there was a push to move it more quickly, those lawyers needed help. I think the biggest reason for this switch, if you will, for these seven victories goes to the attorneys who represented those defendants in post conviction. They simply did a stellar job. They reinvestigated the case as post conviction work needs to do. It really is about starting from the beginning and reinvestigating both the facts of the case and the trial team’s approach, and they came up with very significant information that had not been presented at the time of trial. I think what we are seeing is not so much a criticism of the state of the trial defense at the time those cases were tried, but much more attributable to the quality of the post conviction work that was done by these teams. It is important to keep in mind when we talk about the standards of practice for the death penalty that the investigation that needs to be done first at the trial level and then at the post conviction is unprecedented in terms of its scope and depth. I often say that when somebody wins on post conviction it is not a matter of the trial lawyer being a bad lawyer; it is a matter of their investigation stopping too short. Either it stopped too short because they simply didn’t work the case appropriately, or because they had a blind spot. There was simply something about that individual’s background that didn’t occur to them to investigate. That burden then falls on the post conviction team to identify what wasn’t done, to do it and to present it in a way that is compelling. That’s really what I think these post conviction attorneys have started doing. For instance we just look at the presentation to the post convictions courts. There was an approach which made some sense before habeas corpus law changed dramatically. There was an approach that said, “Let’s just present these cases on paper. Let’s do affidavits. Give those affidavits to the judge and let the judge decide based on affidavits. Then if we need an evidentiary hearing we will get one when we get to federal court.” Well you don’t get evidentiary hearings in federal court anymore, anytime almost, and frankly you need to present live witnesses to a judge to persuade that judge that your case is worth granting relief. That to me is the other salient change is that we have moved from a system of trial by affidavit to trial by live witnesses. I hope that continues. I think that is one of a variety of very complicated reasons that we have seen these changes, but ultimately I think it really is due to the very good work of these post conviction teams.

- 41:40 Chair Ellis Who were the lawyers doing them?
- 41:46 J. Ellis There is a variety of people that have done it.
- 41:51 Chair Ellis I thought we had a PCR contract team.
- 41:56 P. Levy We do for non-capital cases. There are many lawyers and there are always at least two lawyers on these cases, but Kathleen Correll, Noel Grefenson, Andy Simrin and Keith Goody. Mike Curtis, Marc Sussman....
- 42:15 J. Ellis Peter Fahey and Mark Barker.
- 42:22 P. Levy And most recently seven lawyers, too many for me to remember and name, from Stoel Rives.
- 42:31 Chair Ellis I know about that one.
- 42:37 P. Levy On these cases where there have been resolutions three of them were settled. This was while Hardy Meyers was AG. They were settled. The others have been litigated and contested.

- 42:59 C. Lazenby My concern though is sitting on this side of the table is that we sort of pay for both ends of these. So when you say Jeff that the success on post conviction relief and producing witnesses and additional evidence that wasn't produced at trial is why people are having success on PCR, I am kind of, well, we are paying for both ends of this. We are paying for the front end of this that didn't produce the adequate evidence. That didn't get "the right result at trial." Now we are paying for it again in terms of PCR by basically trying the case more thoroughly the second time in a PCR context.
- 43:36 P. Levy I would like to speak to that and then Jeff can give a better answer. He has been a little too kind. The representation in most of these cases in the first go round was not very good. In fact we didn't pay much for it and we got what we paid for. We don't contract with those lawyers any longer, that handled those cases. Part of the problem is that we did not pay enough the first time around and we are paying for it now.
- 44:14 C. Lazenby So part of what I am missing here is that there is a long lapse of time between the trials. You are talking about the iterations of the Commission some time ago and finally catching up with PCR now?
- 44:28 P. Levy Yes.
- 44:28 Chair Ellis In what years are we talking about that these trials took place?
- 44:33 J. Ellis All of them at least 10 years ago.
- 44:38 Chair Ellis This is not directly on point but Janet and I were talking before, and you might be able to help us, we don't quite understand why the state can be ordered by a court to proceed with an execution that a governor doesn't want to do.
- 45:04 J. Ellis The ruling by the now late Judge Alexander was that the Oregon Constitution's clemency power was such that the Governor could extend the offer of clemency, in this particular case a reprieve, but that the inmate needed to accept. That idea came out of conditional commutations. In other words where a Governor would say, "I am going to let you out of prison early, but I want you to do these five things," and a doctrine developed that said where a prisoner is required to do affirmative things in response to an offer of commutation, that the prisoner has a right to refuse. In my opinion Judge Alexander's opinion, decision in the case, extended the ruling to a situation that didn't involve any conditions on the reprieve. Judge Alexander also viewed that the interpretation of the Oregon Constitution from the late 1800s was somehow static, that it didn't change. We had locked into a certain approach and that we were stuck with that approach. I will say that he personally emailed me and invited amicus briefs contesting his position, which I thought was rather magnanimous of him, to say I want a full discussion of this. I don't see the logic behind the position, whether or not that is the law. I think it is a dangerous position to say that the Governor's clemency power is equally shared with each inmate. I have always viewed the Governor's clemency power, and I think the framers of the Oregon Constitution viewed it this way, as being something that is done for the good of the people. My hope is that when this gets decided by, I think, the Oregon Supreme Court, that they will view the Constitution in that same way.
- 47:27 Chair Ellis Help me understand who is representing who?
- 47:32 J. Ellis This is the strange bedfellows. At this point the Attorney General's office, who previously sought Mr. Haugen's execution, are now seeking to uphold the power of the Governor to grant the reprieve.
- 47:47 Chair Ellis And who is representing the other side of it?
- 47:50 J. Ellis Mr. Haugen is being represented by a lawyer, I believe on a *pro bono* basis at this point.

47:55 C. Lazenby Harry Latto.

47:59 P. Levy And we are not paying for any of this representation. Mr. Latto had asked the trial court to order us to pay. We declined. He filed a mandamus asking the trial court be ordered to appoint him and for us to pay. That was denied. Jeff's advocacy work in this area has been his and not part of his contract work and not work we are funding.

48:32 Chair Ellis While we have got you, is the disparity between capital cases in Oregon versus Washington continuing? Billy described the surge that we are getting in new capital filings. I remember data that we have seen in the past and it was just remarkable how disparate Oregon versus Washington was. Is that still true?

49:01 J. Ellis It is still true. If we just talk about cases pretrial where the death penalty is in play, Washington State actually is at a sort of recent high water mark because they have five cases pending. We have 41. By the way, Washington has about double the number of murders that Oregon has.

49:23 Chair Ellis Because it has almost that population differential.

49:26 J. Ellis Right. Exactly.

49:27 Chair Ellis So that four or five to one disparity is really an eight or nine to one.

49:35 J. Ellis It really is. Some of that disparity comes about because, as many of you may know, in Washington State prosecutors are obliged early in the case after aggravated murder is filed, to declare whether it is a death penalty case or not. Something that we have urged prosecutors to do in this particular state is investing the prosecutors with discretion at the early stage of the case. Some of whom recognize that discretion. Some of whom believe they have it and some of whom believe that they don't. I think what happens in Washington State is, although there are fewer aggravated murders, those aggravated murders that are filed turn into non-death penalty cases at a much earlier stage and therefore the death penalty costs fall away very early on. Our cases don't turn into non-death penalty cases nearly so quickly. In fact, one of the things that we looked at, now a little over a year ago, was how long it takes to resolution of these cases, either a guilty plea or a trial. It turns out the timelines are virtually the same. Cases are resolved on the eve of trial in many cases. So you are paying death penalty costs for these cases that the vast majority turns into non-death penalty cases. One of the reasons for that is because we don't have this formalized mechanism.

50:55 C. Lazenby Jeff, don't you also agree that another difference between Oregon and Washington is that the individual counties have to share the cost responsibilities for the prosecution of death penalty cases. That is a piece of the decision that the prosecutor has to make too in looking at her budget in terms of deciding whether to proceed. Isn't that a critical factor too?

51:15 J. Ellis That is absolutely true. Here in Oregon a county prosecutor is using state monies, at least on the defense side.

51:19 C. Lazenby No fiscal downside for pursuing a death penalty case, and all political upside for doing so.

51:28 Chair Ellis Okay. Interesting. Any other questions for our three?

51:34 J. Ellis If I could just address the sort of state of the abolition. There are still talks going on about abolishing the death penalty in Oregon. There are still a number of groups and people working very hard on that issue. Because it is in our Constitution it would take a vote of the people. That is something that happened seven times last century in Oregon. We are far and away the leader in terms of popular votes on the death penalty. We are about to see an

election in our neighbor to the south. California has abolition of the death penalty on their ballot. They are, of course, a much different state in many ways. They have more than 700 people on their death row. By far the largest in the United States right now. It is a complicated issue. I think there are also issues about whether reforms could take place to the death penalty. I think that is complicated in terms of, are we trying to reform the death penalty in Oregon, or are we trying to replace the death penalty in Oregon. It is a complicated time. There are many groups talking about it. We will see what happens.

52:47 Chair Ellis

Okay.

Agenda Item No. 5

PDSC delegation of authority to OPDS

52:52 Chair Ellis

Item no. 5. PDSC delegation of authority to OPDS, attachment 3.

53:01 N. Cozine

Chair Ellis, members of the Commission, this is a continued conversation from December 8, 2011, when you met and we discussed whether or not it would make some sense for the Commission to provide a delegation of authority to the executive director to make small changes within OPDS. When we had that conversation in December, we talked about making that something where there would be a delegation, it would be in writing, so that there was something very clear about what the delegation was, and that we would come back to you on an annual basis with changes that had been made. When the management team sat down and really started puzzling through what the language would look like, and what the process would be, we had some concerns about our internal ability to track throughout the year. We haven't done it before and to the extent that there is a risk that changes would be made and that those changes would not be brought to the Commission's attention, we thought it better to start small and work our way up. So this delegation of authority actually requires us to present to the Commission any changes that are made at the upcoming Commission meeting, so it is not an extensive period of time. It really doesn't create much cushion there. It does give enough time that if something arises and we need to implement, we can do that. I am interested to hear what all of you think about this proposal. My thought is if we start with this language and we find it too burdensome, we could come back for a request of an additional change, but that this might be the appropriate starting point so we at least have something in writing.

54:49 J. Potter

Could you give me an example of what that might be? What this interim change might be in a personnel rule or payment policy?

54:58 N. Cozine

Yes. When we met in December we had two examples for you. One of them was mileage. The federal system changed the mileage rate and we didn't have the mechanism in place to go ahead and change it on our own without Commission approval. That was one example. The second example - I am going to ask Kathryn.

55:14 K. Aylward

It was our personnel policies that said that if an employee has jury duty they get the \$5 from jury duty, bring it back, pay it in, and we just said let's make it so that our employees waive the jury fee and nobody wastes money trading \$5 between Judicial and us.

55:35 N. Cozine

The delegation is also limited, of course, by making it only things that are required by state or federal law, or that include the cost efficient operation of OPDS. That may still be too broad for your comfort and I am willing to listen to your thoughts and we can make changes. This has been a recurring discussion at Commission meetings for many years. We thought it would nice to actually have something in writing and know where we stand.

56:08 J. Potter

Is it safe to say that, should this go into effect, the most amount of time would be maybe eight weeks, six weeks, we are meeting every month and half or so, so we probably wouldn't have a policy in interim effect for more than six weeks before the Commission had a chance to look at it.

56:32 N. Cozine That is correct.

56:32 Chair Ellis Which could argue either way.

56:35 J. Potter Sure.

56:35 Chair Ellis On one end why do we bother, and on the other hand not much harm could happen. I guess my reaction is you wouldn't be asking us for this if you didn't, from a management point of view, think you would really like to have it. Am I right?

56:56 N. Cozine I think it is a helpful tool. I think that because it has been brought up so many times throughout the history of the Commission, when we went back and looked at previous meetings, we really have had this discussion several times. I think it is helpful because we have something documented. It helps to not have the conversation again and again, then try and go back and piece through what the different thoughts were at the time. This creates something that is very concrete.

57:24 J. Potter This strikes me that this allows management to be a little more nimble. It better serves either their staff or indirectly maybe contractors, without having to necessarily wait for the Commission to respond.

57:45 Hon. Elizabeth Welch I have a thought. I think this is fine. But if, to the extent that the change is a result of the change in federal or state law, what is it that the Commission is going to do? In other words it seems to me that the Commission doesn't need to have oversight on things that are required by law. But maybe do need to have oversight on the mushier category of this. I was thinking maybe, make that distinction, and it might cut the traffic down a little bit. I don't know. I don't know how often these kinds of things come up. For whatever it is worth.

58:24 J. Potter The example that is used with the 55 cents – federal – it went from whatever it was, 50 or 55, or whatever the numbers may have been. The feds decided to do that but we didn't have to follow that and it wasn't incumbent upon us. It wasn't a law. It wasn't even arguably cost efficient. It was more efficient to pay less. It was right to pay what the going rate was.

59:03 N. Cozine Now you can see why it has taken us nine months to provide something in writing.

59:03 P. Ozanne Nancy, just knowing how you operate and have, I would assume you would send an email out to Commission members when you made a change of any significance just as a heads up, right, would you do that?

59:20 N. Cozine I would think so. On something like the mileage, to me, I would somewhat worry - all of you are volunteer Commission members, and I don't want to send emails unnecessarily. When there is something that I think has a broader policy implication, or something that I think that you want to know about, I absolutely want to email you. If the Commission would wish to have an email on something like a mileage rate reimbursement, that is something that I would be very happy to do.

59:52 P. Ozanne Since we get it too.

59:58 N. Cozine That is certainly something that I could build into the process.

1:00:05 J. Potter I think you cover yourself by sending an email and the fact that we are volunteers and getting another email from us shouldn't be of concern to you.

1:00:09 Chair Ellis Is there a motion?

MOTION: John Potter moved to adopt this proposed delegation of authority.

1:00:13 J. Stevens Could I ask one more question before we get into the motions? I am kind of curious about what sort of cost efficient operation things might come up? I am just curious.

1:00:27 K. Aylward I think the jury fees. That was costing us money.

1:00:34 C. Lazenby You know and I think the personnel rules are actually sort of more of the practical aspect of this too. Everything you do, you do through an expressed or implied delegation from us. So the more expressed the delegation is, the more it protects us in employee actions against the organization and the validity of a rule that you are applying to an employee who has now been discharged and is suing the organization for that. I could see myself looking and saying, "Well, you didn't have a proper delegation to do that. Did you?" I think it clarifies that. It gives us the process for making those changes.

1:01:15 Chair Ellis There is a motion. I don't think I heard a second.

Chip Lazenby seconded the motion, hearing no objection, the motion carried: **VOTE 6-0.**

Agenda Item No. 6 PDSC policy regarding disclosure of billing records; ORS 135.055(9)

1:01:31 Chair Ellis Item no. 6. PDSC policy regarding disclosure of billing records. Our general counsel.

1:01:38 P. Levy Yeah. This is, I think, a fascinating subject. It is a follow up to our last meeting where, I think, I did myself a disservice on two counts here by saying that I had taken a position in recent litigation that was contrary to Commission policy. At your request I have provided you with the motion, memoranda, that I filed. What I was trying to do was make sure that our agency and the Commission adhered to and followed the law. As you will see if you have read it, I was seeking the protection of the court. I was not seeking to quash a subpoena. I was asking through this mechanism, through the Rules of Civil Procedure, that the court had an opportunity to weigh in on whether we should comply with the subpoena and whether the statute protected those records or not. What that effort made clear to me, though, is that our policy, the Commission's policy, needs to be looked at again. What I said at the last meeting was that our policy has a definition of when the case concludes that is not necessarily helpful. It is not necessarily what the law is. What I found out now is it is not necessarily really the considered judgment of the Commission, either. For instance, whatever position you wanted to take on when a case concludes, and I can get more context here in a moment, our current policy says that statutes effectively prohibit us from disclosing records until the conclusion of the case. That is not true, but the reason it says that is this policy is almost verbatim what we inherited from the Judicial Department. It reads nearly word for word as a 1992 policy of the Indigent Defense Services Division, 1992, and that the Commission then incorporated into its policies and procedures in 2003. It does not reflect later legislation that was enacted in 2003 that said before the case concludes you shall disclose records to the gross numbers on case costs when a trial is over. So what I found out was that in 2006, this Commission was presented with a draft revision of the confidentiality policy. I read the minutes and the transcript and Ingrid presented that to the Commission and said, "This will be a brief matter because we are not asking you to take any action today."

1:05:15 Chair Ellis And here you are six years later.

1:05:21 P. Levy So I am finally coming back. What I found was that the draft that Ingrid proposed, although worded and presented differently than what I have proposed here, contains the very same ideas. It did away with the definition of when the case concludes. It simply said, "OPDS shall disclose information regarding the cost of representation as required by law." It didn't attempt a definition of when a case concludes. Just to back up, in this recent litigation, I had run head into the issue of when does a case conclude and it is not defined by statute. The case

law leaves the question unanswered and the real question is, in PCR litigation, has a case concluded? I set out in my memo, and you ask for me to give you some policy considerations here, and they are in the memo. There is good reason to think that a case should not be considered as having concluded while there is still litigation pending or possibly that would result in a retrial, and thus we would not want the prosecutor, the state, to have access to the detailed requests that were made in support of funds on a case.

- 1:06:56 Chair Ellis Let me ask you. I saw that in your brief and I am balancing in my mind what, I think, are the competing policy concerns. That position in the death penalty area means we would never disclose costs and why there isn't a public interest in what those cases do cost and what the costs are for, and where the money is going. I was troubled by that.
- 1:07:29 P. Levy The answer is in part reflected by the 2003 legislation that said, "At the conclusion of a trial, we shall disclose to the prosecutor the costs of the defense in a case." But what we are clearly not authorized to disclose are the requests for the costs and the individual breakdown of those costs. We have obligated ourselves, and the legislature has obligated us in death penalty and any other case, to give information about the cost of the trial in a case. We do that in death penalty cases.
- 1:08:09 Chair Ellis How does it come? How does a prosecutor after a trial
- 1:08:12 P. Levy Well typically....
- 1:08:14 Chair Ellis Have some kind of interest in what the costs are.
- 1:08:17 P. Levy Typically it comes from the court. Believe it or not they are interested in ordering restitution.
- 1:08:30 Chair Ellis This is imposed on the convicted defendant? You have to repay all the costs.
- 1:08:36 P. Levy Yes. Sometimes it comes from the district attorney typically in a non-capital case, because they want to know for restitution purposes how much was spent.
- 1:08:49 Chair Ellis That would be an aggregate number?
- 1:08:51 P. Levy Yes. It would be an aggregate number. Occasionally it will come from a journalist or another interested party. Your current policy is wrong in saying that we couldn't provide that information. The statute overrides that. Ingrid's proposal recognized that and included that update. It took out this definition, that sort of set in concrete something that is much more in play and unknown, about when a case concludes. That is what we are proposing to do here. In a death penalty case, as in any case, there is a point where the case has concluded. It is reflected in my proposal to you, that is when you no longer have a right to litigate whether your conviction or sentence is valid. There are statutes of limitations both for state post conviction and for federal post conviction that make that very clear. By the way this discussion that you and I just had, Mr. Chair, is pretty much the sum and substance of the conversation in 2006 as well. We then said we will get back to you. I really don't want another six years to go by here. We are proposing, really, to align the policy with both the law and the practice.
- 1:10:50 Chair Ellis I want to just make sure I translate what you have got here. Your proposal is, staff is authorized to disclose aggregate costs at the conclusion of a trial, and you are saying that because apparently the legislature has already said that, but you are also saying that any disclosure of disaggregated amount where there is PCR pending or potential, we would not disclose.
- 1:11:26 P. Levy Unless we are ordered to by a court. That is important because, for instance, in this recent matter we were ordered to, by the court, and we were prepared to follow that court order until,

interestingly, the Department of Justice said when they were told that the matter was going to be reviewed, sought through mandamus, they said, “Never mind. We withdraw the subpoena.” They realized they were on shaky legal ground. The court order is important because, for instance, in this recent case that you have where I filed this memorandum, I argued, and this is also important, that the legislative history around this other legislation having to do with amendments to the evidence code, makes very clear that the attorney/client privilege applies to communications to our office in connection with expense requests. So it would be not just presumptuous, but wrong for us to say, “Well, you have waived that by filing a post conviction relief petition.” We want a court or the lawyers or the petitioner’s lawyer to say we have waived that. In fact the state withdrew their subpoena in the Brumwell case because they realized that the petitioner had not yet waived the attorney/client privilege. I am not saying that we would seek to challenge every subpoena that is filed, but if we do and the court says, “No, we find that as happens, when you file a petition for post conviction relief, if you are alleging incompetent lawyering the case then comes within an exception to the attorney/client privilege” - the court could say that that privilege doesn’t apply any longer - those records should be provided. Or the case is concluded in the court’s judgment. The record should be provided.

