

Members

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Peter A. Ozanne
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Honorable Elizabeth Welch



Ex-Officio Member

Chief Justice Paul J. De Muniz

Executive Director

Ingrid Swenson

PUBLIC DEFENSE SERVICES COMMISSION

PUBLIC DEFENSE SERVICES COMMISSION MEETING

Thursday, November 20, 2008
9:00 a.m. - 1:00 p.m.
Room 102, Oregon State Library
250 Winter Street, NE
Salem, Oregon 97301-3950

AGENDA

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| 1. Action Item: Approval of the Minutes of PDSC's October 17, 2008 Meeting
<i>(Attachment 1)</i> | Barnes Ellis |
| 2. Defense Representation in Drug Courts
<i>(Attachment 2)</i> | Alex Bassos (Multnomah)
Gary Berlant (Josephine)
Robert Hutchings (Lane)
Phil Swogger (Marion)
Scott Thompson (Clack.) |
| 3. Review of PDSC Service Delivery Plans for Baker, Grant/Harney, and Malheur Counties
<i>(Attachments 3 - 5)</i> | Barnes Ellis
Commissioners
OPDS staff |
| 4. Final Approval of PDSC Service Delivery Plan for Jackson County
<i>(Attachment 6)</i> | Barnes Ellis
Commissioners
OPDS staff |
| 5. OPDS Monthly Report
<i>(Attachment 7)</i> | OPDS Management
Team |

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

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

Next meeting: The next meeting of the commission is scheduled for January 22, 2009 from 9am to 1pm at a location to be announced in Clackamas County.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

MEETING MINUTES

Friday, October 17, 2008
12:30 p.m. to 4:00 p.m.
The Resort at the Mountain
68010 E. Fairway Ave.
Welches, Oregon 97067

MEMBERS PRESENT: Barnes Ellis
Peter Ozanne
John Potter
Hon. Elizabeth Welch
Chief Justice Paul De Muniz

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Paul Levy
Billy Strehlow

[Meeting was called in order at 12:36 p.m.]

Agenda Item No. 1 Approval of the Minutes of PDSC's September 11, 2008 Meeting

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

Agenda Item No. 2 Approval of the Minutes of PDSC's August 14, 2008 Retreat

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

Agenda Item No. 3 Report from Oregon Death Penalty Resource Attorney

Matt Rubenstein, who serves as Oregon's capital resource attorney, recalled the Commission's previous hearings on representation in death penalty cases and the information received by the Commission at those hearings. He described the number of pending capital cases in Oregon compared to Washington and said that Oregon lacks a mandatory "cooling off period" that prohibits the state from filing a mandatory notice of intent to seek the death penalty for a period of 60 days or more. The cost to prosecutors in Oregon of bringing an aggravated murder charge is very low and creates an incentive for the defendants to agree to true life sentences in order to avoid the death penalty. But the cost to the defense is relatively high because each case has to be prepared for trial, even though very few cases are actually tried. The cases that go to trial are usually those involving defendants who lack a good relationship with their counsel.

Mr. Rubenstein said that Oregon's death penalty statute, which includes 33 factors that can elevate a murder to an aggravated murder, fails to serve the narrowing function that capital

sentencing schemes are supposed to provide. He discussed the four questions that must be answered in the penalty phase of a death penalty case in Oregon but noted that they, too, fail to rationally identify cases that are appropriate for a death sentence. He said the trend in Oregon and nationally is for fewer death sentences to be imposed, in part because of the exonerations that have occurred and also because true life sentences are now being imposed and served. He described the cases in Oregon in which death sentences have been imposed and the status of each of those cases and noted that while Oregon has some very talented death penalty lawyers, not all of the men on death row were well represented.

Mr. Rubenstein then discussed the work of the Capitol Resource Center which he founded and staffs and the services he is providing to Oregon's capital defense teams. With respect to the mitigation function, he noted that it is very difficult to find enough mitigators who are qualified to handle the caseload because of the poor rate of pay, and the demand for well qualified mitigators to work in federal cases or in other states that pay substantially more.

Commissioners discussed possible modifications to Oregon's current statutory scheme that would require a cooling off period but that would still permit the state to resolve cases by obtaining true life sentences. It was suggested that the Commission consider proposing such legislation as a cost saving measure in view of the high defense costs under the current scheme.

Commissioner Ozanne suggested that the Commission review its service delivery plan in these cases in order to discuss compensation rates.

Professor Sean O'Brien, Associate Professor of Law at University of Missouri-Kansas City School of Law, testified that his work over the last three or four years had been primarily to develop standards for mitigation specialists and discussed the United States Supreme Court cases that had focused on the mitigation function. He talked about the mitigating circumstances in those cases that were not discovered during the course of the original trials but that the Supreme Court found so compelling that it granted relief at the federal level. He also described the training and qualifications needed for mitigation specialists to adequately perform their role. He said the best model is probably a full-time defender offices staffed by full-time mitigation specialists. Professor O'Brien noted that in death penalty cases there is a direct correlation between the cost of defense and the outcome of the case.