- 1:13:50 Chair Ellis But you don’t need something from us on the privileges?
- 1:13:52 P. Levy No. No, because we have written it in here. Your policy is saying, “Staff, if a court tells you to turn over those records, do it.” And we will do it. That is how that will come.
- 1:14:09 Chair Ellis Here is what is troubling me and Janet will probably weigh in. I am putting my journalist hat on. Take the *Guzek* case, which everybody is familiar with, but assume some enterprising reporter wants to write about that and wants to talk about how much it has cost for X, Y, and Z part of that defense. To me that is a legitimate subject for a journalist to want to write about, but theoretically that could never happen because it is always going to be in a PCR or federal.
- 1:15:03 P. Levy Mr. Chair, you have picked a bad example because that case – or good, because that case is pending on direct review of his death sentence, so very clearly under the *Cunningham* case that is in the materials that I cite, very clearly we cannot release that information. We did have a request for aggregate information from somebody.
- 1:15:36 C. Lazenby Steve Duin, probably.
- 1:15:40 P. Levy Somebody more interesting than that, a professor or a retired judge, it was a senior judge. We provided the information on aggregate costs on the *Guzek* case. We may have even broken it down a little bit from attorney’s costs and non-attorney provider costs in the case. But Mr. Guzek is a difficult example only because that was his fourth retrial. We can talk a lot about why there had to be so many retrials. It wasn’t our fault or the defense fault. These are convictions that were reversed or sentences that were reversed. But in every case there will come a time, and his too, when his sentence or conviction – well his conviction is final but his sentence is not.
- 1:16:52 Chair Ellis I probably made a mistake
- 1:16:55 P. Levy Try another one.
- 1:16:56 Chair Ellis I am just concerned that the last sentence of your proposal, may have the unintended consequence that particularly in death penalty cases, no one ever gets to see the work of OPDS on non-routine expenses. I feel like that is not very transparent. I am trying to understand why we should agree to that last sentence.
- 1:17:31 J. Stevens Or if they do get to see it they get to see it so far after the fact that it is meaningless.

1:17:39 P. Levy I would like to respond in two ways. One is practical but it is an important practical consideration. We will not approve expenses unless they are well justified. We tell the provider community that we will not approve your expenses unless you convince us that it is necessary, which is what the statute requires and we cite case law for what necessary means. What that means to you as a trial lawyer is you have to provide us confidential information.

1:18:19 Chair Ellis But the words “well justified” lie in the eyes of the beholder. Somebody might think you guys are being too liberal.

1:18:30 P. Levy At times they certainly do think that. But what we tell the provider community is you need to tell us secrets. You need to tell us confidential, protected information about your case and your client. We will protect that, but that is what you must give us in order for us to be able to review your request properly. They give it to us on the assurance from us that it will be kept confidential, on the assurance of the statute and proper interpretation of the statute and the case law, that it will be kept confidential. We need to honor that.

1:19:09 Chair Ellis But your proposal isn’t limited to confidence of communication that relate to the processing. Yours is focused on the amount and why isn’t that a legitimate public need to know?

1:19:30 P. Levy It might not be clarified here, though. What we are focusing on is not the amount, the gross numbers that the cost

1:19:38 Chair Ellis Hang on. I am not limiting my concern to gross numbers, but some psychiatrist got called and he got paid \$100,000, but it is in the gross numbers – the total defense cost for \$200,000, so the public never knows that this individual that testified got this huge fee.

1:20:09 P. Levy We don’t think the public should know until a case is over that the defense asked for, and that we approved and they used, psychologist X, and we don’t want to give them all of the reasons that were laid out for why they needed psychologist X, and it turns out they didn’t use psychologist X because he had something not very good to say about the case. We don’t want the prosecutor, if there is going to be a retrial, to know about that.

1:20:42 C. Lazenby And that fact can be inferred from the disclosure that psychiatrist X was retained, examined the defendant, and the defense made strategic decision not to call them. To that extent there is a balance between the public’s need to know and trial strategy for the benefit of the defendant. I don’t have a problem with the release of the aggregate numbers of monies that we spend in defense of defendant X. But to the extent that there are still active things going on, I don’t think it is appropriate to put the media in a position where they then have to write about it and inquire about the strategic decisions that counsel makes, which is what would happen when you start getting to these detailed release of why they were asking for money and the explanations that they give to our staff of why they need the money. It reveals trial strategies. It reveals weaknesses in the case both for the state and for the defense side, and really could result in sort of an improperly detailed public debate about the internal strategies of a particular case.

1:21:48 J. Stevens I would argue that you could release, though, something that said we paid \$100,000 for experts without saying who or what they were, and \$100,000 for investigators without saying who or what they were looking at. Seems to me you would satisfy both sides of that.

1:22:06 P. Levy And we essentially do that.

1:22:08 J. Stevens But that is not what this says.

1:22:12 P. Levy I am telling you we do this even though it isn't what this says and it is not exactly what the statute says either. We will, as the statute says, provide gross numbers for the cost of the defense. We have broken it down into large categories of expenses.

1:22:43 K. Aylward That would surprise me.

1:22:45 P. Levy No. We have. For instance in the *Fanus* case recently the court wanted to know expenses and wanted to know attorney, non-attorney, and we provided that information.

1:23:02 K. Aylward Yes.

1:23:03 B. Strehlow As ordered by the court.

1:23:05 K. Aylward That is what we have always done and what we think our policy needs. I thought you were talking about a breakdown of investigators, psychiatrists, and ...

1:23:14 P. Levy Not that itemized, in that sense. I haven't looked at the legislative history behind the 2003 amendment where we have this section 10 of 135.055 that says that at the conclusion of the trial we shall disclose the costs of the defense. But they certainly could have said, and they could have corrected, if they wished in the *Cunningham* case, and say, "No, provide more at that time," and they didn't. I don't think – well, interestingly, this comes up rarely, very rarely.

1:24:02 Chair Ellis Every six years.

1:24:04 P. Levy Yes. And it ...

1:24:07 J. Stevens Every time Guzek goes back to court.

1:24:13 P. Levy It will come up but it doesn't come often where we are asked for cost information. It is sort of interesting that it doesn't come up more often.

1:24:22 N. Cozine Chair, may I have one comment?

1:24:26 Chair Ellis Sure.

1:24:26 N. Cozine I think there is another interesting public policy perspective that is at least worth noting, and that is the argument that Mr. Curtis made in his motion to quash the state's subpoena, which was something of an equal protection argument. The argument didn't win the day, the court still ordered disclosure, but I think it is something that the Commission ought to think about. That is, if you have a defendant who retains a lawyer and that lawyer contacts experts and has experts work on the case, work with the client, there is a significant limitation on what will ever be public. I understand that these are public dollars and there is an interest in ensuring that there is transparency. We also want to be careful not to create a system where, if you get a public lawyer, aspects of your personal life that would be very, very personal and embarrassing become publicly available simply because you had public defense representation instead of private representation. I think we have to keep in mind our interest in transparency and also the important public policy of making sure there isn't a significant disparity in the type of privacy that someone who has a public lawyer has versus a private lawyer.

1:25:59 C. Lazenby It is really a work product question at the end of the day isn't it?

1:26:00 N. Cozine I think you articulated that very well. It is a work product question and what work product becomes available. It is the lens.

1:26:13 C. Lazenby I have never believed that the work product principles that exist in this attorney-client relationship should vary because you have public representation for the legal services. You should have that kind of equal protection in the access to justice.

1:26:32 N. Cozine Right. A private lawyer never has to write an extensive memo to a state agency, in order to retain funds, that displays not only their own strategic thinking, but also personal information about their client.

1:26:49 Chair Ellis What is your argument, why your language, that causes us to buy into this what may be a forever non-disclosure, where PCR is pending or permitted. Why do you like that better than Ingrid's as required by law language, which punts on that but leaves it for a court to decide?

1:27:15 P. Levy I don't like it better. I found Ingrid's language after putting this to you. I jump to that point right there. But I cannot, I am afraid, agree with you, with this characterization, that this policy would be properly read as saying, "Never." It does not say it by its words and it is not going to say it by its practice. In fact there comes a time in post conviction litigation, all too soon for some, where you are out of luck and will no longer be able to challenge your conviction or sentence.

1:28:03 Chair Ellis If I am not mistaken in the death penalty area we have cases that are 20 years in the system.

1:28:11 P. Levy You have been reading the newspaper. The newspaper editorials I should say.

1:28:22 J. Stevens That is what I do for a living.

1:28:23 P. Levy In The Oregonian....yes, as I was saying, an excellent point, Chair. Cases will – the litigation will go on but if – if you don't initiate that litigation within one year of the finality of your conviction and sentence in Oregon, you are never going to get into federal habeas corpus.

1:29:04 Chair Ellis I understand that but I am right, am I not, that there are a whole bunch of these DP cases that go a long, long time.

1:29:14 P. Levy Yes. That is to pick up what Jeff Ellis was talking about. There have been, pending in Marion County, quite a few death penalty PCR cases for years. Part of it was the lawyers on those cases were not especially anxious to get it in gear.

1:29:40 Chair Ellis Tim Sylwester told us, about four years ago, there is sort of an implied notion that if they go on forever maybe everybody is happy with that.

1:29:49 P. Levy The state wasn't trying to push them. Our lawyers were trying to push them. The judges weren't pushing them. What then Chief Justice De Muniz did was said that, not that the lawyers were dragging their feet, but he kicked the dust and he got the judges to get on it. Now Marion County has a judge in charge of the capital PCR caseload, who is intent on moving the cases along and they are moving along. Historically you are right. The modern era now is that these cases are moving fast.

1:30:33 Chair Ellis This statute that came in uses this language about conclusion of proceedings in the circuit court.

1:30:45 P. Levy That is the policy and it is a slight rewording of the statute which says at the conclusion of the trial in the circuit court.

1:31:04 Chair Ellis I will accept the word "proceeding" could be a little longer than a trial. The real hang up I am having is your last sentence, which tacks on that the whole period that PCR either is possible or pending.

1:31:20 P. Levy Right because the statute says, in section 9, you are not to disclose anything until the conclusion of the case. Ten says notwithstanding that you can disclose information about total numbers at the conclusion of trial in the circuit court. This is what is meant to capture the notion of – it was easier to say when the case had not concluded than when it had concluded, but frankly I agree with you. I like Ingrid’s formulation. I like what you were presented with in 2006, better than what I have presented you here.

1:32:13 Chair Ellis Read that to us again.

1:32:17 P. Levy It includes some precatory language that cites to the various statutes. The important language here, it says, “In light of the foregoing all the statutes, it is the policy of OPDS,” but it really should be PDSC,” that its staff, OPDS, will keep confidential all information regarding the cost of representation of a client in non-routine expense requests for a particular case except as follows: 1) May release, upon request at the conclusion of the trial, the total amount of money paid for representation of the case; 2) It shall disclose information regarding non-routine expense requests in a particular case and the cost of representation of the client to the attorney who represents or represented the client, the attorney who represents the client in a matter arising out of a particular case, or upon written request of the client, except when we are prohibited from doing so.” Then it says, “This policy does not prohibit OPDS from disclosing statistical information that cannot be identified to a particular case. OPDS may disclose to appropriate authorities information regarding fraud.” 5) OPDS shall disclose information regarding the cost of representation as required by law.

1:33:56 Chair Ellis Which, practically, means that there will be somebody trying to get the information. We may be resisting that, and some court will decide it. I am frankly more comfortable with that than with what is here.

1:34:15 P. Levy I am too. I kind of like what I put together here and it makes sense to me and reads well, but having found this after this went out – and at our last meeting wasn’t all of this the subject of a great deal of discussion and compromise. Well, no, it wasn’t. I was amazed to find only one agenda item for the entire Commission history other than recently. When this was presented to you and we said we will come back to that. I would be happy to come back to this one. I would fix it a little bit.

1:34:55 Chair Ellis Are we at a point we can just ...

1:34:56 J. Stevens Do we have copies of Ingrid’s?

1:34:59 P. Levy You do.

1:35:03 J. Stevens Do we have recent copies?

1:35:03 P. Levy No. I would recommend that we come back to this, but at the next meeting.

1:35:15 J. Stevens I was going to suggest that you just copy it and then come with it after lunch.

1:35:19 Chair Ellis We can either do it that rapidly, or we can wait until the next meeting. I think I hear consensus emerging.

1:35:28 P. Levy What is your pleasure? I have forgotten how to operate the copy machine since we are not allowed to use it.

1:35:35 J. Stevens Someone else could do it for you.

1:35:39 K. Aylward But you want to change it because there is like bad grammar.

1:35:42 Chair Ellis If it has taken us six years to get to the point we can go six more weeks. Clean it up and put it on the agenda for next time. It will be a much shorter discussion.

1:35:58 P. Levy Thank you.

1:35:58 Chair Ellis Thank you. All right.

Agenda Item No. 7 Executive Director Review Process

1:36:08 Chair Ellis Now. The ED review process. There is a request for a break. We will do that. We can be eating while Kathryn tells us about the next subject.

(Break)

1:36:34 K. Aylward September 9th – September 7th or 9th was her one year anniversary. A couple of meetings ago the Chair asked me to recall or reconstruct what we had done for prior reviews. I couldn't find anything until I finally figured out that we had Commissioner Potter deal with it for us. That is why I couldn't find any record of anything we had sent out. What we did do, this survey that I have provided in your materials....

1:37:05 J. Potter You should have ask me. I have an electronic file on it.

1:37:09 K. Aylward I eventually found the answer. This one-question survey monkey survey went out to OPDS staff. I think we got three or four responses out of the 70-some people. Then we asked Commissioner Potter if he would use basically – the question was is he wearing the executive director OCDLA hat, or is it Commissioner Potter hat? There was an executive session discussion which I haven't provided because I think it is a secret. Anyway, the Commission decided that Commissioner Potter using OCDLA's sort of conduit and mailing list, whatever mechanism you prefer to use or a survey monkey, whatever, would do something similar and there was a lot of discussion about should there be lots of questions about different categories of evaluation and the conclusion at that time was, no just your basic how is she doing when it was Ingrid a year and a half ago. The other thing that came up was whether or not legislators should be canvassed. I spoke to our LFO analyst at the time and his advice was that it was really not appropriate for legislators to be commenting on the performance of a state agency executive director. So we didn't do anything in that regard. So that is what we did last time and I am happy to facilitate my tiny part. Actually Paul sent the email out. I had a really tiny part.

1:38:50 P. Ozanne This is just sort of a fundamental question. Is our policy to review the executive director every year?

1:38:58 K. Aylward It is.

1:38:59 Chair Ellis We have tried to. I think there were some years we were more on top of it.

1:39:04 K. Aylward You were pretty good. It is a Commission best practice. An annual review of executive director performance.

1:39:10 P. Ozanne Okay. That is water over the dam. My fear is that every year we are going to put all these people through this. I am not sure once a year – I would vote for every two years for this but that's, as I say, water over the dam. Nancy just got here. As I get older the years go by faster. You know how that goes.

1:39:34 Chair Ellis I think it is particularly important early in her service to get this.

1:39:43 K. Aylward The other thing that was discussed was there was sort of this sense that the Commission wanted the information but they didn't necessarily want it to have to be filtered through staff. So I think, Barnes, you provided your email address in this and said, "If you don't want to go through this process and you don't want Kathryn and Paul..."

1:40:00 Chair Ellis I did get some correct.

1:40:04 K. Aylward Those were sort of the three things we did last time.

1:40:12 Chair Ellis I think the other things we did were we had separate meetings with the senior staff direct reports.

1:40:20 K. Aylward That is correct. In executive session.

1:40:22 Chair Ellis And I would continue that process. So is there a motion to do again this year what we did last time.

1:40:33 J. Potter Which I am sending out to identified contractors; I think we used contractors, a survey. I am happy to do that. I am happy to move that that take place.

Hon. Elizabeth Welch seconded the motion;

1:40:44 Chair Ellis I am happy to leave my email address and use the one you have here. So my Mercy Corp email doesn't get clogged. I still get email at the Stoel Rives firm.

1:41:05 J. Potter This particular survey shouldn't clog your email.

1:41:11 Chair Ellis Be careful what you ask for.

1:41:14 Hon. Elizabeth Welch Four responses. Is that what you said?

1:41:15 K. Aylward Yes.

1:41:18 Hon. Elizabeth Welch That was from the staff or from the internal?

1:41:21 K. Aylward That was from staff.

1:41:24 Chair Ellis You know there are two purposes. One is for us to get information. The other is that people feel they were asked. I think it is a good thing. The date of the December meeting?

1:41:36 N. Cozine The meeting is December 12.

1:41:47 Chair Ellis I learned yesterday that I am probably out of the country on December 12, and I would like to be present for this. Do you think we can move it four or five days later, I would be okay.

1:42:00 N. Cozine And it occurred to me that we must have avoided the 13th, because the 13th is a Thursday which is our typical meeting day. Someone must have a conflict with the 13th, is what I was guessing. So if we pushed it out to the following Wednesday the 19th, unless people prefer a Monday or Tuesday.

1:42:21 Chair Ellis Wait a minute. December 12th.

1:42:27 N. Cozine Can we do it on the 13th? Does anybody have a conflict on December 13?

1:42:34 Chair Ellis I am not sure I will be back yet. So if we could move it anywhere in the following week I would be fine. If that worked for others.

1:42:43 J. Potter I am gone the 17th on.

1:42:48 Chair Ellis And the 17th is what day of the week? Do you know?

1:42:49 C. Lazenby Monday.

1:42:51 Chair Ellis Move it to that Friday. That would be the 14th. I am pretty sure that I am going to be okay by then.

1:43:03 N. Cozine And this meeting is in Linn County unless we want to change the service delivery review.

1:43:08 Chair Ellis That doesn't bother me.

1:43:21 C. Lazenby That is in Albany?

1:43:24 J. Stevens I thought it was in Silverton?

1:43:25 Chair Ellis That is the October meeting.

Agenda Item No. 8 OPDS Monthly Report

1:43:40 Chair Ellis All right next is the monthly report.

1:43:47 N. Cozine Kathryn, you are there. Why don't you give CBS updates.

1:43:52 K. Aylward The only thing we are looking at is there has been a need to update our software for a long time. We are using Office 2000. It works just fine and I don't want to pay the money for the upgrade, but they have got you because as soon as your operating system moves beyond XP or Windows 7, then those older versions simply don't work with the operating system. Judicial wants to move the operating system toward Windows 7, so it will work with all the other programs and e-filing and all that stuff. So for us it is a huge endeavor because it means our Office Suite and our Lotus Notes and Adobe Acrobat that all communicate with each other with very tinker toyish kind of programming between them. As soon as you upgrade any one of those components, everything falls apart and you have re-tinker toy it. There is also a training issue. To go from early Word to later Word is quite a bit different. The legal secretaries will need training. That is our 12-month project to slowly chip away at. As far as costs go, last biennium I did upgrade our licenses so we have all the licenses for Office. I just purchased the upgrade for the Adobe Acrobat licenses. I bought the licenses but we just didn't install them because we knew it would be a huge issue. I think money wise it is something that we have prepared for. That is the next big thing.

1:45:41 Chair Ellis Okay. Do you want to do this Clatsop peer review?

1:45:45 P. Levy That is just on the staff report. We will be doing a peer review in Clatsop County in two weeks. We have a team of volunteer lawyers.

1:45:59 Chair Ellis I saw Jack Morris was on it.

1:46:00 P. Levy Jack and Keith Rogers. Jennifer Kimble and Jennifer Nash, who is the administrator of the Benton County Consortium. We have a very busy schedule. This will be our first peer review with modified confidentiality provisions. We expect that about six months after the finalization of our report that we will actually be reporting to the Commission about this.

- 1:46:33 Chair Ellis Okay. Pete? I thought you did a great job, by the way, with the Chief. That was very, very nicely done.
- 1:46:51 P. Ozanne Yeah. It was a neat gift.
- 1:46:53 P. Gartlan And it really is a tradition in our office. We are just a little bit late catching up with the Chief. I have only two items to report on and they are kind of follow ups from the last meeting. The first one is that I reported last time that the Court of Appeals' backlog for our cases was increasing about 15 to 20 cases per month. I met with Chief Judge Hazelton on Monday, and the Chief is considering going to a different system effective in January, 2013. That will be different from the current system. The current system is there are three panels. Each panel hears 40 of our criminal cases each month at one sitting and they rotate that. In January what the court will do, at least this is the proposal, is each panel will hear 20 of our criminal cases each month. So we go from one sitting a month to three and 20 cases before each panel. The Court of Appeals will be addressing 60 of our cases. What that will do is tread water for the Court of Appeals because we are producing about 55 cases or so, merit cases, a month. The backlog will not increase for the Court of Appeals. They are just trying to tread water before they can institute the fourth panel next year. The other item is a follow up with respect to the Chair's comment and Chief Justice Balmer's comment about some sort of an exchange program with trial attorneys, trial attorney offices. Tom Sermak and I met and we have agreed that beginning in October he is going to send us an attorney and that attorney will come here. I can describe the program a little bit the way we envision it. That is that attorney will come here and read a relatively short transcript along with an AD attorney who is actually working on that case. Our attorney can talk with the Marion County PD attorney about what goes into reading the transcript and identifying issues and writing the brief. That attorney will also go to team meetings and prepare for moot courts for Court of Appeals arguments. We expect to give the Marion County PD attorney a case, at least one case, to be argued in front of the Court of Appeals. The Marion County PD will get a taste of what it is like to review a transcript and prepare a brief. They will go to our team meetings and see how we moot our cases before oral argument. Then they will actually be mooted and argue a case in the Court of Appeals.
- 1:50:04 J. Potter How long is this visitation?
- 1:50:06 P. Gartlan We were hoping it would be about 24 to 30 hours over the course of about three months. It shouldn't impact too much their workload at the trial court level and the same thing for us. What we will do is – we are just going to start out small with one attorney each. We will send an attorney to the Marion County PD. Our attorney will shadow an attorney. Go visit clients at the jail or wherever. Go through the case preparation. Assist, perhaps, with respect to filing any motions and memoranda for a case and co-counsel and perhaps even be lead counsel on a misdemeanor case. Tom says that their office already has a program for Willamette students. They are already set up for this kind of shadowing. We are hoping this will go along the lines of what the Chair and what the Chief were suggesting last meeting. Assuming this all goes well I can see – well we want to incorporate it into part of the training for new attorneys. I can see this happening up in Portland as well as in Eugene.
- 1:51:32 P. Ozanne I think it is great, Pete, but the one thing that seems to me you are missing a chance for, and what the trial lawyers really need, is writing ability. Getting a hard edit, somewhere, of a piece of writing, would really be a take away that hardly any of us get except in places like appellate law where someone giving a hard edit of the writing. I think my sense is that trial lawyers often can use that experience. I don't know if you can work that in. I think would be a higher priority in terms of exposure or cross-fertilization.
- 1:52:17 P. Gartlan I think we can try and work that in. We have a manual for the attorneys in the office and so we are going to prepare kind of a modified manual for the Marion County attorneys who come here. It will be shorter and that will be part of this, at least with respect to how to write.

You are right. I didn't anticipate that they would actually write something and we would actually edit.

1:52:44 P. Ozanne There are all kinds of ways you could do it. You could have them bring a piece of writing that they have done or a piece that they are thinking of. It doesn't necessarily have to be connected to the case. I think that is really where the transfer of skills would really be valuable.

1:52:58 Chair Ellis I think it is great what you are doing and I appreciate the speed with which you took action. It was just a short discussion last month and now it is really happening.

1:53:08 P. Ozanne Yes. It is great without the writing.

1:53:13 P. Gartlan It is a good idea that will benefit our attorneys and trial attorneys. It is nice to be in a position to be able to do this. Commissioner Ozanne when you were here we really weren't in that position because we were just submerged.

1:53:32 P. Ozanne It was just a sweatshop.

1:53:37 Hon. Elizabeth Welch Now we need to talk to the Chief Justice about getting appellate judges to sit as trial judges. Talk about disconnects.

1:53:54 P. Gartlan I know the former Chief Justice did do that and even Chief Justice Balmer did sit – I think it was in Lane County last year.

1:54:07 Chair Ellis He did.

1:54:09 C. Lazenby Can I ask a question? Is there a piece of this too, where these trial lawyers who kind of come in and learn your process here, will they go back and preach the gospel to the heathen trial lawyers down in their shop? Is there a CLE component for that, that will benefit the whole office as well? Is it just going to be an individualized experience? I am sure your folks have those moments when they are reading a transcript, if only the trial lawyers knew A, B, and C. It happens over and over again. There must be a series of those I would assume. Those gaps if they could give you a better record to work with. If you could send those lawyers back down to preach the gospel.

1:55:00 P. Gartlan It is a good idea.

1:55:00 Chair Ellis CBS?

1:55:03 K. Aylward I did my bit, but I think there was one more thing that the Commission was going to discuss.

1:55:13 N. Cozine Yes. Before I launch into that, I circulated some information on reemployment, and before I delve into that conversation, a quick update just on the juvenile delinquency appointment of counsel task force. That development is still ongoing. We have been working on a survey to send out to all the counties. I actually forwarded it to Judge Welch so she could look at it. We are going to meet again next week to continue refining it. The survey will give a very broad brush look into what is happening in each county. It is still in progress.

Now on to reemployment unless you have questions. Okay. So, I sent everyone an email explaining that the OPDS reemployment personnel rule was adopted in 2003, and to my knowledge it hasn't been discussed since that period of time, if it was actually discussed at that time. There are some mechanics to reemployment that I think are helpful for you to know about. When someone is reemployed they can work 1,039 hours within that year. So if someone retires in January they have to spread those hours out over the entire year. It has to

be a part-time status. If someone retires in July, they can actually work full-time because they can finish out that year and then they can do a second six months for the second year. An employee during their reemployment is drawing on their PERS and receiving a paycheck. That component of reemployment sometimes is, I think, attracting some media attention. I bring it to you today because we do have retirements within OPDS on the horizon and for me it would be very helpful to get your current thinking on the topic. There are various approaches. When an employee retires they can continue in the same position. I did send that Statesman Journal article to demonstrate how one shouldn't do it, I suppose. So continue in the same position with no change in FTE status. An employee can retire and return in a similar position in the same classification, but not the same position, at either full-time or part-time, or retire and return in a lower classification with reduced responsibilities either full-time or part-time. I think, in terms of OPDS as I thought about it, if we are going to utilize a reemployment provision, there are reasons to do it. We are a lean organization and we have employees who are performing functions that no one else performs. If OPDS were to engage in reemployment the vision that I have is that it should be for part of transition planning and keeping continuity. So auditing, training, special projects that ensure consistency and accuracy during a transition. However, again, I am interested in your thoughts. I want to know whether the Commission wants to know when someone retires and is reemployed, and whether or not that goes without saying for any employee within the organization. The Statesman Journal article it was the executive director, oddly enough, who had not informed the entire board. So I would like to know ...

- 1:58:43 J. Stevens She told their Chair and the Vice-Chair and then about four months later those two shared it with the executive committee and about eight months after she retired, they bothered to tell the rest of the board.
- 1:58:59 Chair Ellis So why doesn't a policy that allows retirement, collecting PERS, reemployment, while you are also getting your PERS payment. Why doesn't that have the effect of creating an incentive that I think is maybe bad for the agency, for employees to retire at the earliest possible date, get reemployed, and draw two incomes?
- 1:59:33 N. Cozine I don't know that that is bad for the agency. The agency is actively saving because the agency is responsible for paying the PERS contribution or for paying the benefits.
- 1:59:42 C. Lazenby And it is only a half-time employee so they free up budget dollars.
- 1:59:43 N. Cozine It can be full-time if they retire in July.
- 1:59:46 C. Lazenby Right. That is correct.
- 1:59:47 N. Cozine That is structurally a possibility. So there is a potential agency benefit. That was actually one of the components in the Statesman Journal. When the executive director explained they were short on cash and it was a way to save the agency some money. In media stories it has often been written up as an additional state expense. I think that there are people who would argue that it is not additional state expense because that employee has invested in their PERS retirement fund over time and the agency would have to pay someone to do the work.
- 2:00:29 J. Stevens I was going to say the only way it really doesn't cost you more is if you don't hire someone. It costs you more if Pete retires and you hire Pete's replacement and then you hire Pete part-time, but if you just leave the space empty and hire Pete part-time you save money.
- 2:00:49 N. Cozine Correct.
- 2:00:49 P. Ozanne To answer one question I think it is sufficiently sensitive. I would suggest maybe the board might want to consider that they be informed of each decision. One instance could backfire. I guess the issue too is – especially those of us of a certain age, we like hanging on but then we

are sitting in a chair that others can fill. I see the advantage for the agency. It is a question for the culture. How long do you have these old guys sitting in there blocking – or gals blocking progression?

- 2:01:41 J. Stevens That depends on how good they are.
- 2:01:45 P. Ozanne Yes but you could say there are young people waiting that will be waiting that are just as good or better. It is a tough issue.
- 2:01:51 Chair Ellis You want to say something.
- 2:01:52 K. Aylward I would like to point out another advantage to the agency. Obviously there is a huge financial advantage. You can get that same employee doing the same job for 20% less. It is a sale on employees. But in addition you then actually have a better way to plan because for a lot of employees they pick a target date or maybe it is based on finances or family plans or season. They pick a time when they are not going to be working anymore, but if they have actually retired and said, "I would like to stay in the position four more months or six more months," then you know exactly when they are leaving. You can plan and you can do a transition. But if you don't offer them that alternative then they have no obligation to tell you when and their plans might change. They might think it is going to be April and they get to April and realize, "Wow. I need another year or six more months." Being able to plan is also pretty significant for the agency.
- 2:02:53 C. Lazenby I have seen it in a variety of different agencies. The best case scenario, and this is more typically than not, you have somebody who has been doing a pretty significant singular role within the organization and they want to retire, but they also don't want to let go all at once. It does help provide transition. It helps being able to train people and bring people on and make a smoother internal transition. It is also keeping a talent pool available to help with the things that go on. I think that our current focus on employees benefiting or getting extra money is sort of beside the point from a business structure standpoint. I think the analysis should be more like a sole source contracting analysis. We do this in the public sector all the time. We grant sole source contracts to people saying, "This person is uniquely qualified to do this and we don't need to go out and do competitive bidding to do that." I think if you can pass muster under some criteria that mimics that for hiring people back, that will help immunize you against this sort of shallow attacks.
- 2:04:13 K. Aylward You know I have even been inclined to look at it the other way. If I had an employee that I was just waiting for that person to retire and they said, "Okay, I can retire December 31, if you will let me keep working three or four months until my payments kick in." Your PERS payments don't actually start that first month. You have to wait three months. So if you are an underperforming, low paid employee, you have got to be able to save enough buffer to wait for the cash flow to start. If your boss says, "Okay. You can do that." Boom. Then they have retired and you know they are not going to stay on forever.
- 2:04:49 Chair Ellis But that scenario doesn't have the dreaded headline double-dip. Because under that scenario the three month employee stays on. The three month employee isn't getting
- 2:05:02 J. Stevens As long as the dreaded headline writer knows that they are not getting it.
- 2:05:08 K. Aylward No. It is a delay in actually processing the payment. Three months later, when you get a payment, it is three months worth of payment. You are getting it but you are just having to have the cash flow to get you there.
- 2:05:20 Chair Ellis I sit here aware that there is a lot of bad feeling among taxpayers and the public about this practice. There is a reaction that it is double-dipping. All those years of PERS and PERS isn't contributed by the employee it is contributed to by the agency. This notion that someone

who retires and is getting these, what are perceived as various generous PERS benefits, is still getting.....

2:06:09 P. Ozanne

He is a man of the people today.

2:06:10 Chair Ellis

I am very aware of this. I think there's significant potential of a reaction by maybe the unsophisticated newspaper reader or writer or ...

2:06:25 J. Stevens

Or a sophisticated one.

2:06:27 Chair Ellis

This is what is wrong with the world. It is double-dipping.

2:06:31 K. Aylward

In my view, it is just a complete misconception of what is actually going on. Because, I could retire, draw my pension and sit on my couch. My pension will not allow me to do that. I will have to get another job after I retire. Now, if that job is in a flower shop, or guess what, something I really understand like public defense, I am getting paid for the work that I am doing. If I am not doing the work I am not getting paid and I am 20% off. So to me they are completely separate transactions. In addition to that, the whole sort of notion that it is inappropriate. Last year there were 10,005 retirees who were rehired in PERS covered employment, and one of those was former Governor Kulongoski. It is a practice that is so advantageous for agencies that the legislature even said, "Okay. We know this is..." Even PERS itself - the agency - rehires retirees because it is so advantageous for the agency. Because it is so valuable for agencies and the impact on PERS is the only - and it's just infinitesimal - except the legislature said, "Okay. PERS and legislature let's get together. What is a reasonable amount? We have to put a cap on it. If all of our employees retired and then worked for 20 more years. That would start to impact PERS. So let's put a limit on it." And they said, "How about 600 hours a year." Okay. Sounds good. Then agencies came back and said, "Wow, I really don't want to lose this talent and look how cheap they are. Can I please keep them longer?" Then it was 800. Now it is not more than 1,040. That is some kind of magic number that is roughly half-time. That is what PERS and the legislature says maximizes the benefit to the agency. The public perception thing - we do public defense. We are slimy lawyers who get rapists off. That is the public perception, but we know we are defending the constitution. So it's surprising to me that this agency would be so concerned about public misperception that they would make a foolish business decision.

2:08:50 J. Stevens

But Kathryn - and I am not arguing against it because I think it isn't particularly double-dipping anyway, but the problem is the unsophisticated newspaper reader hears in the same day that his school district is having lay off 100 teachers because next year their PERS payments are going to go up 60% of whatever it is. It makes the issue very difficult to explain and it makes it very ugly for you. That is my only concern about it is it really is ugly looking to someone who doesn't understand the savings. I work for a guy who absolutely thinks it is the worst thing in the world.

2:09:37 P. Ozanne

And especially the payouts that some people get with PERS.

2:09:41 J. Stevens

When you get the football coach with 10 bazillion dollars.

2:09:48 J. Potter

You are arguing from a business standpoint we should be looking at that. I understand that argument. Do you understand the counter-argument that it may look bad and it may come back and haunt you a bit? You may get bad press.

2:10:08 K. Aylward

I believe that to run an agency efficiently you make good business decisions that are defensible and then you support your staff to the extent that you can defend that. Even if it is misunderstood and unpopular and a nasty headline, state wastes millions, it is just bad reporting if that is the headline.

- 2:10:30 J. Stevens But the problem is bad reporting or good reporting, it ends up in some legislator's lap somewhere and the legislator owes a lot more to the voters in his community who also read that headline than he does to anybody in this agency.
- 2:10:50 C. Lazenby You know perception is reality. In an age when a major political candidate says they aren't going to let facts get in the way of their campaign. That should tell you a lot about the quality of people's thought process.
- 2:11:05 P. Ozanne I kind of like your thoughts, Chip, about the sole source analysis. I think it does take into account, and it should, I guess, I am still worried about the organizational culture where you have people coming up – okay they might not quite be ready, but how long is a guy like me going to hang around. I have an organization like that with two people and no they aren't ready and I can argue for years that they aren't ready, but at
- 2:11:32 C. Lazenby And that is a framework for making an analysis, or if you end up once you have that sort of background framework is unfortunately you end up saying, "Well, Pete, we are going to let you come back half-time because we need you and under these criteria you are indispensable, but you know Billy, we can get 10 of you for a dime, so you are gone. You are going to have to just go retire if that is what you want to do." When you did get this criticism you can say, "Well, look, there are reasons that we did this and there are other folks that requested it that we didn't do because it is based on what an organization does and needs."
- 2:12:13 K. Aylward And I think that part of the problem that the Commission should be aware of is that not only are 10,000 retirees doing that. That means lots and lots of agencies are accepting this as a practice, but when you actually go to How To Retirement training they say, "Everybody. You have got to retire July 1. If you take nothing away from this seminar, retire July 1st." We are all like why? Well, okay, the COLA is awarded July 1st, but what difference you could retire June 1st and you would still get it. They say, "No, no, no. If you retire July 1st, then you can continue to work full-time for one year after you have retired. That is the biggest benefit to yourself if you time it like that. They are teaching it like it is something you are entitled to. My concern is that if the Commission felt that possible bad press, we are named in the one in 10,005, we had one, is enough to cause the Commission to say, "No, we don't want to do this for our employees even though they had a reasonable expectation that it would be possible and everybody else who seems to want to do it gets to do it, but not our employees." I think that would be sending a wrong signal.
- 2:13:21 J. Potter It is a discretionary decision on your part right now?
- 2:13:24 N. Cozine Executive director.
- 2:13:27 J. Potter Does it make a difference to have that discretionary judgment affirmed by the Commission? So each time an employee wants to do it, you can make the recommendation and it is back on the Commission?
- 2:13:44 J. Stevens That feels like micromanaging, personally.
- 2:13:50 J. Potter I think it is micromanaging. I just wonder if it helps for the perception for the public.
- 2:13:55 Chair Ellis Part of what bothers me, and I will disclose I am bothered, is I think if you do it for anyone there then becomes an expectation by everyone. I really doubt that it is right to universalize the practice of retire and then get reemployed for whatever period of time. If you don't universalize it, then it becomes, I think, a very slippery policy.
- 2:14:36 K. Aylward I think it is easy in a small organization because there is only one of this position and there is only one of this and one of this in many of the positions. Or we only have a couple and they are crucial. Or they take forever to learn the job and you need another year to train someone.

We are not talking about me in this situation, although I know ultimately it may impact me, but the things that I do, I do them every two years. So I can't say okay here is a month for me to train my replacement. In 23 months you will have to do this. I hope you take notes now. I think depending on the position, the degree of the responsibility and the type of work it is that it would be pretty easy to make decisions saying, "Yes you and not you." But in addition there are very few retirements when you think about it, and very few people who retire actually are so desperate that they need to keep working. Some of them have spouses with incomes and pensions. Some of them have savings. Some of them paid for their house. Whatever their circumstances are, a lot of people, when they are ready to retire, they want to see the back of you. They are just gone. I am going to France, whatever. So we are talking about a very small number of people in the next five years, ten years, who might wish to do this or request being able to do this. I think we are talking three people and it will probably be pretty obvious who is a yes and who is a no.

- 2:16:05 J. Stevens So you are advocating that it be on a case by case basis?
- 2:16:12 K. Aylward I would hope that this discussion would result in the Commission saying, "Yes we see the value and we are willing to take the heat, but it still the executive director's decision." I am just hoping that the Commission at this juncture will not say, "No, we never want to do this."
- 2:16:35 P. Ozanne If it is so few then John's point is we take the heat by actually having a decision if it is just a few people in a small organization.
- 2:16:46 K. Aylward Or you say if it is more than 90 days, you want to hear about it. If it is just somebody waiting until the check comes. Or wait until your interviews are done.
- 2:16:54 C. Lazenby I am less concerned about the duration than I am about the rationale. I would much rather have you have an objective rationale that you are applying across the board in these decisions that you can say, "I made a rational decision to allow this to happen and based on that same criteria it was rational for me to say no to this person." I think that way as a Commissioner I would be willing to say, "Well, we looked at that criteria and we have delegated that authority and then applied the criteria in a certain circumstance and it is a legitimate business decision that they have made." I would take the heat under those circumstances and I think that avoids your slippery slope that, Mr. Chair, has possibility of being rudderless without any sort of criteria for making those decisions. I don't think we should say, "No. You can't do it under any circumstances, either."
- 2:17:45 J. Potter What happens if it is not universalized but the impetus is not upon the employee to request, it is upon the executive director to ask the employee. So it is coming from management saying that we need this particular person. We know you are going to retire but we need you to stay on six months, one year, so it is not the employee.
- 2:18:07 C. Lazenby My sense is that these discussions are much more sort of collaborative than that. I am thinking about retiring, it is pretty clear. My hair is all gone and it is all gray and I have been here awhile. I am leaving, right. It is a matter of when and how and what PERS says. Then in consultation with the management some sort of plan is hatched as to whether they will be hired back or not.
- 2:18:35 K. Aylward That is correct. For many people, not many people, okay, I am talking about myself. I can figure it out and say, "If I retire July 1st and work a year beyond that, that gives me enough one time extra money to pay something that is a recurring payment so that then I actually could survive on my pension. If the answer is "no," then I would have to work another 10 years; every additional year adds \$100 a month, and if I can't make it on \$3,500 and I need \$5,000, I will be here until I am 90, and you guys don't want that. The Chair said it was time for me to retire at the last Commission meeting. I was so offended.

2:19:22 Chair Ellis I said that?

2:19:22 K. Aylward You did.

2:19:35 C. Lazenby I think a really good manager manages to do away with their own job and I am sure you are capable of doing that too.

2:19:45 Chair Ellis What is our retirement policy, if we have one? Is there a fixed age that people must? Is there an age at which they can?

2:20:00 K. Aylward It is age 58 if you are tier one. It is age 60 if you are tier two, hired after a certain date.

2:20:09 Chair Ellis By age, that is the earliest that they can?

2:20:10 K. Aylward With a full pension. The earliest is 55 with reduced pension. Then 58 would be your full formula pension or 60 if you are hired later and you are tier two. Then after that there is kind of like no pension. You have your individual 401k. It is not a defined benefit plan. It is a defined contribution plan. Then you will be working until you are 90 or something. But if somebody is here and they could retire at 58 and they say that I just haven't picked a date yet. Then pretty soon they are 60 and then 62 and then 68 and they still haven't picked a date yet, which is fine except where is the whole argument of that young talent that is waiting. Or the whole argument of we need fresh eyes, whatever your arguments are for getting rid of the old and getting in the new. You have no ability to plan for that. They just continue to stay. I am not going to retire. Oops heart attack. Hope you can find things on my desk.

2:21:14 Chair Ellis But I assume the agency gets to say somewhere in there

2:21:19 K. Aylward Time to go? Nope. Not unless you are failing to do your job if you get all senile.

2:21:37 Hon. Elizabeth Welch I have a question about this. I did not know that the state had actually stepped in and done something about this. When I was still working regularly this was so widespread and just massive. There was no duration limitation. It was purely an executive discretion. You talk about saving and I have a problem with that concept. I just want to understand how it works. I don't want to look at you because I am not talking about you. I am just asking a question. You want somebody, particularly an upper level person in the organization, to stay on to train their replacement. That is not a savings. Okay. Just hear me. I don't know how you can make that into a savings. So the issue is what is the purpose of the organization in keeping this very talented, capable person on?

2:22:42 N. Cozine I think that it goes to the structure. It is the sole source type of argument. It is more expensive to the agency when you have to replace – when you have to hire that person back to do a component of training so that you don't lose the consistency. That is more expensive to the agency because you have two bodies instead of one. No question about it. But the question is, is the expense of having that overlap period of time worth it because you are actually creating consistency that, if you lose it, you are going to lose money down the line. If you have someone who is handling every single accounts payable transaction, or every single contract payment that goes out the door, and you have a transition in which there is no overlap you risk losing out on quality control pieces that aren't documented. So one of the efforts that we are engaging in internally is to start documenting some of the processes, but that is difficult because we are very lean. So when somebody working every single hour just to get the work done, there is no time left for documentation of what that work is. If someone retires you hire into that position. You reemploy someone, then to do the audit and documentation or training, then you actually create the consistency. That is that type of sole source concept and process. In dollar terms there is an extra expense to the agency for that period of time.