Robin Maher, the Director of the ABA Death Penalty Representation Project, described the work of the project. She congratulated the Commission on its adoption of the ABA standards and the creation of a death penalty resource attorney position. She noted, however, that the hourly rate paid to attorneys in some death penalty cases in Oregon is among the lowest in the country and that the rate for mitigation specialists is the lowest of which she is aware. The rate paid to death penalty attorneys under contract in Oregon, however, is slightly above the national average.

Commissioners and Ms. Mayer discussed some of the advantages and disadvantages of systems that have FTE state employees handling death penalty cases as opposed to Oregon's private contractor system.

Agenda Item No. 5

Introduction to Drug Courts

Heather Jefferis, the administrator of the Clackamas County Treatment Courts testified about the structure of most drug courts in Oregon, and some of the particular features of those courts, particularly the Clackamas County court. She described the National Association of Drug Court Professionals' ten key components for drug courts, how they are implemented in Clackamas county, and the importance of adhering to these principles. She noted that the Clackamas program targets high risk offenders since the program has limited capacity and the

county believes it is more cost effective to focus on these individuals. She described the role of each of the participants, including the defense representative.

In response to questions about the effectiveness of drug courts, Devarshi Bajpai, the Grant Manager for the Oregon Criminal Justice Commission which administers drug court grants in Oregon, pointed to a Washington State Institute for Public Policy meta analysis of drug court research which concluded that a conservative estimate of the effectiveness of drug court programs indicated that they are 11.7 percent more successful in reducing recidivism than “business as usual.”

Agenda Item No. 6 Approval of 2009-11 Budget Binder Narrative

Kathryn Aylward described the contents of the agency’s budget narrative document and the instructions for its preparation.

Commissioners recommended that in the section of the narrative that relates to budget drivers for the agency that reference be made to Ballot Measure 57’s potential impact.

Commissioners also discussed some of the contents of the report including Key Performance Measures, the appellate backlog, the agency’s inability to prioritize any areas representation should a budget reduction be required, and the agency’s affirmative action goals. The Commission approved the contents of the report.

Agenda Item No. 7 Approval of Service Delivery Plans for Jackson and Josephine

Commissioners discussed the Josephine County report and Bert Putney’s regional defender concept and agreed that the report should indicate that the Commission would not be pursuing the concept at this time. The proposed service delivery plan for Josephine County was approved.

With regard to Jackson County, Commissioner Ozanne recommended that the report address directly the question of whether there is a social work component to the role of attorneys in juvenile dependency cases and that the position of the Commission on this issue be included in the report. An amended service delivery plan will be presented to the Commission at its next meeting.

Ingrid Swenson discussed some of the positive changes which had occurred since the Commission’s initial hearing in Medford, including reduced caseloads and the return of an attorney who had worked with the consortium in the past.

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

Agenda Item No. 8 Approval of Amendments to Complaint Policy and Qualification Standards

Paul Levy described proposed amendments to PDSC’s complaint policy and to the Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense. The amendments would permit the agency to suspend an attorney from future court appointments, not just from an appointment “list.” He noted that the change is consistent with the current agency practice of either approving or not approving an attorney to handle specific types of cases.

MOTION: Peter Ozanne moved to approve the changes; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

Agenda Item No. OPDS Monthly Report

Paul Levy provided Commissioners with a list of attorney recruitment events in response to the Commission's direction at its September meeting that OPDS begin to institutionalize its involvement in these types of events.

Ingrid Swenson and Kathryn Aylward advised the Commission of the management team's decision to use an open position to add a deputy director in the Contract and Business Services Division to assist Kathryn Aylward with her the multiple responsibilities.

MOTION: John Potter moved to adjourn the meeting; Peter Ozanne seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

Meeting was adjourned.

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Friday, October 17, 2008
12:30 p.m. to 4:00 p.m.
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68010 E. Fairway Ave.
Welches, Oregon 97067

MEMBERS PRESENT: Barnes Ellis
Peter Ozanne
John Potter
Hon. Elizabeth Welch
Chief Justice Paul De Muniz

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
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[Meeting was called in order at 12:36 p.m.]