- 2:24:20 J. Stevens Not necessarily. Because if you were to hire the person before this person retires then you are paying two PERS benefits and two health benefits and two of everything, but if you wait to hire until this person is just working for just a salary than you have saved money, actually.
- 2:24:37 N. Cozine Right. That is the savings piece. But from a pure dollar standpoint....
- 2:24:41 J. Stevens Oh, it will cost you more but it will cost you less more ...
- 2:24:48 K. Aylward I never overlap. When we swapped out executive directors and everybody said, "Let's have an overlap" and I said, "No. Let's have a break." I would never to do that. But if you have got someone that you are promoting from within and you know when you are leaving, you know who is going to be promoted from within, and the person is still here doing their job. Your question of do you want to keep them on to train? No. That person is the best person on the planet doing this job. I want every single month that I can have of that person. That history, that memory, that experience, and if I should be so lucky that while she stays on four to six months we have identified someone else in the office that she can say, "Watch, oh, here is an example. Here is how I do this." Then you have got your transition and it doesn't cost you extra money. It saves you money.
- 2:25:39 C. Lazenby This happens not with people that are particularly fungible, right? It happens with people that know that if you pull this, something way over there falls down. So keeping that institutional knowledge around is very, very important. It is not just as simple as plugging another body in and everything is going to work the way it has worked.
- 2:26:00 Chair Ellis What if we went to sort of a little bit of everything. We are okay with selective reemployment not to exceed that three month period that the cash flow is not there. That, it seems to me, gives us a pretty reasonable response to the - you would say uninformed newspaper reader public critic. It also seems to me that 90 days is devoted to transition. It is not 90 more days of doing what was going on before, but it is devoted to transition. Because it has a finite end to it, you don't get what I think is, at least cosmetically and I have to believe economically, not right. This idea that people "retire," but then they get reemployed and they just keep on going. That is sort of where my head is right now.
- 2:27:08 J. Stevens I don't have a problem letting them stay. But the one thing I would say is the notion if we do start looking at this as single source contracting that there be something written in the record somewhere that says, "I looked at these and these and these and these and this is why we decided that she is so valuable we want for the next year. We will save money on this and this and this and this is why she is the best person for this." It may be that she does exactly what she is doing now. It may be that there is some special project that Nancy wants done and she can't spring anybody away from it and Kathryn is perfect for it. That makes sense to me, but I would like to have it in writing somewhere the logic and reasoning by that.
- 2:27:56 P. Ozanne I don't disagree with your logic, Barnes, but it just seems to me that it ties our hands in ways that we may not ... I like the idea of the sole source analysis. The individual cases and I am still happy to have it come to us because it is so few. I am happy to have Nancy to do it. I hear all what you are saying about the public reaction, but I think it is important for a lean organization to keep our options open. I think we need to be careful when we analyze the cases and come up with the rationale, but I kind of agree with Kathryn that our problems of PR are already bad enough that I don't think this incrementally is going to make a difference.
- 2:28:47 J. Stevens I think if we were DHS this would be a much more critical issue than it is here. We are not getting that much scrutiny on this unless Kathryn comes in with a machine gun on the last day and cuts loose. After today you never know.

- 2:29:03 Chair Ellis This is all in the context of our current policy which has the last sentence, “Reemployment shall be subject to the discretion of the executive director.” By way of background the executive director and I had lunch last week and you detected I have a visceral bad reaction.
- 2:29:28 K. Aylward As do I with the opposite view.
- 2:29:31 Chair Ellis This is how we do things. We talk about them. I guess the question for the Commission is does anyone want to change that last sentence?
- 2:29:42 Hon. Elizabeth Welch I do. I like what Barnes said. I could be talked into something longer than that. It just starts falling apart after a certain amount of time. What is the benefit to the organization? Maybe if there was a six month acceptable period with the executive director being able to come to the Commission and say, “I need to extend this and this is the reason why,” but that we establish an expectation. I know what it was like at DHS. That is the main place where I had experience with it. It wasn’t good old boys because they were all woman, but it was good old girls payoff. It was. It absolutely was. These people were good people and had been working there for a long time. Their friends were still running the place and they got to keep working. I don’t see how that benefits an organization.
- 2:30:54 J. Potter Did DHS have a board or Commission like this with any oversight? So I think we do have this one extra layer here to provide some oversight to make sure that that kind of thing doesn’t happen. It strikes me that this is a management tool using this reemployment. It should be viewed as a management tool with oversight, whether it is informal or formal or however you want to structure it. But you have a Commission that can take a look at it.
- 2:31:25 Hon. Elizabeth Welch I guess that makes sense.
- 2:31:27 J. Potter I think Chip maybe wanted to try criteria. I wouldn’t object to that or formal review by this group.
- 2:31:37 Chair Ellis What if we amended the last sentence to read, “Reemployment shall be at the discretion of the PDSC upon recommendation of the executive director.” The concept is Nancy initiates. So she isn’t going to come to us with one of these unless you really think it is the right thing to do, but we will review and approve it. You know my visceral feeling but I try to be a pragmatist too. I think this might be a better way to go.
- 2:32:20 P. Ozanne Especially if there is not a lot of them.
- 2:32:24 Chair Ellis There probably won’t be. This is designed to not make it – you said something happened that does trouble me that employees have a reasonable expectation, I think those were your words that this will happen. That bothers me because....
- 2:32:42 K. Aylward It bothers me too. PERS tricked me. I planned every penny on the assumption of this date and continuing to work and then I leave and it all worked. Now I am hearing, “What. You are not going to let me?” PERS is sending this signal that you can stay on and do your extra year. I just assumed it was unless you were a bad employee nobody was going to say no.
- 2:33:09 C. Lazenby For me that is kind of the nexus of the issues. There is this public perception out there that there are abuses within the PERS system. I think the focus has been on exceptions rather than the rule as far as that is concerned. But the reality is that under the law and under options that are available out there for people that are in that system, this is a perfectly viable option for them should their employers feel a need to continue on with them and that many use it and plan their transition from a full-time working life into more of a retirement. It is a legal option that is available. It is not like people are making a short cut or going through loophole.

It is established in law and allowable. Because I am tier one PERS, I am going to state my conflict on the record. I don't think that I should be punished for taking my benefits in a system that I paid into. The criteria should not be judging me because I am getting money. That is what the argument is. Any of the stuff I see in the PERS, yeah it is overpaid, but what nobody every talks about is the fact that the reason why the employers starting picking up all that stuff was the 15, 20, 25 years ago management said to employees, "We can't give you a pay raise but we will pick up your benefits and pay for it in the future because we don't have the money to pay you salary increases now."

- 2:34:43 P. Ozanne You and I with the money match. We don't want the public to see how much we are making. That is the problem.
- 2:34:51 C. Lazenby But the reason why we are making as much money as we are making is because the unions and the organized folks cut a deal with management that they would not get raises in exchange ...
- 2:35:05 P. Ozanne Not with the money match. I just want to say your boss appointed me to the PERS board, so I was on for like nine years. This was a concern that came up with the board at the time. If memory serves me right we actually came up with an hour limitation because we were concerned about it.
- 2:35:25 C. Lazenby That is where the 1,039 came from, right?
- 2:35:30 P. Ozanne I am not suggesting that my colleagues' concerns are not important. I guess I still err on the side – I like the review idea. Subject to our review and we retain that flexibility for key employees or sole source employees.
- 2:35:48 J. Stevens The fact of the matter is we call it reemployment. Well there is nothing that says an employer has to reemploy somebody. As long as that is clear that is fine. It is not a guaranteed thing that everybody in this room, except me and you, Barnes, because we don't work for the state.
- 2:36:07 K. Aylward Which is fine. That is what an employee normally does. "I would like to retire on such and such a date. Can I stay on for four month, six months, 12 months." If the answer is no then you think okay then I guess I can't retire on such and such a date. You make your plan according to having something in writing. I just wanted to make sure that the Commission wasn't going to say, "Oh, no, no, we always want our executive director to say no because we have a visceral reaction that this is bad."
- 2:36:34 C. Lazenby Paul, can I ask you a question? If we were to go to the structure that the Chair suggesting that it would be ED suggesting Commission approval. That is in executive session as a personnel matter?
- 2:36:27 P. Levy No. I can answer that question. I am shocked.
- 2:37:02 P. Ozanne You sure you don't want to see the statutes.
- 2:37:02 P. Levy It is 192. There is an exception for executive session, it is to consider initial hires and initial hires only, and only under circumstances where the position has been advertised and other criteria is present. It would not apply to a rehire in these circumstances.
- 2:37:34 N. Cozine What about personnel?
- 2:37:38 P. Levy The only other personnel exception is for discipline and then there are others related to contract negotiations.
- 2:37:45 C. Lazenby Well isn't this in the form of contract negotiations?

2:37:50 P. Levy No. Not really. I do not think it would be the proper subject for an executive session. I would be happy to share that statute and the Attorney General's manual provisions out to the Commission if you want to see it, but I am pretty confident in that answer.

2:38:14 C. Lazenby I may be the only geeky one, but I would like to see it.

2:38:16 Chair Ellis Is there a motion?

2:38:20 K. Aylward Excuse me. This is not an action item. It has not been noticed and you cannot make a change to policy without having noticed it. Even if you were going to vote my way you still can't.

2:38:32 Chair Ellis Okay. Let's put this on the next agenda and give the appropriate notice.

2:38:34 J. Stevens Well, do we want to ask that it is modified for us to vote on it?

2:38:43 Chair Ellis That is what I am suggesting.

2:38:44 J. Potter I think the executive director has written down those modifications.

2:38:50 N. Cozine I did.

2:38:50 Hon. Elizabeth Welch I just wonder if there isn't – last shot kind of cutting the baby into long time practice in mind.

2:39:04 P. Ozanne I think you were cutting juveniles weren't you?

2:39:04 Hon. Elizabeth Welch That the executive director has some initial discretion, and that if runs past a certain amount of time that it comes to the board. In other words giving Nancy back her authority to make basic decisions, but giving us oversight if it extends.

2:39:32 Chair Ellis I kind of like the way...

2:39:33 Hon. Elizabeth Welch You want to do them all.

2:39:35 Chair Ellis There aren't going to be that many of them.

2:39:36 Hon. Elizabeth Welch That remains to be seen.

2:39:36 Chair Ellis She is going to have a good reason when she comes to us why she recommends somebody and we will decide.

2:39:50 J. Potter We can mull her thought over. You are suggesting that it would be three months and six months and beyond that it would have to come to us.

2:39:58 Chair Ellis All right. Clarity?

2:39:59 N. Cozine Clarity. Thank you. I appreciate the help.

2:40:05 Chair Ellis I thought it was a good discussion. We will have on the next agenda the proposed revision and someone can move to amend that if they want. All right. Anything else?

2:40:22 K. Aylward We will just go get your \$2 million.

2:40:27 C. Lazenby Small, unmarked bills, please.

2:40:31 Chair Ellis Is there a motion to adjourn?

MOTION: J. Potter moved to adjourn the meeting, Janet Stevens seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

Meeting adjourned.

Attachment 2

PUBLIC DEFENSE SERVICES COMMISSION

MEMBERS

Barnes H. Ellis, Chair
General Counsel and Corporate Secretary, Mercy Corps

Shaun S. McCrea, Vice-Chair
Partner, McCrea PC

Chief Justice Thomas A. Balmer, Ex-Officio Permanent Member

Henry H. Lazenby, Jr.
Partner, Lazenby & Associates

Peter A. Ozanne
Deputy Chief Operating Officer, Public Safety, Multnomah County

John R. Potter
Executive Director, Oregon Criminal Defense Lawyers Association

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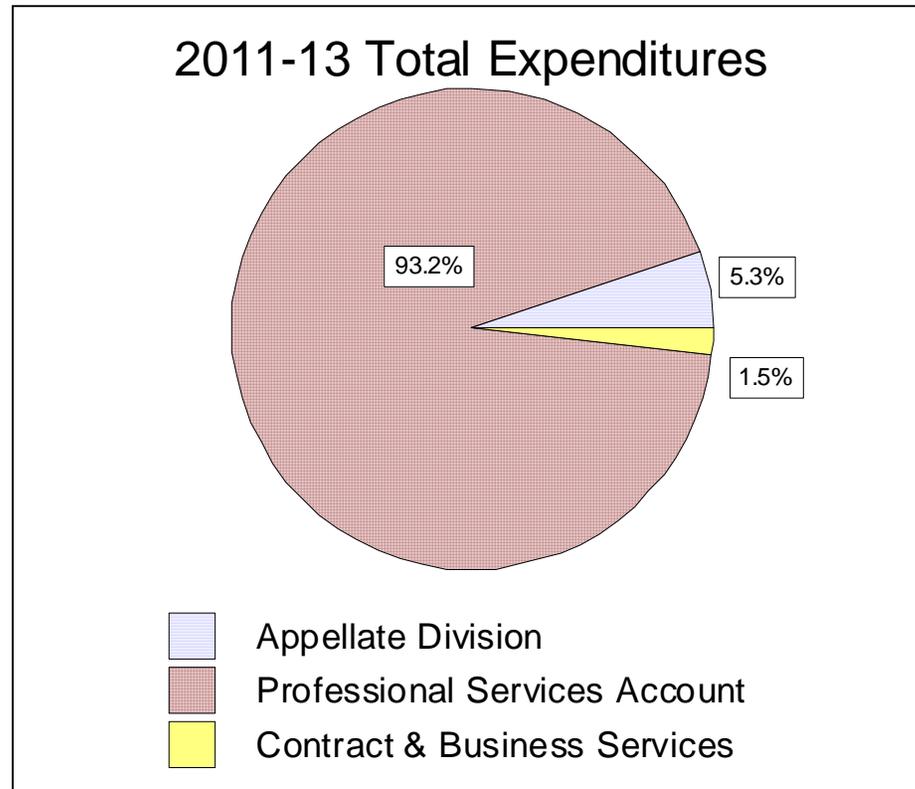
Public Defense Services Commission

Agency Summary

The Public Defense Services Commission (PDSC) is the judicial branch agency responsible for establishing and maintaining a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice.

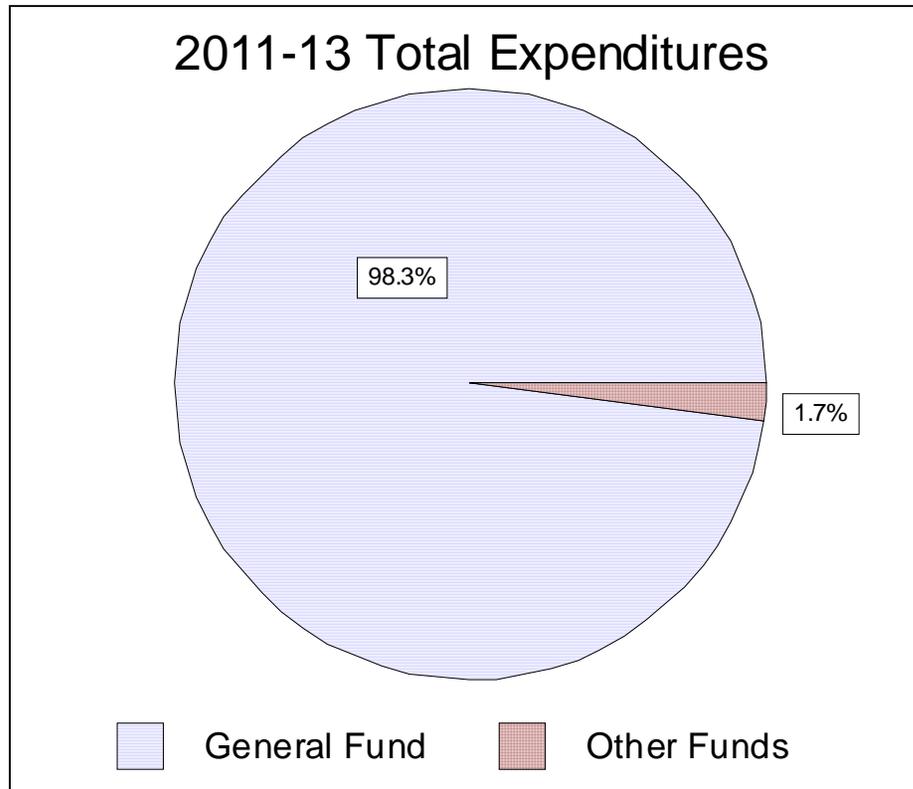
Budget Summary Graphics

How the budget is allocated among programs or activities



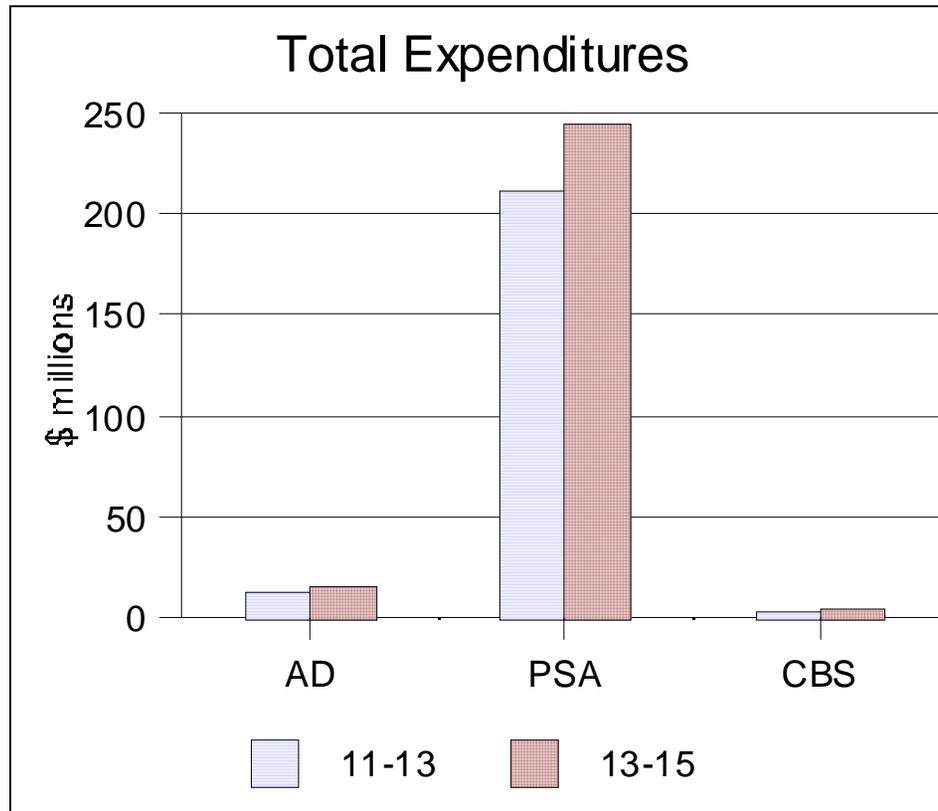
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Distribution by fund types



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Comparison of 2011-13 Legislatively Approved Budget (as of April 2012) with the 2013-15 Agency Request Budget



AD = Appellate Division PSA = Professional Services Account CBS = Contract & Business Services

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Mission Statement and Statutory Authority

The Legislative Assembly enacted a mission statement for PDSC in 2001. ORS 151.216 directs PDSC to administer “a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice.”

Oregon Revised Statutes: PDSC’s authority is derived from ORS 151.211 et seq.

Long-Term Plan

PDSC is a vital partner in Oregon’s public safety system. As noted below and as illustrated very clearly in the ’01-03 biennium, the system as a whole cannot function without public defense. When public defense is appropriately fulfilling its statutory and constitutional role, however, the entire system benefits.

While a defense attorney’s first duty is to represent individual clients with skill, loyalty and zeal, the fulfillment of those obligations generally benefits the entire system. No public interest is served in allowing the innocent to be convicted or in allowing children to be removed from their parents without just cause or in committing persons to mental institutions who do not require such placements. Judges and prosecutors rely on the defense to protect their clients’ interests and the integrity of the system. When the defense does not meet its obligations, the court and the prosecution must assume responsibility for seeing that justice is done.

In communities around the state, judges, prosecutors and defense attorneys work together to find efficient methods of handling large volumes of cases while preserving the rights of all involved. There are early resolution programs in many communities which help identify cases that can be resolved without trial and move those cases out of the system so that resources can be concentrated on the cases that require litigation. Drug courts, family courts, mental health courts rely on judges, prosecutors and defenders to identify, engage and support appropriate clients for participation in and successful completion of these treatment focused systems. All participate in moving ceremonies to celebrate successful completions. When clients are convicted of criminal offenses, defense attorneys aid the system by helping to identify appropriate evidence-based programs and sanctions that can assist in their clients’ rehabilitation. Attorneys for parents and children have been able to identify family members or others who can help address the family’s needs without requiring that the family be separated. Some of these attorneys also identify treatment resources previously unknown to the child welfare system.

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In order for the public defense system to perform its statutory and constitutional function, it must be adequately funded. Quality representation requires that there be qualified, experienced, dedicated defenders. In order to sustain Oregon's unique public defense system comprised entirely of private providers at the trial level, defense providers and their employees must be adequately compensated and assured of continuing support. The public defense system sustained significant, but fortunately not long-term damage in 2003. In a series of special legislative sessions during the 2001-03 biennium, public defense funding was reduced by 27.5 million (17%) from the legislatively adopted budget. Although \$5 million of that cut was later restored, these cuts occurred so late in the biennium that public defense funding was virtually eliminated during the last quarter.

On February 28, 2003 the State Court Administrator issued a notice of insufficient public defense funds to pay for appointments accepted and services rendered on certain types of cases filed between March 1, 2003 and June 30, 2003. District attorneys, including Multnomah County District Attorney Mike Schrunk, joined in a suit seeking to compel appointment of counsel. A federal court challenge under the 5th, 6th and 14th Amendments to the United States Constitution was ultimately dismissed when the 9th Circuit Court of Appeals found the case moot since funding had been restored after the start of the new biennium before the court could issue its ruling. In finding the issue to be moot, the court found no reason to believe that a similar situation would arise again since it was an unprecedented occurrence at the time.

The withholding of funding from public defense providers caused layoffs, furloughs, closures and other major disruptions to law firms and individuals. Crime rates increased, repeat property offenders could not be held. Portland Police Chief Mark Kroeker told the *New York Times* that officers had to give a new version of the Miranda warning when they arrested a suspect for a non-violent crime: "If you can't afford a lawyer, you will be set free. Enjoy." He noted a significant increase in shoplifts, car break-ins and other crimes. Lane County District Attorney Doug Harclerod told the Eugene *Register Guard* that the cutbacks in funding for public safety had placed "the rule of law in serious jeopardy," and that the most critical issue was the cutting off of funds for public defense, since, as stated by the newspaper, "The problem is simple: In the absence of a defense, there can be no prosecution." Harclerod told the editorial board that while cuts in public defense violate the rights of defendants, the real impact is on victims. Car thieves, burglars, shoplifters and the like would still be arrested but would be back on the street within hours doing more of the same.

Fortunately for the entire public safety system, the fiscal crisis was temporary and restoration of funds could begin in the following biennium. A caseload "bulge" at the beginning of that biennium included the cases that were still prosecutable after significant delay. Some were not and were simply dismissed or treated as minor offenses and dealt with summarily. Some public defense providers did not survive the crisis; all experienced shortages and lost skilled defenders who could not be assured that such measures would not be repeated in the future. In the 2003 Legislative session, representatives of the Citizens' Crime Commission, the judges, the sheriffs, the chiefs of police, district attorneys and the Oregon Department of Justice came to PDSC's budget hearings and urged lawmakers to provide adequate funding for defenders as a critical component of the public safety system.

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Although the crisis of 2003 has not recurred, the system continues to face challenges to its long-term stability, including the continuing loss of older attorneys and increasing competition for younger attorneys to replace them. This plan targets the three main challenges faced by the agency: 1) the need to attract and retain more public defense providers; 2) the need to improve the quality of representation, primarily in juvenile dependency cases; and 3) the need to enable contractors to reduce caseloads while maintaining adequate revenue to support continued operation.

All three of these challenges are interrelated. Among the agency's long-term providers, some of the most senior attorneys are reaching retirement age. Due to increases in the cost of living over the past two decades and the lack of a corresponding increase in the public defense budget, these providers have experienced increasing difficulty recruiting and retaining new attorneys. High caseloads also contribute to the loss of attorneys. The major reason that public defense caseloads in Oregon exceed national standards is that public defense contractors accept ever-increasing caseloads in order to meet rising costs. Quality of representation as well as morale and long-term job satisfaction have been negatively affected by excessive caseloads.

To address these challenges, the agency will be using a multi-biennium strategy. Rather than present the Legislature with policy option packages that completely achieve a target, the agency's policy option packages represent moving one third of the way towards a goal in each of the next three biennia. The agency believes these incremental improvements will not only be more easily funded but will also allow the public defense system to maintain stability by phasing in changes in workload and compensation.

The agency's 2013-15 budget includes policy option packages that will address the hourly rate for hourly paid attorneys and investigators, the salaries of attorneys employed by not-for-profit public defender offices (accounting for 33% of the statewide caseload), and some of the quality of representation issues in juvenile dependency cases. Taking these steps will keep providers from leaving public defense and will improve the quality of representation in the key area of juvenile dependency representation.

In subsequent biennia, the agency will include policy packages aimed at reducing caseloads across the board to levels recommended by national standards and in accordance with the agency's mandate to provide public defense services "consistent with...national standards of justice." Reduced caseloads would be a powerful recruitment and retention incentive for public defense attorneys and would promote high-quality representation and long-term stability throughout the public defense system.

If the agency achieves the goals discussed above, it can then focus on establishing and rigorously enforcing standards of representation. Future policy packages will likely include funding requests to meet training and resource center needs, and additional staffing to enable the agency to better monitor the quality of representation.

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2013-15 Short-Term Plan

Agency Programs – the agency is comprised of two divisions:

- The Appellate Division (AD) provides direct legal services in the Oregon Supreme Court and Court of Appeals on behalf of financially eligible clients appealing trial court judgments of conviction in criminal cases, and trial court judgments in juvenile dependency and termination of parental rights cases. Through best practices in performance management, results-based attorney work plans and regular performance evaluations of every employee in the office, AD plans to continue making progress in increasing office efficiencies and, as a result of such efficiencies and any additional positions that may be authorized by the Legislature, eliminate historic criminal case backlogs in the state's appellate courts and achieving established timelines for briefing in these cases.
- The Contract and Business Services Division (CBS) negotiates and administers over 100 public defense contracts with individual lawyers and groups of lawyers and with nonprofit corporations for the delivery of legal services across the state in criminal, juvenile, civil commitment and post-conviction relief cases. After assuming the responsibility from state circuit courts in 2003 to review, approve and pay fees and expenses for public defense cases, CBS plans to continue developing and refining policies and practices that ensure the cost-effective administration of public defense contracts and payment of necessary and reasonable fees and expenses. (Contract costs and fees and expenses are funded from the Professional Services Account.)
- PDSC's Executive Director and General Counsel in collaboration with its division heads will continue to implement quality assurance programs that evaluate the operations and performance of PDSC's major contractors throughout the state and their adoption of best practices in public defense and law office management:
 - (1) PDSC has reviewed the public defense delivery systems in 23 of Oregon's 27 judicial districts and will continue to hold meetings and conduct investigations throughout Oregon for the purposes of developing a "Service Delivery Plan" for every county or judicial district in the state. Such reviews are conducted with the cooperation of the public defense contractors in the area, the Circuit Court judges, the District Attorneys and many other representatives of the local criminal and juvenile justice systems. PDSC prepares written reports that include final service delivery plans for each district and that are on its website for review by any interested person or group. These plans establish the most cost-effective local organizations, structures and policies for the delivery of public defense services, taking into account the justice system practices and resources in each locality.

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- (2) The agency's General Counsel performs quality assurance assessments of providers in each judicial district. This unique program involves the volunteer effort of dozens of public and private defense attorneys and other professionals who devote two and a half days to the study and analysis of the quality of representation being provided by a particular contractor or contractors in the county or district. To date 20 of these assessments have been performed. The Quality Assurance Task Force, which oversees the program, has been able to assemble a list of best practices from information obtained during the course of these assessments. Detailed reports are provided to the subject contractors identifying areas of special achievement as well as areas in which improvement is needed and recommendations for actions to be taken to address any deficits. PDSC is not aware of any other state public defense system that is able to achieve thorough assessments of its providers with the use of an all volunteer group of lawyers and other professionals. The contribution made by these volunteers is an indication of their commitment to supporting high-quality representation for public defense clients.
- (3) PDSC co-sponsors, with the Oregon Criminal Defense Lawyers Association (OCDLA) (a membership organization of defense providers), an annual two-day training for public defense managers which includes training on best practices for law office management, quality improvement initiatives, updates on technical developments that can affect productivity, and many other issues of interest to contractors. OCDLA is the organization that provides the great majority of continuing legal education programs for lawyers engaged in the practice of criminal law.

Environmental Factors – The public defense services that PDSC provides are mandated by state and federal constitutions and statutes.

The factors that drive the demand for these public defense services are beyond the control of PDSC. These factors include demographic factors such as population growth and growth in the at-risk population for juvenile and criminal offenses, the state's crime rate, policy decisions regarding criminal law by the Legislative Assembly and by the voters through ballot initiatives, and law enforcement policies and practices of state and local police agencies and 36 independently elected district attorneys.

PDSC is committed to ensuring that taxpayer funds devoted to public defense services are spent wisely by carrying out its mission of providing quality legal services cost-efficiently. PDSC is accomplishing that mission through results-based agency operations and management and a commitment to performance measurement and evaluation, as well as through collaborations with public defense contractors to implement best practices in law office management and quality assurance throughout the state.

Public defender compensation is well below the compensation received for legal services not only by attorneys in all other areas of practice but by their counterparts in public prosecutors' offices as well. Qualified lawyers are increasingly unavailable to provide these services, particularly in rural areas of Oregon. As a result, local public safety systems throughout the state, especially in those

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rural areas with a short supply of lawyers, are at risk of potential collapse because of the legal impossibility of prosecuting criminal and juvenile cases without public defense attorneys, as occurred statewide in the 2001-2003 biennium.

Agency Initiatives – This budget request contains three policy packages that are designed to ensure the availability of qualified public defense attorneys throughout Oregon and the continuing operation of the state’s public safety system.

- Package No. 100 would provide one third of the funding required to reduce trial-level juvenile dependency caseloads by 20% in order to address chronic and serious quality of representation issues. This package would allow the agency to significantly improve the quality of legal services in juvenile dependency matters.
- Package No. 101 would provide one third of the funding required for PDSC to carry out the statutory directive to PDSC to adopt a compensation plan for the office of public defense services that is commensurate with other state agencies. ORS 151.216(1)(e).
- Package No. 102 would bring public defender attorney salaries one third of the way closer to deputy district attorney salaries, and increase the hourly rates for attorneys and investigators to rates that are more competitive in order to allow the public defense system to recruit and retain a sufficient number of qualified attorneys and investigators as well as to comply with PDSC’s statutory mandate to adopt policies that provide for a “fair compensation” system. ORS 151.216(1)(f)(C).

Criteria for 2013-15 Budget Development

To continue to provide constitutionally and statutorily mandated legal representation to financially eligible persons while improving the quality of representation and maintaining the long-term viability of the program.

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Reduction Options

Appellate Division

A 25% reduction (\$3.8 million GF) of the agency's current service level for the Appellate Division would require the elimination of 13 attorney positions and three support staff positions. The existing backlog of appellate cases would increase and the average length of time an appeal is pending would increase. The Court of Appeals may order the dismissal of pending cases that exceed 350 days from the date the record settles to the filing of the opening brief.

Professional Services Account

A 25% reduction (\$58.3 million GF) of the Professional Services Account represents the level of funding required for over six months of public defense services. Unless the 2013 Legislature acts to either decriminalize some behavior or reduce the seriousness level of some offenses and thereby reduce the number and cost of the cases on which counsel must be appointed, or funds this caseload, PDSC will have to cease payment for appointed counsel and related expenses during the last quarter of the 2013-15 biennium. Generally, if counsel is not available, the cases will be dismissed or held in abeyance.

Contract and Business Services Division

A 25% reduction (\$839,000 GF; \$125,000 OF) of the division's current service level will require the elimination of approximately five positions (contract analysts and accounting staff), which will result in delays in paying providers and a substantially reduced ability for staff to audit contractor caseload reports, fee statements and expense requests. Delayed payments will impact over 1,500 individual service providers and businesses in Oregon. Failure to adequately review payments will likely result in the inappropriate expenditure of funds.

10/25% REDUCTIONS OPTIONS (ORS 291.216)

10% Reduction

ACTIVITY OR PROGRAM (WHICH PROGRAM OR ACTIVITY WILL NOT BE UNDERTAKEN)	DESCRIBE REDUCTION (DESCRIBE THE EFFECTS OF THIS REDUCTION. INCLUDE POSITIONS AND FTE IN 2013-15 AND 2015-17)	AMOUNT AND FUND TYPE (GF, LF, OF, FF. IDENTIFY REVENUE SOURCE FOR OF, FF)	RANK AND JUSTIFICATION (RANK THE ACTIVITIES OR PROGRAMS NOT UNDERTAKEN IN ORDER OF LOWEST COST FOR BENEFIT OBTAINED)
1. Appellate representation will be further delayed.	REDUCTION OF 5.4 FTE ATTORNEY POSITIONS AND 1.2 FTE SUPPORT STAFF POSITIONS WILL AT FIRST EXTEND THE CURRENT DELAY IN FILING THE OPENING BRIEF. OVER TIME, AS THE BACKLOG OF CASES GROWS, ALL CASES WILL BE DELAYED MORE THAN 350 DAYS AT WHICH POINT FEDERAL INTERVENTION IS LIKELY.	\$1,500,702 GENERAL FUND	THE AGENCY CANNOT RANK THE RELATIVE IMPORTANCE OF CONSTITUTIONALLY MANDATED SERVICES.
2. Trial-level representation will not be provided during the final 2.4 months of the biennium.	IN THE ABSENCE OF FUNDING FOR LEGAL REPRESENTATION, PROSECUTIONS CANNOT PROCEED.	\$23,318,249 GENERAL FUND	THE AGENCY CANNOT RANK THE RELATIVE IMPORTANCE OF CONSTITUTIONALLY MANDATED SERVICES.
3. Auditing of fee statements and caseload reports.	REDUCTION OF 2 FTE WOULD REDUCE AGENCY'S ABILITY TO AUDIT FEE STATEMENTS AND TO VERIFY CONTRACT CREDITS CLAIMED.	\$335,481 GENERAL FUND \$49,844 OTHER FUND (APPLICATION/CONTRIBUTION PROGRAM)	IN THE ABSENCE OF AUDITING, IT IS LIKELY THAT THE EXPENDITURES FROM THE PROFESSIONAL SERVICES ACCOUNT WOULD INCREASE.

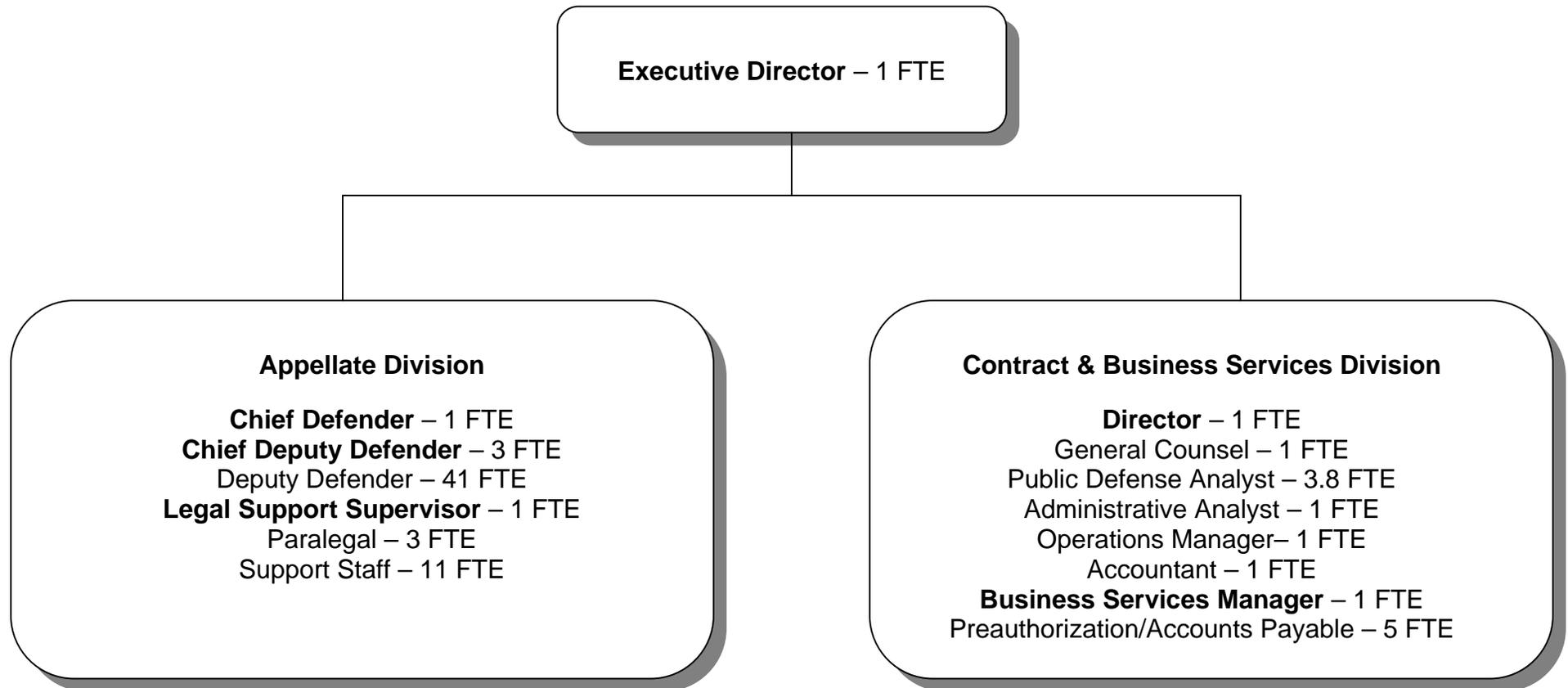
10/25% REDUCTIONS OPTIONS (ORS 291.216)

25% Reduction

ACTIVITY OR PROGRAM (WHICH PROGRAM OR ACTIVITY WILL NOT BE UNDERTAKEN)	DESCRIBE REDUCTION (DESCRIBE THE EFFECTS OF THIS REDUCTION. INCLUDE POSITIONS AND FTE IN 2013-15 AND 2015-17)	AMOUNT AND FUND TYPE (GF, LF, OF, FF. IDENTIFY REVENUE SOURCE FOR OF, FF)	RANK AND JUSTIFICATION (RANK THE ACTIVITIES OR PROGRAMS NOT UNDERTAKEN IN ORDER OF LOWEST COST FOR BENEFIT OBTAINED)
1. Appellate representation will be further delayed.	REDUCTION OF 13 FTE ATTORNEY POSITIONS AND 3 FTE SUPPORT STAFF POSITIONS WILL AT FIRST EXTEND THE CURRENT DELAY IN FILING THE OPENING BRIEF. OVER TIME, AS THE BACKLOG OF CASES GROWS, ALL CASES WILL BE DELAYED MORE THAN 350 DAYS AT WHICH POINT FEDERAL INTERVENTION IS LIKELY.	\$3,751,756 GENERAL FUND	THE AGENCY CANNOT RANK THE RELATIVE IMPORTANCE OF CONSTITUTIONALLY MANDATED SERVICES.
2. Trial-level representation will not be provided during the final 6 months of the biennium.	IN THE ABSENCE OF FUNDING FOR LEGAL REPRESENTATION, PROSECUTIONS CANNOT PROCEED.	\$58,295,622 GENERAL FUND	THE AGENCY CANNOT RANK THE RELATIVE IMPORTANCE OF CONSTITUTIONALLY MANDATED SERVICES.
3. Auditing of fee statements and caseload reports.	REDUCTION OF 5 FTE WOULD ELIMINATE AGENCY'S ABILITY TO AUDIT FEE STATEMENTS AND TO VERIFY CONTRACT CREDITS CLAIMED.	\$838,703 GENERAL FUND \$124,609 OTHER FUND (APPLICATION/CONTRIBUTION PROGRAM)	IN THE ABSENCE OF AUDITING, IT IS LIKELY THAT THE EXPENDITURES FROM THE PROFESSIONAL SERVICES ACCOUNT WOULD INCREASE.

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Organization Chart



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Revenue Discussion

ORS 151.487, et seq., provide the authority for judges to order individuals who apply for court-appointed counsel to pay the administrative costs of determining the eligibility of the person and the anticipated cost of public defense services prior to the conclusion of the case. Judicial Department Verification Specialist (VS) staff assist the courts in determining whether a person will be ordered to pay what is currently a \$20 application fee and a “contribution amount” toward the anticipated public defense cost of the case. The program is referred to as the Application/Contribution Program (ACP).

ACP revenue that is collected is deposited in a subaccount of the Public Defense Services Account, pursuant to ORS 151.225(3). The same ORS authorizes funds in the subaccount to be used to reimburse the actual costs and expenses, including personnel expenses, incurred in the administration and support of the public defense system. Currently, ACP revenue funds 22.7 FTE VS positions in the courts and 2.3 FTE positions within PDSC. The VS positions are distributed throughout the state with partial FTE in a number of counties.

Anticipated revenues for the 2013-15 biennium are \$4,433,018. Of that amount, \$2,722,500 will be transferred to the Judicial Department to fund the VS positions and \$498,435 will be expended by PDSC. The remaining \$1,212,083 will be held in reserve.