Agenda Item No. 1 Approval of the Minutes of PDSC's September 11, 2008 Meeting

- 20 Chair Ellis Shall we call the meeting to order. I want to welcome everybody here. I find it interesting that my colleagues are all to my right, which is not probably where they are politically. The first item is approval of the minutes of the September 11 meeting. Are there any additions or corrections to the September 11 minutes? If not, I would entertain a motion to approve.
- 56 I. Swenson Mr. Chair, I do have one correction. It is not a correction to the minutes but to the information contained in the minutes. On page 14 - if you will remember we were talking about trial rates in some of the eastern Oregon counties. I represented to you that in Grant and Harney counties the trial rate was significantly higher than it was in Malheur County which we had been looking at. I realize that when I gave you that information, I gave you information about the felony rate and told you it was 11 percent of the cases. You wanted to know how many actual cases that was and I have that information for you, but I reversed the felony and misdemeanor rates. In those two counties it should have been a felony trial rate of 8.3 percent of the cases. The misdemeanor rate was 11.3 and I will make that correction in the official minutes. There were 145 felonies altogether and 222 misdemeanors. The percentages are high but the actual number is not high.
- 2:15 Chair Ellis Okay. Thank you. Any other additions or corrections? Is there a motion to approve the minutes of September 11?

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

Agenda Item No. 2 Approval of the Minutes of PDSC's August 14, 2008 Retreat

2:35 Chair Ellis Item No. 2 is approval of the minutes of our August 14 retreat. Any additions or corrections to the retreat minutes? If not, I would entertain a motion to approve the minutes of the August 14 retreat.

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

Agenda Item No. 3 Report from Oregon Death Penalty Resource Attorney

3:11 Chair Ellis The subject matter we are going to address now relates to death penalty representation. Matt Rubenstein, and maybe Ingrid, do you want to introduce the topic?

3:27 I. Swenson Thank you, I would be happy to do that. As you recall, Matt Rubenstein has been serving as the resource attorney, technically the resource center, for death penalty attorneys in Oregon for a little more than a year – well, several months more than a year at this point. I think one of the things that Matt will be talking about is some of the assistance he has been able to provide to other death penalty lawyers during that period of time and some of the directions that he sees that project going, plus some of the issues that continue to exist for death penalty representation. We are very fortunate that he was able to bring with him today two national authorities on death penalty representation, Robin Maher of the American Bar Association Capital Representation Project, and Sean O'Brien, who is a professor of law and who has been a public defender, a death penalty attorney. He has conducted many trainings for lawyers on death penalty representation and is a leader in the community as well as a well known litigator in these cases. You will hear from them directly and I don't think I have any further introductions.

4:50 Chair Ellis Take it away, Matt.

4:54 M. Rubenstein Thank you. I would like to present an overview of the capital scheme in Oregon and some of the work I have done with the Capital Resource Center, then some suggestions about areas in which I think we have done well as a defense community and some areas where we could improve. I would like to answer any questions that I can. Then Robin Maher and Sean O'Brien are going to follow up. Sean is going to speak more specifically to the mitigation function and then Ms. Maher is going to address the ABA guidelines and efforts to implement them. Would you like me to sit over there? Would it be easier?

5:40 Chair Ellis Whatever is comfortable for you. That would be fine.

5:52 M. Rubenstein The topics I wanted to talk about are the meetings you all had last year regarding the death penalty, our scheme here in Oregon which is quite unusual in some respects, and the resource center. Last year at Portland State you held a hearing in February and you heard from Professor Long, Judge McShane and Judge Barron, from Tim Sylwester at the AG's office, and then from three of the most respected capital defense attorneys in our community, Mr. McCabe, Mr. Wolfe and Mr. Balske. At the conclusion of that hearing you issued findings in June that there was an urgent need for mitigation specialists. That is something that Sean and Robin would be able to address further. In Oregon we have about five qualified mitigation specialists who really know how to obtain a social history, who can meet the guidelines. The (inaudible) articles that you were given - Sean O'Brien was a primary architect and coordinator for putting those supplementary mitigation guidelines together – describe what a defense attorney is supposed to do, what our mitigation specialists are supposed to do, to provide adequate representation in a death penalty case. It is awesome in terms of the responsibility we have. It is a very high standard and in Oregon we have about five folks who are qualified and doing that work well. As we will see in a few minutes I hope I can communicate effectively that we have many, many more cases than we can provide adequate representation for. You also found that there was a shortage of attorneys to handle the death

penalty post conviction relief cases. You approved the contract to hire me and you adopted the ABA guidelines. You adopted the portion that applies to the performance of counsel, not the portion that describes the function of the responsible agency, or the government authority, in providing these services. Oregon has lots of aggravated murder indictments brought every year. Billy Strehlow is the analyst at OPDS, and he reported that 22 cases were brought in the last calendar year. Over a 12-year period there were roughly 28 new cases a year. That is very high. By comparison Washington State, with twice our population, has about two cases pending. Yesterday they actually just authorized two more, so I think right now they have four, but on average they are well below 10 pending.

8:54 Chair Ellis

What do you think causes that?