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Appellate Division

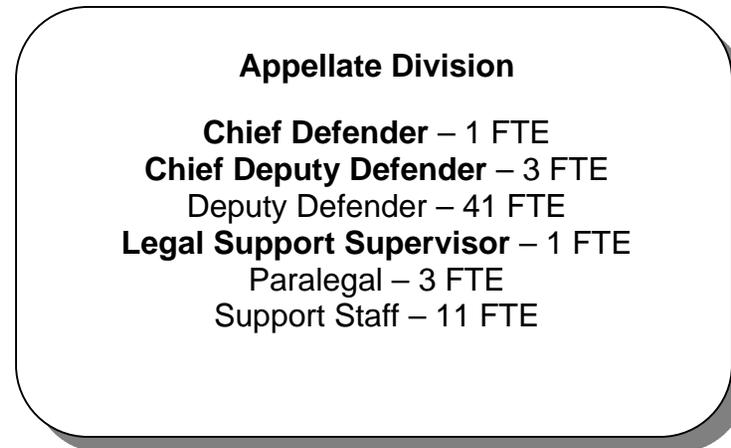
Program Description

The agency's Appellate Division (AD) is the defense counterpart to the Appellate Division of the Oregon Department of Justice. AD provides statutorily and constitutionally mandated appellate representation to financially eligible individuals in misdemeanor and felony appeals, inmates requesting judicial review of decisions by the Board of Parole and Post Prison Supervision, and parents in juvenile dependency and termination of parental rights appeals.

The majority of AD's representation occurs in the Oregon Court of Appeals and the Oregon Supreme Court. The division has appeared and argued in the United States Supreme Court twice in the past six years.

Organizational Chart

The Appellate Division has 60 FTE in the following positions:



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Summary Description of Attorney Positions

Chief Defender: The Chief Defender is responsible for managing the division. The responsibilities include recruiting and training new attorney employees and directly supervising the division's litigation in the Oregon Supreme Court and the United States Supreme Court. The Chief Defender has a minimal caseload that emphasizes practice in the Oregon Supreme Court.

Chief Deputy Defenders: Three Chief Deputies support the Chief Defender in managing the division. Each Chief Deputy carries half a caseload and is responsible for a discrete management area: personnel, operations, or outreach.

Deputy Defenders: The remaining Deputy Defender classifications are Senior Deputy, Deputy Defender II, and Deputy Defender I.

A Senior Deputy Defender provides representation in the most complex cases, such as death penalty litigation, and acts as leader for a team of four to six Deputy I and Deputy II attorneys. In the team leader role, a Senior Deputy leads discussions, serves as a resource for team members within and outside the team meeting setting, and edits the team members' meritorious Court of Appeals briefs.

A Deputy Public Defender II attorney provides representation in moderate to complex felony cases.

The Deputy Public Defender I position is the entry level attorney position. A Deputy Defender I provides representation in misdemeanor, simple felony, and parole appeals.

Case Assignments and Production Levels

Criminal Section

There are two primary case types for direct criminal appeal: (1) a *trial*-type case and (2) a *plea*-type case. A trial-type case includes a jury trial, trial to a judge, conditional plea, parole appeal, and an appeal initiated by the Attorney General. The transcript length for a trial-type case varies from 50 to several thousand pages.

A plea-type case refers to a guilty plea, no-contest plea, probation violation hearing, and re-sentencing proceeding. Transcript lengths typically range from 20 to 80 pages for plea-type cases.

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During the 2003-05 biennium, the Appellate Division assigned 3,223 cases to its attorneys (2,060 trial type and 1,163 plea type cases); during the 2005-07 biennium, the division assigned 4,041 cases (2,210 trial type and 1,831 plea type cases); during the 2007-09 biennium, the division assigned 3,694 cases (2,005 trial type and 1,685 plea type cases); during the 2009-11 biennium, the division assigned 4,020 cases (1,973 trial type and 2,047 plea type cases). During the first half of the 2011-13 biennium, the division assigned 1,640 cases (878 trial and 762 plea type cases); those numbers project to 3,280 cases for the biennium.

AD attorneys exceed national workload standards. According to the Institute for Law and Justice, the annual appellate public defender workload ranges from 25 to 40 cases per attorney. Georgia, Indiana and Washington set the maximum appellate caseload at 25 cases per attorney; Nebraska sets the maximum appellate caseload at 40 cases per year. *Compendium of Standards for Indigent Defense Systems* (2000). The average annual caseload for an AD attorney is currently 45 case assignments per year.

Juvenile Section

At the end of the 2007 session, the Legislature funded the creation of a four-attorney Juvenile Appellate Section within the Appellate Division to centralize and enhance appellate representation for parents in juvenile dependency and termination of parental rights cases.

The section is responsible for the representation of parents in 75% of the dependency and termination cases appealed to the Court of Appeals. In addition, the section functions as a statewide resource for trial-level counsel.

Juvenile dependency and termination of parental rights cases have an expedited appeal schedule. ORAP 10.15(6). These cases must be resolved quickly so that the permanent placement of children can occur with the least disruption to the child's life. For this reason, the Juvenile Appellate Section can never have a backlog. The section only accepts the number of cases that can be resolved within the established timelines. Cases that are referred to the agency that cannot be kept in-house due to workload issues are referred out to a panel of appellate attorneys.

In 2012, the agency assigned one additional attorney position from the criminal section to the Juvenile Appellate Section so that there was sufficient capacity to cover absences due to parental leaves, sick leave and vacation time.

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Appellate Division

010 Non-PICS Personal Services / Vacancy Factor

Package Description

This package includes standard adjustments to the PERS Pension Bond Contribution, adjustments to Mass Transit Tax and adjustments to the division's anticipated vacancy savings. The components of this package increase general fund expenditures by \$140,376.

030 Standard Inflation & State Government Service Charge

Package Description

This package includes standard inflation adjustments on services and supplies in the amount of \$46,894 in general funds. State government services charges have increased by \$18,431, making the total amount of the package an increase of \$65,325 in general funds.

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Appellate Division

101 Employee Commensurate Compensation

Package Description

Purpose:

This package will enable the Appellate Division of PDSC to provide quality legal representation through recruitment and retention of expert attorney staff who will be capable of providing quality and cost-efficient appellate representation. The package provides one third of the funding needed to establish attorney salary schedules comparable to attorney salary schedules at the Department of Justice, a goal that is consistent with legislative directive: "The Public Defense Services Commission shall * * * [a]dopt a compensation plan, classification system and personnel plan for the office of public defense services that are commensurate with other state agencies." ORS 151.216(1)(e).

How Achieved:

In developing the requested salary structure, the agency used the Department of Justice's Appellate Division as the comparable agency. Agency and Department of Justice attorneys appear on the exact same cases from opposing sides. The following chart compares agency attorney salary ranges with the ranges of comparable positions in the comparison agency. (Steps are current as of the April 2012 PICS freeze used for budget preparation.)

	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8	Step 9	Percentage increase required to match top step
Asst Atty General	5288	5551	5825	6120	6428	6737	7060			
Deputy Defender 1	4789	5037	5288	5550	5825	6120				15%
Sr Asst Atty General	7435	7808	8205	8616	9042	9493	9967	10465		
Deputy Defender 2	5550	5825	6120	6424	6743	7080	7433	7804	8195	28%
Attorney-in-Charge	7332	7699	8089	8490	8906	9351	9813	10308		
Sr Deputy Defender	6120	6424	6743	7080	7433	7804	8195	8605	9036	14%

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Historically, the agency hires recent law school graduates into the entry-level Deputy I attorney position and devotes significant management-level resources to training during an attorney's first six months of employment. The training investment shows returns for the agency after twelve months, when the typical entry-level attorney becomes increasingly self-sufficient and productive. After two to three years, the Deputy I attorney has demonstrated sufficient competency to warrant consideration for the Deputy II position. After two to three years in the Deputy II position (or five years with the agency), the attorney is an experienced, competent, and valued contributor to the agency. Unfortunately, this time period coincides with the greatest salary disparity between the agency and the Attorney General's office, the attorney is experienced and attractive to other firms, and the time loss and fatigue associated with a two-hour daily commute from Portland or Eugene leads many attorneys to consider and seek employment elsewhere. Since 2003, twenty six attorneys have left the agency, many at the the four-to six-year mark.

The policy package helps address the glaring compensation inequity between state employees on opposite sides of the same cases, would mitigate the brain drain that occurs around the five-year employment mark, and enables management to direct training resources into case production. The policy package would enable the agency to recruit and retain attorneys who are committed to and capable of achieving the agency's goal of providing quality, cost efficient legal representation.

Staffing Impact: No impact on staffing.

Revenue Source: This package would require an additional \$279,155 from general funds.

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Professional Services Account

Program Description

The Professional Services Account pays the cost of legal representation in criminal cases for financially eligible persons at trial, and for persons who are entitled to state-paid legal representation if they are financially eligible and are facing involuntary civil commitment proceedings; contempt; probation violation; juvenile court matters involving allegations of delinquency and child abuse or neglect; and other limited civil proceedings. The Account also funds the costs of all transcripts and the cost of appellate legal representation for cases not handled by the Appellate Division.

The United States Constitution, the Oregon Constitution, and Oregon statutes require the provision of legal representation, at state expense, for persons who are determined to be “financially eligible” (see “Financial Eligibility Guidelines” below) and who face the types of state court proceedings listed below.

- Although “court-appointed counsel” and “public defenders” generally are associated by the public with criminal cases, only 58% of the FYE 2011 public defense caseload was for representation in criminal trial court proceedings. Another 40% of the caseload, for example, was for representation in juvenile cases.
- Public defense representation was provided in over 170,000 cases in FYE 2011.

The Professional Services Account provides funding for legal representation in the following types of state trial court proceedings for persons who are determined to be financially eligible for appointed counsel. The percentages of the total public defense trial-level caseload that each of the following case types represented in FYE 2011 are noted in parentheses.

- Criminal proceedings, ranging from misdemeanors to death penalty cases (43%);
- Child abuse and neglect proceedings, including dependency and termination of parental rights proceedings and review hearings—all of which require the appointment of counsel upon request for children who are the subject of these proceedings and the appointment of counsel for most financially eligible parents (35%);
- Probation violation and extradition proceedings (13%);

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- Contempt proceedings, including nonpayment of court-ordered child support and violations of Oregon's Family Abuse Prevention Act (2%);
- Civil commitment and Psychiatric Security Review Board proceedings (1%);
- Post-conviction relief and Habeas Corpus proceedings (<1%); and
- Juvenile delinquency and probation violation proceedings (5%).

In addition, persons who are determined to be financially eligible are entitled by constitutional provisions or statutes to appointed counsel on appeal of any of the above types of cases.

The Appellate Division is responsible for the majority of criminal and probation violation appeals and for the majority of parents' appeals from juvenile dependency and termination of parental rights judgments. The Professional Services Account provides funding for counsel in all other appeals – for all the case types set out above.

Oregon's Eligibility Verification Program and Financial Eligibility Guidelines

The Oregon Judicial Department established one of the first eligibility verification programs in the nation in 1989. For years, Oregon's program for screening applications for appointment of counsel and verifying applicants' income and assets was nationally recognized. Its structure remains intact, but the resources available for the program have been adversely impacted, particularly over the past eight years.

From implementation of the verification pilot project in 1988 until 1993, the Judicial Department's Indigent Defense Services Division had total responsibility for the verification program and verification positions in the courts. Effective January 1, 1993, the verification positions (Verification Specialists – VSs) and supervision of VSs were transferred to the individual trial courts. Since that time and increasingly so, these positions have been among the first in many local courts to be reduced or laid off due to reduced funding, or utilized for court functions other than verification.

The verification program, which continues to be administered by the Judicial Department, historically more than pays for itself; i.e., for every dollar expended for the program, approximately \$2 is saved from the Professional Services Account.

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Vs assist judges in their decision whether to order the appointment of state-paid counsel. The Vs are responsible for ensuring that Affidavits of Eligibility are completed and that the information provided by applicants is complete. Using an “Eligibility Worksheet”, a VS performs calculations relating to an applicant’s available income and liquid assets and the eligibility guidelines addressed below to make a determination whether to recommend to the judge the appointment of counsel. This process is called “screening” for eligibility.

In addition, Vs are responsible for verifying financial information provided to the court, such as income, assets and dependents. This process, which generally occurs after the applicant first appears in court, is called the “verification” process. Vs routinely verify the financial information provided by applicants, using information obtained from the Department of Motor Vehicles, local county assessors’ offices (property value), federal and state agencies (e.g., Social Security, Food Stamps, Employment Division) and private businesses (credit reports).

Financial Eligibility Guidelines

The United States Constitution, Oregon’s Constitution and/or Oregon statutes require the appointment of counsel at state expense for those who are unable to retain suitable counsel in certain legal proceedings. Generally, these proceedings are limited to those that involve the potential for the loss of one’s liberty (e.g., criminal, probation violation and civil commitment cases) or the loss of other rights determined to be so essential as to demand the assistance of counsel (e.g., termination of a person’s parental rights).

The following is a summary of the statutory provisions and policies/guidelines adopted with respect to the courts’ determinations of whether a person who applies for court-appointed counsel will be provided such counsel, i.e., whether the person is financially eligible for state-paid counsel.

The Oregon statutory standard for determining who is financially eligible to receive services paid from the Professional Services Account mirrors that established under the federal constitution. Specifically, “. . . a person is financially eligible for appointed counsel if the person is determined to be financially unable to retain adequate counsel without substantial hardship in providing basic economic necessities to the person or the person’s dependent family...” (ORS 135.050 and ORS 151.485). An applicant for state-paid representation is required to provide a verified financial statement, listing detailed information regarding income, assets, debts, and dependents.

The eligibility standard is implemented statewide under a two-pronged means test.

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First prong: Federal food stamp guidelines (130% of the federal poverty level) serve as the first determinant of eligibility. If the applicant's income is less than or equal to the eligibility level for food stamps, the applicant is presumed to be eligible for appointed counsel, unless the applicant has liquid assets that could be used to hire an attorney. As of October 2011, the Federal food stamp gross income eligibility level for a family of four is \$28,665 per year.

Second prong: If an applicant's income exceeds food stamp standards, that person is eligible for state-paid counsel only if the applicant's available income and liquid assets are determined to be insufficient to hire an attorney, depending upon the seriousness of the pending case(s). The "privately hired attorney" guideline rate currently used, for example, for a DUII case is \$2,500. If an applicant has available income and assets exceeding \$2,500, guidelines provide that eligibility verification court staff recommend that the person be denied appointed counsel.

Program Service Delivery

There is no position authority associated with the Professional Services Account. The Account funds mandated legal representation entirely by independent contractors or hourly paid attorneys in the private sector.

PDSC provides legal services through the Account principally pursuant to two-year contracts under which compensation is paid on a per-case basis, based upon the types of cases included within a specific contract. The contracts are negotiated and monitored for compliance by the director and staff of the Contract and Business Services Division. In addition PDSC provides legal services through "private bar appointed counsel" (individual case-by-case assignments where compensation is on an hourly rate basis).

In approximately 98% of all trial-level, non-death penalty public defense cases, legal representation is provided pursuant to contracts entered into between the PDSC and private sector, non-state employee attorneys. These contracts are with nonprofit public defender offices, law firms, consortia of attorneys, and sole practitioners. By comparison, in FYE 1993, legal representation was provided pursuant to contracts (versus hourly rate individual case appointments) in 85% of the total caseload. Unlike public defense cases in which an attorney is appointed on a case-by-case, hourly paid basis, a number of PDSC's contractors also provide additional non-attorney services such as investigation and interpreter services.

As of June 30, 2012, there were 96 contracts in all 36 counties for the provision of public defense representation. The contracts vary with respect to the types and number of cases covered. The contracts range from "specialty contracts" (limited to specific case types such as death penalty, post-conviction relief, juvenile, or civil commitment) to contracts that include representation in virtually all

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case types for which state-paid counsel is mandated. The PDSC also has 14 contracts for non-attorney services, such as forensic services and mitigation services.

Among the agency's long-term providers, some of the most senior attorneys are reaching retirement age. Due to increases in the cost of living over the past two decades and the lack of a corresponding inflationary increase in public defense funding until recent biennia, these offices have experienced increasing difficulty recruiting and retaining new attorneys.

Based on testimony presented to the Public Safety Subcommittee of the Joint Ways and Means Committee in the 2007 Legislative Assembly about the extreme difficulty one type of provider — nonprofit public defender offices — was having attracting and retaining a sufficient number of qualified attorneys to fulfill their contract obligations, the Legislature provided the agency with sufficient funding in the 2007-09 biennial budget to increase public defender salaries to a level that would move them one-sixth of the way to parity with district attorney salaries in the same counties. Unfortunately, since average district attorney salaries also increased over the course of the last two biennia, the cost of achieving parity with district attorney salaries is actually greater now than it was in 2007.

But public defense offices don't compete only with prosecutor's offices for qualified attorneys. It is also important to note that both prosecutor and public defender salaries lag significantly behind the average salaries of attorneys engaged in other types of practice. The Oregon State Bar's 2012 Economic Survey report noted that average full-time public defense attorneys' and prosecutors' salaries (\$68,246 for public defenders, and \$93,979 for public prosecutors) were well below any area of private practice. (Business and corporate litigation lawyers reported an average salary of \$192,715. Family law practitioners received an average salary of \$99,637 and private criminal defense lawyers received an average of \$134,779.)

Many years of declining compensation (in terms of real dollars adjusted for inflation) and increasing caseloads (which providers had to accept in order to make ends meet) means that Oregon's public defense system will remain in jeopardy until some of the lost ground can be recovered through the provision of more reasonable rates of compensation.

With respect to the much smaller portion of the Professional Services Account that is expended for attorneys handling cases on an hourly rate basis, the current guideline rates (\$45 per hour for non-death penalty cases and \$60 per hour for death penalty cases) have increased by only \$5 per hour since June 1991. The funding requested in Policy Option Package 102 would allow an increase in the current rates to \$53 per hour for non-death penalty cases and \$72 per hour for death penalty cases for the 2013-15 biennium.

Persons who are financially eligible for appointed counsel are also eligible for non-attorney services that are "reasonable and necessary" for the preparation, investigation, and presentation of the case (ORS 135.055(3)). Examples of such non-attorney services

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are interpreters, investigators, transcriptionists, and psychologists. Non-attorney services must be sought and approved on a case-by-case basis.

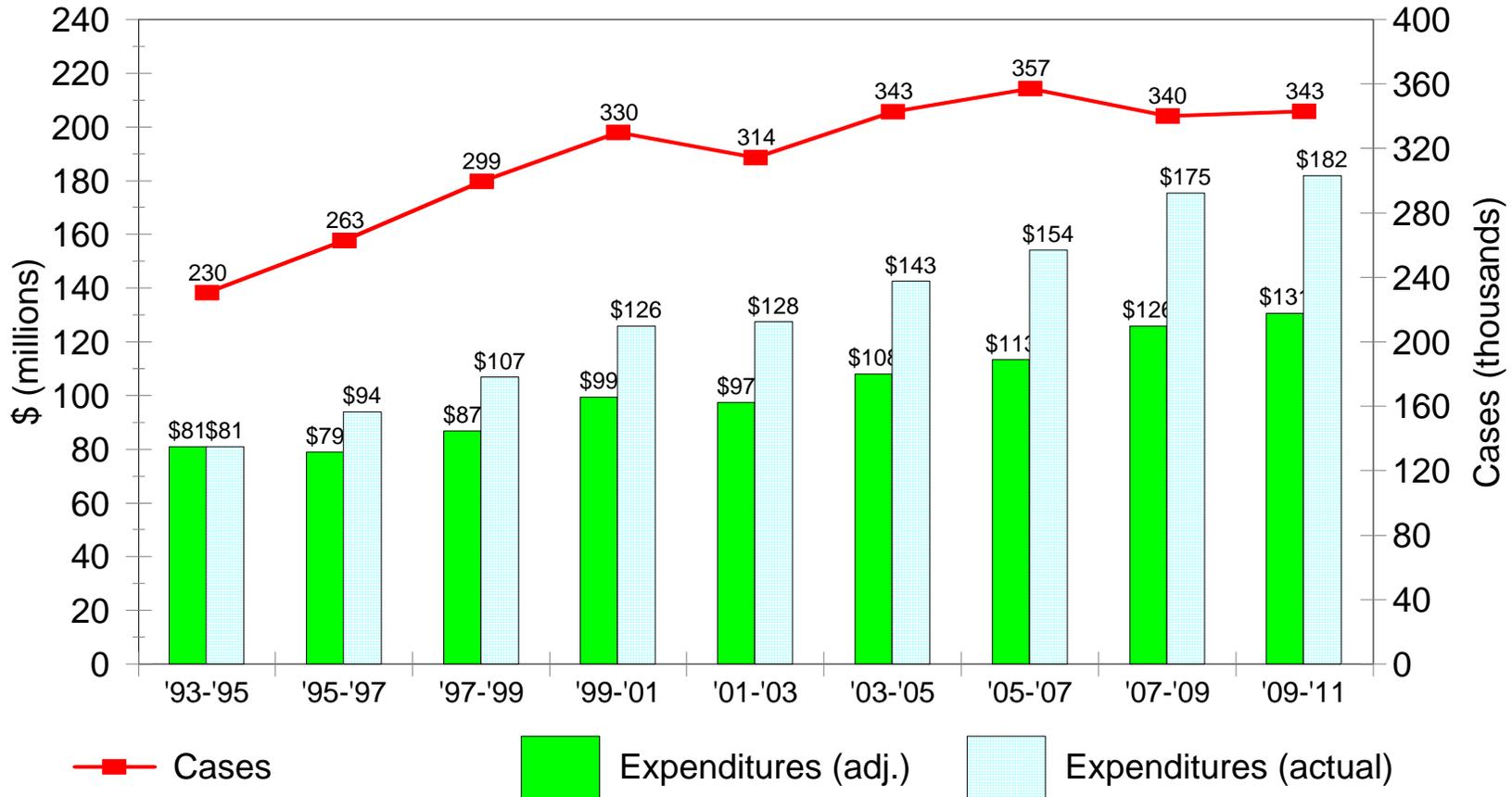
Policy Option Package 102 would also allow increases in the rates paid to investigators from \$28 to \$30 per hour in non-death penalty cases and from \$39 to \$41 per hour in death penalty cases. Policy Option Package 100 would provide funding to reduce trial-level juvenile dependency caseloads by 7% in order to make progress toward addressing chronic and serious quality of representation issues.

Program Costs

Generally, program costs have increased due to increased caseloads and the complexity of the caseloads; e.g., Measure 11, “Jessica’s Law” prosecutions, juvenile dependency and termination of parental rights and death penalty post-conviction relief cases. A chart displaying a “Comparison of Public Defense Trial Level Non-Death Penalty Expenditures and Caseloads” for the last nine biennia is included on the following page.

The chart includes figures that have been adjusted for inflation. Viewing the actual program costs versus inflation-adjusted costs shows that a significant portion of the increase in costs for non-death penalty cases is attributable to simple inflation.

Comparison of Public Defense Trial Level
 Non-Death Penalty Expenditures and Caseloads
 1993-95 biennium through 2009-11 biennium
 (Inflation Adjusted and Actual)



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The costs associated with death penalty representation do not follow the same pattern as costs for non-death penalty cases. A charge of Aggravated Murder with a possible sentence of death is the most costly case type to defend. Even so, one would expect that if the number of new cases each biennium remains constant, then costs should remain constant (plus inflation). However, the real cost driver is whether or not a sentence of death is imposed.

When a death sentence is imposed, the case is subject to automatic review by the Oregon Supreme Court. The majority of these appeals would be handled by the Appellate Division and would not impact expenditures from the Professional Services Account. However, the Appellate Division has a limited capacity to accept death penalty cases so, depending on the timing of such cases, some would need to be assigned to counsel payable from the Professional Services Account.

If an appeal is unsuccessful, the next step is post-conviction relief. All post-conviction relief cases are handled by attorneys payable from the Professional Services Account. A post-conviction relief case with a sentence of death will often cost as much or more than the original trial-level case. Post-conviction relief attorneys must not only review the work performed by the original trial counsel but must also explore avenues of defense that were not pursued in the original case.

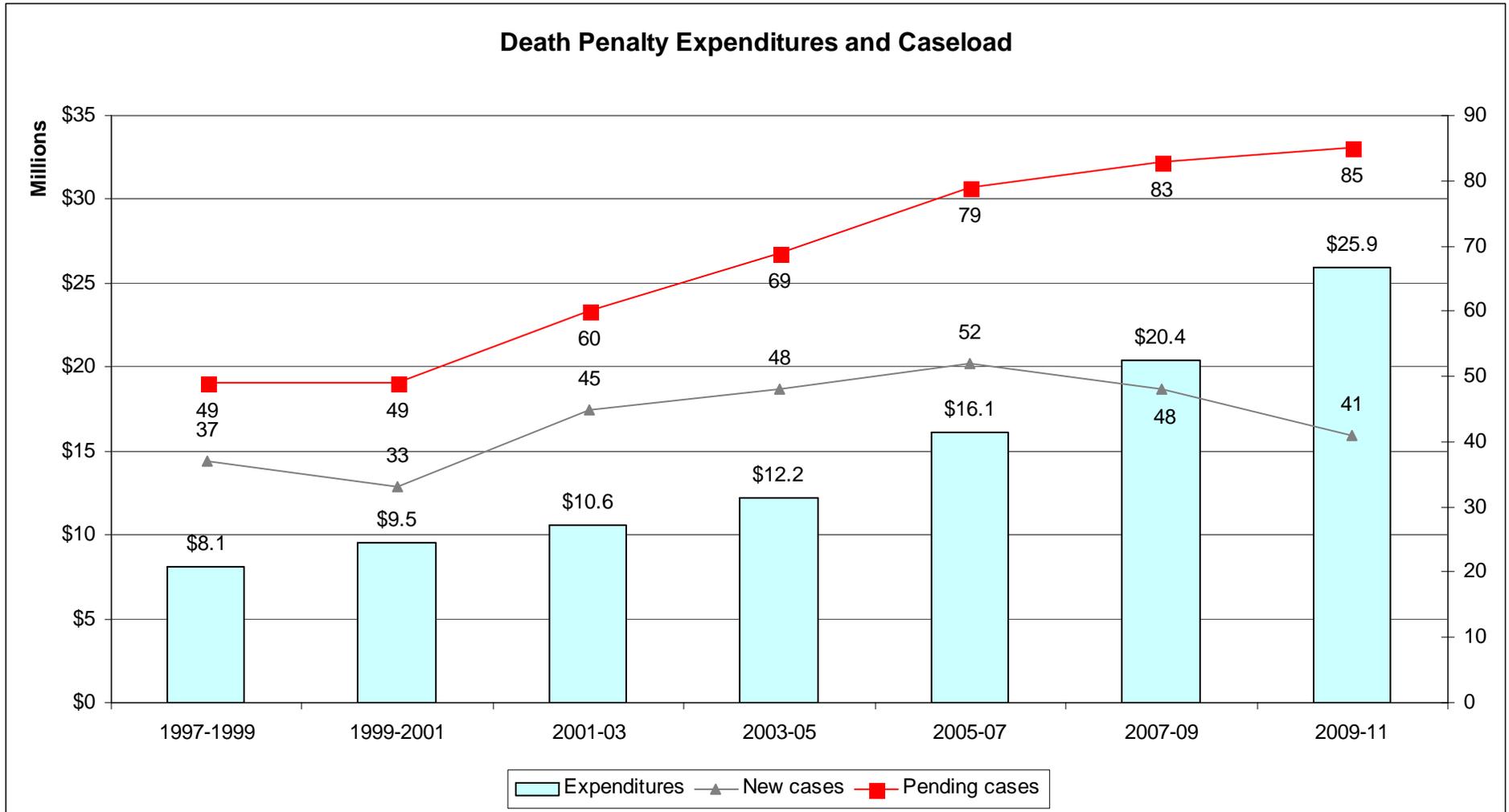
If the post-conviction relief case is unsuccessful, the next step is an appeal of the post-conviction relief case. Post-conviction relief appeals are also handled exclusively by attorneys payable from the Professional Services Account. If a post-conviction relief appeal is unsuccessful, then all state remedies have been exhausted and a case moves to the federal court with representation provided by the Federal Defenders office.

If a direct appeal, a post-conviction relief, or a post-conviction relief appeal is successful, then a case can return to the trial court for a new trial or resentencing.

There have been 61 defendants sentenced to death since the death penalty was reinstated in 1984. Of those, two have been executed, two died while their cases were still pending in the state court system, one had his sentence overturned, and 19 were later resentenced to a lesser sentence. Of the remaining 37 defendants, only one has exhausted his state remedies and moved to the federal system.

What this means in budgetary terms is that there will be an exponential growth in expenditures for death penalty cases until the point at which new sentences of death each year match the number of cases that are resolved at the state level or move to the federal system. The chart on the following page shows death penalty expenditures relative to new aggravated murder filings during each biennium and relative to the number of cases that are pending from previous biennia on July 1st (the start of each biennium).

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Professional Services Account

021 Phase In

Package Description

The agency is required by ORS 151.216 (1)(i) to reimburse the Judicial Department for the costs of personnel and other costs associated with location of eligibility verification and screening personnel pursuant to ORS 151.489. Prior to July 1, 2012, the reimbursements had been made using revenue transfers. On the recommendation of the Legislative Fiscal Office, reimbursements to the Judicial Department are now entered as Special Payments, effective July 1, 2012.

Because the change was made mid-biennium, the budget roll-up from the 2011-13 biennium to the 2013-15 biennium only included one year's worth of Special Payments. This package increases the agency's Other Fund limitation to account for the transfers that occurred during the first year of the 2011-13 biennium.

040 Mandated Caseload

Package Description

This essential package provides the additional funding required for the 2013-15 biennium. The package assumes no changes in PDSC policies regarding financial eligibility and no changes in guideline payment rates. The package does not include any additional funding that may be necessary due to the passage of ballot measures or new legislation.

There are six components to this essential package:

1. Standard inflationary adjustment

The Department of Administrative Services has set the standard inflationary adjustment for the 2013-15 biennium at 2.4% for services and supplies and 2.8% for personal services. For the Professional Services Account, the inflationary adjustment is \$5,644,321.

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2. Trial-level non-death penalty caseload change

The caseload in recent years has been more challenging to project in part due to unprecedented changes in the economy. Budget reductions for law enforcement, prosecution, probation, corrections, social services, and the judicial system create unpredictability in the caseload as each entity adjusts its current practices to cope with budget shortfalls. For budgetary purposes, the caseload is projected to remain flat compared to the caseload funded for the 2011-13 biennium. The agency will adjust the projection throughout the remainder of the 2011-13 biennium and periodically during the 2013-15 biennium.

3. Death penalty caseload from prior biennia

Although the annual number of new death penalty cases filed has been fairly stable in recent years, the cumulative cost of these cases increasingly impacts each subsequent biennium. After the initial trial-level case, which often spans a year or more, there is an appeal, then post-conviction relief, then an appeal of the post-conviction relief case. So every year, in addition to expending funds for representation on new cases filed, the agency continues to have expenditures for cases filed in previous years. Death sentence post-conviction relief appeals currently pending are the result of cases originally filed as far back as 1986. The additional expenditure during the 2013-15 biennium for death penalty cases from prior biennia is \$4,238,379.

4. Non-attorney provider cost increase

The agency's guideline rate for forensic services is \$90 per hour. Most forensic experts in Oregon have raised their rates to \$125-\$150 per hour. The guideline rate for medical experts is \$110 per hour. Many medical experts now charge \$150-\$300 per hour. Because the federal defender pays higher rates, providers have a sufficiency of work available to them and do not need to accept public defense work at the state level at reduced rates. The agency has therefore had to allow exceptions to the guideline rates in order to obtain such services.

5. Personal services adjustment

The standard inflationary adjustment for services and supplies is not applicable to personal services. Personal services expenditures (principally salary and health insurance) increase at a greater rate. An adjustment of 8.4% of the personal services portion of contracts corresponds to the Department of Administrative Services personal services adjustment for state employees.

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6. Mileage reimbursement.

The agency's mileage reimbursement rate is linked to the rate set in the Oregon Accounting Manual (currently 55.5 cents per mile). Funding in the current biennium is provided for a rate of 51 cents per mile; the increase to 55.5 cents per mile exceeds the amount covered by the inflationary adjustment by \$139,484.

The table below summarizes the components of this essential package.

1. Standard inflationary adjustment	\$5,644,321
2. Trial-level non-death penalty caseload decrease	\$0
3. Death penalty caseload from prior biennia	\$4,238,379
4. Non-attorney provider cost increase	\$1,248,436
5. Personal services adjustment	\$12,219,139
6. Mileage reimbursement (55.5 cents per mile)	\$139,484
Total	\$23,489,755

050 Fund shifts

Package Description

This package shifts \$2,150,000 from Other Funds to General Funds within the Professional Services Account appropriation. The agency's budget for the 2011-13 biennium includes a one-time Other Funds expenditure limitation for expenditure of the ending balance in the Public Defense Services Account (funds generated by the Application Contribution Program). Because this was a one-time use of this funding source, these funds must be replaced by General Funds. This package reflects this fund shift and has a net impact of zero.

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Public Defense Services Account

100 Juvenile Dependency Representation

Package Description

Purpose:

The purpose of this policy package is to provide funding to reduce trial-level juvenile dependency caseloads in order to address chronic and serious quality of representation issues. This package would allow the agency to improve the quality of legal services in juvenile dependency and termination of parental rights cases.

Over the last six years, the agency has evaluated and sought to improve the work of its juvenile contractors through a number of approaches including comprehensive performance reviews; promotion of best practices; provision of education and training opportunities; investigation and resolution of complaints from judges, attorneys and clients; the creation of a juvenile law resource center; and the creation of a juvenile appellate section within the Appellate Division. Despite these efforts, a statewide survey and the agency's site visit evaluations and structural reviews disclose continuing deficiencies in the quality of representation being provided statewide.

How Achieved:

The agency estimates that workloads exceed acceptable levels by approximately 20%. The agency is taking a multi-biennial approach by requesting incremental improvements over three biennia. This policy package would permit the agency to reduce current caseload levels in juvenile dependency and termination of parental rights cases by approximately 7%. The agency has followed with interest an ongoing effort in Washington State to address similar issues. Significant caseload reduction was a key component of a highly successful parent representation pilot project in that state. What began as a pilot project in three counties has now been extended to twenty-five counties.

If this policy package were funded, the agency would ensure that reduced caseloads actually resulted in improved representation by making such reductions conditional upon agreement to implement established best practices, participation in mandatory training sessions, and rigorous evaluation.

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Staffing Impact: No impact on staffing.

Revenue Source: \$3,818,237 from general funds.

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Public Defense Services Account

102 Public Defense Provider Compensation

Package Description

Purpose: To provide funding necessary to:

- attract and retain qualified attorneys in nonprofit, public defender organizations, primarily in Multnomah, Lane, Jackson, Deschutes, and Washington Counties;
- increase the hourly rates paid to attorneys who provide legal representation in public defense cases on an hourly rate basis (versus a flat, average cost per type of case basis under contract) — hourly-rate compensated cases represent a small portion of the public defense caseload; and
- increase the hourly rates paid to investigators who accept work on public defense cases.

How Achieved:

Adjustment Toward Public Defender Contractor Parity

The first component of this policy package would allow some adjustments to be made in response to the difficulty nonprofit, public defender organizations are having attracting and retaining qualified attorneys. Eleven of the current public defense contracts are with nonprofit public defender offices. Full-time attorneys and staff employed with these organizations are restricted to performing state-paid, public defense work only. In other words, the nonprofit contractors differ from their private law firm and consortium public defense contractor counterparts in that private, retained work is not available to the nonprofits to supplement their state-funded contracts.

One measure of their ability to attract and retain attorneys is whether the salaries of such attorneys are competitive within their local communities with attorneys engaged in comparable types of legal practice. A comparison of public defender attorney salaries and prosecution salaries in the same counties (based on the Oregon District Attorneys Association 2012 salary survey) showed that, based upon average salaries, public defender salaries for eight of eleven nonprofits were less than those for prosecuting attorneys. The differences between public defender attorney salaries and their prosecution counterparts ranged from \$7,838 to \$41,186 per attorney

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per year. The projected full biennium cost of increasing public defender attorney average salaries to the level of prosecution average salaries in their respective counties totals \$6,989,187 based upon 2012 salary levels. Neither benefits nor non-attorney staff salaries were compared in the 2012 study.

Benefits (such as PERS) that generally are available for government-employed attorneys (versus independent contractors, such as public defenders) make it more difficult for public defender offices to attract new hires. Retirement benefits available to public defender attorneys range from 6% to 10% employer contribution programs. Two of the 6% programs have been in effect for less than fifteen years. Prior to their establishment, there was no provision for retirement.

Approval of the amount requested would allow for some adjustments and improvements in salary for public defender offices in those counties where there is significant disparity with prosecutor salary levels. It is clear, however, that the amount does not represent the total cost of establishing salary and benefit parity for public defenders and their staff. The requested funding would be allocated to public defenders based upon greatest salary needs. For example, no improvements in the current public defenders' benefit program, such as retirement programs, are contemplated within the requested funding. Rather, the amount is viewed as a first step in establishing greater consistency in salary levels between public defender and district attorney staff. Reaching full parity in terms of both salary and benefit levels is a longer-range effort.

But public defense offices don't compete only with prosecutor's offices for qualified attorneys. It is also important to note that both prosecutor and public defender salaries lag significantly behind the average salaries of attorneys engaged in other types of practice. The Oregon State Bar's 2012 Economic Survey report noted that average full-time public defense attorneys' and prosecutors' salaries (\$68,246 for public defenders, and \$93,979 for public prosecutors) were well below any area of private practice. (Business and corporate litigation lawyers reported an average salary of \$192,715. Family law practitioners received an average salary of \$99,637 and private criminal defense lawyers received an average of \$134,779.)

Hourly Rate Increase for Hourly Paid Public Defense Attorneys

The current guideline rates (\$45 per hour for non-death penalty cases and \$60 per hour for death penalty cases) have increased by only \$5 per hour since June 1991. The requested funding would allow an increase in the current rates to \$53 per hour for non-death penalty cases and \$72 per hour for death penalty cases for the 2013-15 biennium.

The 2007 legislature provided funding for the 2007-09 biennium that permitted PDSC to increase the guideline rates for hourly-rate paid counsel statewide for the first time since 1991. Prior to 2007 public defense funding was inadequate, despite inflationary adjustments, to permit the agency to increase the rates, due to the fact that actual public defense caseloads generally exceeded the

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projected caseloads on which appropriations were based. Other demands on the Professional Services Account, such as continuing expenditures on death penalty cases filed in previous biennia, also contributed to the need to adopt a conservative approach toward administering public defense funding and prevented the Commission from increasing rates. A limited number of exceptions to the guideline hourly rates had been made in years just prior to 2007 on an individual case-by-case basis or for certain types of cases, such as post-conviction relief cases. For a number of years, there has been a shortage of attorneys who are qualified and willing to accept appointment to post-conviction relief cases.

The small increases in hourly rates that were implemented in August 2007 did not result in rates that bear any relation to rates regularly charged for their services by attorneys who handle criminal and family cases for retained clients. The Oregon State Bar's 2012 Economic Survey reports statewide average and median criminal defense hourly rates at \$214 and \$200 per hour. Family law attorneys statewide charge \$214 (average) and \$200 (median). Family law practice is similar to the work performed by public defense attorneys in juvenile dependency and termination of parental rights cases. To the extent attorneys who perform public defense representation at \$45 and \$60 per hour responded to the Bar's survey, those hourly rates would have helped contribute to the lower overall rates.

Just as with automobile mechanics or plumbers who are paid on an hourly basis, hourly rates paid to attorneys, whether in the public or private sector, are meant to include overhead costs such as staff salaries, taxes and benefits, rent and other office costs, and necessary capital. Overhead expenses frequently are estimated by attorneys to be 50% of the hourly rate. Assuming 50% overhead expenses and an average of 1,800 billable hours in one year, an hourly-rate paid public defense attorney working full time at \$45 per hour would receive \$81,000 per year, with half of that amount (\$40,500) paying for overhead and half being available as attorney salary.

The Consumer Price Index increased 69% between 1991 and 2012. Adjusted for inflation, the 1991 rates of \$40 and \$55 per hour should be \$67.66 and \$93.03 per hour in 2012.

Hourly Rate Increase for Hourly Paid Investigators Who Provide Public Defense Services

The amount requested for the 2013-15 biennium is the amount needed to allow increases in the rates paid investigators from \$28 to \$30 per hour in non-death penalty cases and from \$39 to \$41 per hour in death penalty cases.

Until 2007, with the exception of some investigation services in death penalty cases beginning in 1996, the public defense guideline rate for investigation services had been \$25 per hour since at least 1988. It appears that in most and perhaps all counties,

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the rate had been \$25 per hour since the state's assumption of responsibility from the counties for public defense in 1983. For death penalty cases, the hourly rate had been \$25 per hour until mid-1996 when that rate was increased to \$34 per hour for the most experienced investigators. In 2007 the Legislature provided sufficient funding to permit the agency to raise the rate in non-death penalty cases from \$25 to \$28 per hour and from \$34 to \$39 in death penalty cases.

Despite the increases that took effect in August 2007, investigator rates remain inadequate. The Public Defense Study Commission, established to study the public defense system during the 1999-01 interim, received testimony from investigators and non-investigators that the number and the quality of investigators who accept public defense work has diminished overall. This is due in significant part to the lack of increases in the hourly rates paid to these investigators and the hourly rates available in other public and private sectors for the same pool of investigators.

The table below summarizes the three components of this package.

1.	Funding to increase full-time public defender salaries to corresponding deputy district attorney salaries.	\$2,329,729
2.	Funding to provide an increase in the hourly rate paid to attorneys (\$53/hour non-capital; \$72/hour capital).	\$1,799,868
3.	Funding to provide an increase in the hourly rate paid to investigators (\$28/hour non-capital; \$39/hour capital).	\$732,814
Package total		\$4,862,411

Staffing Impact: No impact on staffing.

Revenue Source: \$4,862,411 general funds.

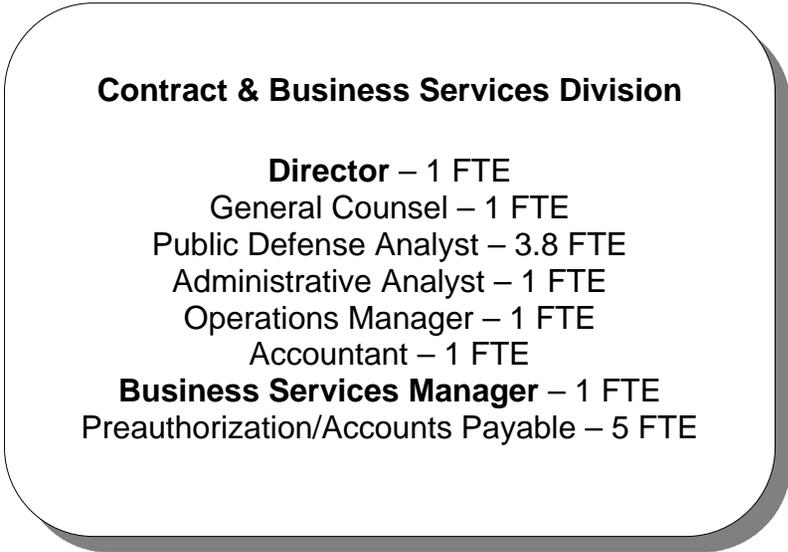
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Contract & Business Services Division

Program Description

The Contact and Business Services Division (CBS) is responsible for administering the public defense contracts that provide legal representation for financially eligible persons, and for processing requests and payments for non-contract fees and expenses. In addition, the division provides administrative support (accounting, budget development, human resources, facilities management and general operations) for the agency as a whole.

Organizational Chart



Contract & Business Services Division

Director – 1 FTE

General Counsel – 1 FTE

Public Defense Analyst – 3.8 FTE

Administrative Analyst – 1 FTE

Operations Manager – 1 FTE

Accountant – 1 FTE

Business Services Manager – 1 FTE

Preauthorization/Accounts Payable – 5 FTE

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Major functions

Contract Administration:

CBS staff negotiate and administer over 100 contracts for provision of legal services. Four Contract Analysts have primary responsibility for contracts assigned to them. In addition, CBS has one Administrative Analyst position to audit monthly caseload reports submitted by contractors.

Review of Non-Routine Expense Requests:

ORS 135.055(3) requires that PDSC pay the cost of "reasonable and necessary" expenses for public defense cases. Routine expenses, such as copying costs, do not require pre-authorization. Non-routine expenses, such as investigation, must be approved by PDSC before the expense is incurred. Over 10,000 requests for pre-authorization are submitted per year.

Accounts Payable:

Five accounts payable staff process the operating bills for both the Appellate Division and CBS as well as all fee statements submitted for payment from the Public Defense Services Account. Over 20,000 payments are reviewed and processed per year.

Quality Assurance and Complaint Processing:

PDSC's General Counsel coordinates the efforts of the Public Defense Advisory Group made up of experienced public defense managers and attorneys from across the state. The group developed PDSC's contractor site visit process to identify strengths and weaknesses in the management and operations of public defense contractors. PDSC measures the desired outcome of quality and cost-efficiency in the delivery of services by tracking and reporting the extent to which contractors adopt best practices and resolve problems in the management and delivery of public defense services. In addition, CBS receives and investigates complaints regarding expenditures and regarding the quality of legal representation.

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Contract & Business Services Division

010 Non-PICS Personal Services / Vacancy Factor

Package Description

This package includes standard adjustments to the PERS Pension Bond Contribution, adjustments to Mass Transit Tax and adjustments to the division's anticipated vacancy savings. The components of this package increase general fund expenditures by \$17,303 and increase other funds expenditures by \$2,255.

030 Standard Inflation & State Government Service Charge

Package Description

This package includes standard inflation adjustments on services and supplies in the amount of \$13,394 in general funds. State government services charges have decreased by \$7,025, making the total amount of the package an increase of \$6,369 in general funds.

PUBLIC DEFENSE SERVICES COMMISSION'S NON-DISCRIMINATION AND AFFIRMATIVE ACTION PLAN

Introduction

The purpose of this plan is to initiate and maintain a non-discrimination and affirmative action program consistent with directives of the Governor and applicable state and federal laws and regulations.

Non-Discrimination and Affirmative Action Policy

It is the policy of the Public Defense Services Commission that no person shall be discriminated against by reason of race, color, national origin, religion, gender, marital status, sexual orientation, age (if the individual is 18 years of age or older), or disability not directly and substantively related to effective performance. It is also the policy of PDSC to establish a program of affirmative action to address the effects of discrimination intended and unintended, which is indicated by analysis of present employment patterns, practices and policies.

PDSC's Non-Discrimination and Affirmative Action Plan shall be followed by all PDSC staff. All personnel actions of PDSC shall be administered according to this policy. PDSC's supervisory and management staff shall ensure that the intent as well as the stated requirements of the Plan are implemented. In addition, it is the duty of every employee of PDSC to create a job environment that is conducive to non-discrimination and free of any form of discriminatory harassment.

This Non-Discrimination and Affirmative Action Plan will be posted in plain sight at all times for employees' use and referral. Any agency or member of the public requesting a copy of the PDSC Affirmative Action Plan shall be provided one at no cost.

Harassment in the Workplace Policy and Procedures

Harassment is a form of discrimination that is prohibited by state and federal law and by PDSC's Affirmative Action Policy. Any person who believes that he or she has been harassed at PDSC based on race, color, national origin, religion, gender, marital status, sexual orientation, age, or disability, or based on opposition to discrimination or participation in investigation or complaint proceedings under this policy may file a formal or informal complaint with PDSC's Executive Director. Confidentiality will be maintained to the fullest extent permitted.

Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting that individual; or

- such conduct has the purpose or effect of unreasonably interfering with an individual's work or creating an intimidating, hostile, or offensive working environment.

Harassment based on race, color, national origin, religion, gender, marital status, sexual orientation, age, disability, or because the employee opposed job discrimination or participated in an investigation or complaint proceeding under this policy is any objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment, intimidation or threat engaged in by an individual that is directed at and offensive to another person or persons in the workplace, that the individual knew or ought reasonably to have known would cause offense or harm when:

- submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting that individual; or
- such conduct has the purpose or effect of unreasonably interfering with an individual's work or creating an intimidating, hostile, or offensive working environment.

PDSC's informal complaint process affords an opportunity to gather information to either establish a suspicion of harassment or to attempt to resolve a disagreement without following PDSC's formal complaint procedure. An informal complaint involves the following procedures:

- The complainant submits a written or oral complaint to the Executive Director or his designee,¹ who advises the complainant of her or his right to file a formal complaint with PDSC or with other state and federal agencies.
- The Executive Director contacts the individual or individuals accused of harassment to discuss the alleged harmful act.
- The Executive Director develops a proposed resolution, if appropriate, and informs the parties of that proposed resolution within fifteen (15) calendar days of receipt of the informal complaint.
- If the proposed resolution is unacceptable to the complainant, she or he may file a formal complaint with the Executive Director.

PDSC's formal complaint process ensures the investigation of cases of alleged harassment, the determination as to whether or not harassment has occurred and, where appropriate, the resolution of a complaint. A formal complaint involves the following procedures:

¹ The Executive Director will appoint as her "designee" for the purposes of PDSC's informal and formal Harassment in the Workplace complaint procedures a PDSC employee who has no management or supervisory responsibilities and who possesses personal characteristics that will not discourage employees' reports of harassment. All references to "Executive Director" in the informal and formal complaint procedures are meant to include this designee.

- The complainant submits her or his complaint in writing to the Executive Director or his designee, which must be filed within 365 days of the alleged harmful act.
- The Executive Director acknowledges in a Letter of Acknowledgement receipt of the formal complaint, which includes information on the complainant's right to file a complaint with other state or federal agencies. Copies of the Letter of Acknowledgement are sent to the individual or individuals accused of harassment and the director of the relevant division of PDSC. Upon determining that the complaint is facially valid, the Executive Director conducts a thorough investigation of the complaint.
- Within thirty (30) calendar days of receipt of the formal complaint, the Executive Director informs the complainant and all persons who received copies of the Letter of Acknowledgement of the formal complaint by a Letter of Determination of the final status of the complaint, its disposition and the complainant's rights to file a complaint with other state or federal agencies.

Persons with Disabilities Policy and Procedures

It is the policy of PDSC to comply fully with Sections 503 and 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990 (ADA) as amended by the 2008 ADA Amendments Act, and other applicable federal and state laws that prohibit discrimination on the basis of disability. The Rehabilitation Act and the ADA require that no qualified person shall, solely by reason of disability, be denied access to, participation in, or the benefits of, any program or activity operated by PDSC. Each qualified person shall receive the reasonable accommodations needed to ensure equal access to employment, educational opportunities, programs, and activities in the most integrated setting.

For a disability to be protected by the ADA, an impairment must substantially limit one or more major life activities. These are activities that an average person can perform with little or no difficulty, such as walking, seeing, or working. Temporary impairments, including pregnancy, are not covered as disabilities under the ADA.

PDSC's employees or qualified applicants for employment by PDSC with disabilities shall be responsible for:

- notifying PDSC in a timely fashion of their need for reasonable accommodations;
- submitting appropriate documentation of the disability from an appropriate professional prior to receiving the accommodations requested; and
- demonstrating and documenting how the disability affects the employee's job processes, functions, responsibilities or performance evaluation criteria when requesting reasonable accommodations.

Upon receiving such notification and documentation from a disabled employee or applicant for employment requesting reasonable accommodation, PDSC shall be responsible for:

- making reasonable accommodations for a physical or mental disability, including but not limited to job restructuring, reassignment to a vacant position, part-time or modified work schedules, assistive technology, or aides or qualified interpreters, which do not create an "undue hardship" (defined as significantly difficult or expensive), and excluding the creation of new jobs or the reallocation of essential functions to another employee;
- engaging in an interactive process with the disabled employee or qualified applicant for employment with regard to the type of accommodation that will enable the individual to perform the essential functions of the relevant position;
- evaluating the employee's or applicant's physical or mental limitations in order to determine the accommodation that will be effective, excluding accommodations of a personal nature such as a guide dog for a visually impaired employee, or a wheelchair;
- keeping confidential any medical information obtained from a disabled employee or applicant; and
- using qualification or performance standards, tests and other selection criteria that screen out individuals with disabilities only when they are (a) job-related and consistent with business necessity and (b) cannot be satisfied through the provision of a reasonable accommodation.

Employee Training and Education

The Oregon State Bar requires every attorney licensed to practice law in the state to attend Continuing Legal Education (CLE) programs that train and educate lawyers concerning issues of elimination of bias in the legal profession and the practice of law. PDSC presents in-house training programs that satisfy these requirements. PDSC has presented in-house diversity training for all employees that satisfy the Bar's CLE requirements, and plans to continue to do so.

Responsibilities for Implementation

The person responsible for discharging this policy is PDSC's Executive Director: Nancy Cozine, 1175 Court Street N.E., Salem, OR 97301; (503) 378-2515.

The Chief Defender of PDSC's Appellate Division and the Director of PDSC's Contract and Business Services Division are assigned the following responsibilities:

- Brief all new employees on PDSC's affirmative action plan and their role in supporting it.
- Periodically review training programs and hiring and promotion patterns in order to remove impediments to attaining affirmative action goals and objectives.

- Regularly discuss PDSC's affirmative action policy with employees to ensure the policy is being followed.
- Periodically review office policies, practices and conditions to ensure that:
 - Equal Employment Opportunity information and PDSC's affirmative action policy are properly displayed;
 - all facilities for the use and benefit of employees are in fact desegregated, both in policy and use, exclusive of those areas excepted by federal laws and regulations;
 - minorities, females, and disabled employees are afforded a full opportunity to participate in PDSC's educational, training, recreation and social activities; and
 - all facilities are accessible to disabled employees or clients.

Analysis of PDSC's Workforce and Job Groups (As of 6/30/12)

With a total workforce of 70, PDSC employs 49 females and five people of color (two Hispanic, two Asian and one African-American).

PDSC has four job groups: management, professional, paraprofessional, and support staff. The management group has three positions, two of which are filled by females. The professional group has 40 positions, 24 of which are filled by females and three of which are filled by people of color. The paraprofessional group has two positions, one of which is filled by a female. There are 20 positions within the support staff group, 18 of which are filled by females and two of which by persons of color.

The agency meets (or is within a fraction of a position) or exceeds goals for women and people of color. The agency's current workforce does not meet the goal for disabled persons.

Goals and Objectives

PDSC will pursue the following goals and objectives in order to carry out its affirmative action policy:

- Expand employment opportunities for members of protected classes not represented in PDSC's current workforce.
- Increase the distribution of PDSC's protected class employees at all salary range levels in an effort to approximate the proportion of protected class members in the workforce from which PDSC employs.
- Assess minority group and female staffing on an ongoing basis to ensure that PDSC is making progress toward meeting these objectives.

- Refine recruitment strategies and hiring practices to facilitate the placement and promotion of minority group and female personnel.
- Actively participate on affirmative action committees, organizations and activities to promote PDSC's Affirmative Action Plan.

PDSC'S AFFIRMATIVE ACTION STRATEGIES AND ACCOMPLISHMENTS

PDSC is comprised of two divisions: The Appellate Division (AD), which provides direct legal services in the Oregon Supreme Court and the Court of Appeals on behalf of financially eligible individuals appealing trial court judgments of conviction in criminal cases, and trial court judgments in juvenile dependency and termination of parental rights cases; and the Contract and Business Services Division (CBS), which administers the state's public defense contracting and payment systems.

PDSC's Non-Discrimination and Affirmative Action Plan includes both policies and procedures governing PDSC's own activities as an employer and strategies for working with the private contractors who provide the great majority of public defense representation in the state to help them attract and retain attorneys and staff that more closely reflect the diversity in their communities.

PDSC's Accomplishments in 2011 - 2013

- Attended and made presentations regarding employment in public defense at job fairs and recruitment events at regional events sponsored by minority law student groups and others.
- Continued to develop working relationships with law faculty and placement offices at Oregon's law schools to identify and recruit law students of color who might be interested in attorney positions in the state's public defense system.
- Presented a one-day "Elimination of Bias" training for attorneys and staff at the Office of Public Defense Services as well as interested attorneys from the Marion County area, and undertook preparations for a program in 2013.
- Participated in the Oregon State Bar's Convocation on Inequality, and continue to incorporate lessons learned into management practices.
- OPDS management team took part in demonstration tests using Project Implicit, a web-based program designed to reveal hidden biases, and had a discussion regarding the test results, and ways that the program could be used in employee education programs.

PDSC's Strategies for 2013- 15

- Work with public defense contractors to create more recruitment opportunities, possibly in conjunction with prosecutors, to interest first-year law students and college students in the practice of criminal law.

- Work with Affirmative Action office of the Oregon State Bar to identify new strategies for increasing diversity in public defense.
- Improve outreach efforts of OPDS to attract more diverse applicants for all job categories in both divisions.
- Continue to participate in job fairs and recruitment programs throughout the Pacific Northwest and elsewhere for law students and attorneys of color who may be interested in careers in public defense.
- Encourage public defense attorneys to examine the causes of disproportionate representation of minority clients in the criminal justice, juvenile justice and child welfare systems and to identify and implement strategies to address overrepresentation.
- Prepare and present an elimination of bias training to OPDS attorneys and staff and other members of the Marion County legal community.

PDSC's Strategies for 2015-21

- The demand for minority attorneys and other legal professionals such as trial assistants and investigators is high in Oregon as it is elsewhere in the country. In order to attract these professionals to public defense work, PDSC needs to be able to offer compensation that is at least comparable to the compensation offered to district attorneys and other government lawyers in the state. In support of this effort PDSC has included in its 2013-2015 budget request policy packages that would help it achieve parity in compensation with prosecution lawyers for its appellate lawyers and for at least some of its private contractors. The achievement of parity may well take more than a single biennium.
- Over the next six years PDSC will develop and present an integrated series of trainings for its own employees designed to address some of the underlying biases and misconceptions that can impair one's judgment about members of other cultural groups. The agency's general counsel is well qualified to assist in the development of this series, having served as the trainer for the largest public defense office in the state and having planned and presented many such trainings in the past. The training series will be open to interested contract providers and may be recorded for possible future use by others.
- PDSC intends to continue working with its contractors to obtain reliable data about workforce composition and establish appropriate goals for each year of the next six-year period to expand the number of minority attorneys and staff members employed in public defense in Oregon.
- In anticipation of the difficulty of recruiting successfully from the small group of minority attorneys graduating from Oregon law schools each year, PDSC will work with its contractors to develop strategies for promoting legal careers and, specifically, careers in public defense, among Oregon high school and college students.

Attachment 3

OPDS Reemployment Rules

Current

- a. Reemployment. A former OPDS employee may request to be reemployed in a position for which the employee is qualified with a salary range equal to or lower than the salary range for the position the employee last held. An OPDS employee may be reemployed only once within the one-year period following resignation, voluntary demotion, layoff, or downward reclassification. Reemployment shall be subject to the discretion of the Executive Director.

Proposed Revision #1

- a. Reemployment. A former OPDS employee may request to be reemployed in a position for which the employee is qualified with a salary range equal to or lower than the salary range for the position the employee last held. An OPDS employee may be reemployed only once within the one-year period following resignation, voluntary demotion, layoff, or downward reclassification. Reemployment shall be subject to the discretion the Public Defense Services Commission upon recommendation of the Executive Director.

Proposed Revision #2

- a. Reemployment. A former OPDS employee may request to be reemployed in a position for which the employee is qualified with a salary range equal to or lower than the salary range for the position the employee last held. An OPDS employee may be reemployed only once within the one-year period following resignation, voluntary demotion, layoff, or downward reclassification. Reemployment shall be subject to the discretion of the Executive Director, but shall be authorized only when the following criteria are met:
 - There is a documented business need for the reemployment or reemployment is necessary to ensure an adequate transfer of knowledge, and
 - The reemployment period does not exceed six months.

When the Executive Director authorizes reemployment, such authorization must be provided in writing, must document the business reason supporting the decision to reemploy, and must include a plan for achieving the documented objectives. Failure of the reemployed employee to actively engage in the plan will terminate the reemployment agreement.

The Executive Director shall notify the Public Defense Services Commission of the authorization of reemployment.

Attachment 4

Proposed Amended PDSC Confidentiality Policy

5. CONFIDENTIALITY OF BILLING AND NON-ROUTINE EXPENSE REQUEST INFORMATION

In order for the Office of Public Defense Services (OPDS) to carry out its obligations under ORS 135.055, ORS 151.216 and other statutes regarding payment of counsel and authorization and payment of non-routine expenses in public defense cases, it is necessary for OPDS to receive information that may be confidential or privileged or both.

ORS 135.055(9) prohibits disclosure of requests and administrative orders for preauthorization of non-routine fees and expenses, and billings for such fees and expenses, to the district attorney before the conclusion of the case. ORS 135.055(10) permits disclosure to the district attorney of the total amount of moneys determined to be necessary and reasonable for non-routine fees and expenses at the conclusion of the trial in the circuit court.

ORS 40.255(5) provides that the lawyer-client privilege is maintained for communications made to OPDS for the purpose of seeking preauthorization for, or payment of, non-routine fees or expenses.

ORS 192.502(4) exempts from disclosure under the Public Records Law information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

In light of the foregoing statutory provisions, the Public Defense Services Commission (PDSC) adopts the following policy.

It is the policy of the PDSC that OPDS staff will keep confidential all information regarding the cost of representation of a client and non-routine expense requests for a particular case, except as follows:

- (1) It may release, upon request at the conclusion of the trial, the total amount of moneys paid for representation in the case.
- (2) It shall disclose information regarding non-routine expense requests in a particular case and the cost of representation of a client to: the attorney who represents or represented the client in the particular case; to the attorney who represents the client in a matter arising out of the particular case; or, upon written request, to the client, except that OPDS shall not disclose information to the client that it is prohibited from disclosing under state or federal law.
- (3) This policy does not prohibit OPDS from disclosing statistical information that cannot be identified with any particular case.

(4) OPDS may disclose to appropriate authorities information regarding non-routine expense requests and the cost of representation when such information is reasonably believed to be evidence of, or relevant to, alleged criminal activity on the part of the court-appointed attorney or other OPDS-paid provider.

(5) OPDS shall disclose information regarding the cost of representation as required by law.

Attachment 5

PDSC

2013 Draft Meeting Schedule

January

Discussion of PDSC Service Delivery Plan for Linn County
Update Regarding Service Delivery in Lane County
ED's 2012 Annual Report to the PDSC
Dependency Caseload Studies
Representing Veterans in Oregon
DA Charging Practices – invited district attorneys (Multnomah, Deschutes, Lane)
Revised Certification Process for Capital Providers
OPDS Monthly Report

February

No meeting

March

PDSC 2011-13 Budget Update
OSB – Revised Performance Standards – criminal, delinquency, dependency
PDSC Recommendations Regarding Representation for Veteran Clients
Service Delivery Review – location TBD
OPDS Monthly Report

April

Review and Approval of PDSC's Draft RFPs
PDSC Discussion of funding priorities for 2014-15 contracts
Juvenile Delinquency Appointment of Counsel – TF Update
Discussion of Service Delivery Plan for [selected] County

May

No meeting

June

Clatsop County Peer Review – Report Recommendations
Funding Priorities & Invited Contractor Comments
OPDS Monthly Report
PDSC Budget Report
OPDS Monthly Report

July (late)

Service Delivery Review – County TBD

Executive Session: Review of Statewide Contracting Plan (for contracts beginning 1/1/14)

Action Item: Approval of Statewide Contracting Plan

OPDS Budget Update and Approval of 2013-15 Compensation Plan

Annual Performance Progress Report

Commission Approval of Biennial Report to the Legislature

OPDS Monthly Report

August

No meeting

September

Discussion of Service Delivery Plan for "TBD" County

Executive Session: Review of Contracting Plan for Capital Contracts

Action Item: Approval of Contracting Plan for Capital Contracts

Action Item: Approval of Non-Capital Contracts

OPDS Monthly Report

October

Retreat

Commission Approval of Biennial Report to the Legislature

PDSC Schedule for 2014; possible agenda items

Action Item: Approval of Capital Contracts

OPDS Monthly Report

November

No meeting

December

OPDS Monthly Report