9:00 M. Rubenstein

I have a slide in a moment that I think may explain that. The primary reason is there is no statutory requirement here to file a special notice. The way the state brings an aggravated murder charge is to seek an indictment. The cost to the prosecution is very low. If you talk with prosecutors from around the state most of them will candidly share with you that, "We don't think this is a case of the worst of the worst. We don't think this man is the evil, wicked, unrepentant killer that should be executed. We are bringing this aggravated murder charge because we are going to save money. It is an important tool that we have in our tool box and by charging aggravated murder in lots of cases we create an incentive for each defendant to plea." In Multnomah County, the most progressive county in our state, we have 21 cases pending. Most of those cases will resolve. The prosecutor sees it as a cost-saving mechanism. What they don't realize and I think this is very ripe for a public policy study - in fact there has been some effort to put together a study commission similar to New Jersey and Maryland and California - but from the county perspective they are saving money because they are having fewer trials. They don't take into account the cost from Salem, the defense function. For every case that they are bringing the defense has to meet minimal national standards, Sixth Amendment standards. We need to have two qualified attorneys, a mitigation specialist, and an investigator, gear up with mental health and forensic experts. It is extremely expensive. If you look at it collectively we are not saving money. Regardless of your philosophical position, whether you are morally opposed to the death penalty or not, take that equation out of it. We are spending a tremendous amount of money for a system in which there are very few aggravated murder trials. It is three to five trials a year and in those cases it is not the worst of the worst. They are basically self selected cases that are running the gauntlet - the defendant who doesn't have a very good relationship with his counsel - instead of the prosecution function saying, "This is the worst case and we are going to target it," it is the defendant self selecting - "I am not going to resolve my case and I am going to trial." It is a very random process of who is going to trial and who is getting life and who is getting death from my perspective. Right now we have 54 cases pending in the state. In the tri-county areas, Multnomah, Clackamas, and Washington Counties, we have 32 cases. I practiced in Georgia and Georgia has roughly three times the population of Oregon. We had roughly 75 cases pending.

12:17 Chair Ellis

Is there a variation in practice between DAs in terms of whether they are seeking the death penalty or not?

12:26 M. Rubenstein

Yes.

12:32 Chair Ellis

I think I understand that some of them don't make that decision for quite a long time into the process?

12:40 M. Rubenstein

I think that is accurate.

12:41 Chair Ellis

Which forces the defense function to assume the worst.

- 12:49 M. Rubenstein That is correct and our system is really set up inefficiently. In Washington State, by statute, there is a cooling off period. The state brings charges against someone. They can't death notice the case for I believe it is 60 days. That gives the defense an opportunity to put together a mitigation package and to do a preliminary and social history investigation. By agreement of the parties they usually continue that 60-day period for three months or six months. Then the defense can put together a mitigation package and present that to the district attorney. Usually there is an authorization committee and the defense makes a pitch saying, "This is a not case that you want to pour all these resources into. This should be a normal murder case." In Washington State there is much more selection in terms of cases that are ultimately authorized. In Oregon there is no special death notice requirement. When the prosecutor obtains an aggravated murder indictment death is on the table. In Multnomah County I tried two cases this year. I was involved in picking the juries and arguing to the juries in the penalty phase. The prosecutors were quite lukewarm about seeking death especially compared to trying cases in Louisiana or Georgia. It is odd. We go through this entire process. We have spent hundreds of thousands of dollars, lots of court time, lots of staff time and then the state is not even really driving hard to seek death. It is an irrational system, but from the defense side we have an obligation to gear up and be prepared for that ultimate life or death decision even if the district attorney is not rabid for it.
- 14:39 Chair Ellis It is not something as a Commission we have, to my knowledge, ever done - making a substantive law proposal. It strikes me that - I know something of the economics we face on these cases and I don't think this is weighing in one way or the other on the death penalty issue - do you think we ought to consider proposing to the next session something like the Washington notice statute?
- 15:19 M. Rubenstein There are a number of modifications that can be made to our scheme that would lead to a better system, just from the public policy perspective irrespective of, again, opposition to the death penalty or not, a special notice requirement. Right now the state uses the charging of aggravated murder as leverage to encourage a guilty plea. We could have a scheme where you had a natural life sentence for an aggravated murder conviction. You don't have to have a penalty phase. If you are convicted of aggravated murder you do life without. If our aggravated murder statute was modified so that the state could obtain a natural life sentence they could use that as leverage. Instead of having a full penalty phase and requiring us to prepare to defend a person for their life, they could say, "We are charging agg murder in your case. If you want to plead to straight murder, you can get life with 25. If you don't, we are going to convict you of aggravated murder and you are going to go away for life." I think the incentive would still be very great on a defendant to give up the trial.
- 16:39 Chair Ellis When we get through your presentation, I would be interested in how the Commission reacts to proposing legislation on at least the first one and maybe the second one as well.
- 16:55 M. Rubenstein Around the country there has been a lot of public policy debate on the death penalty. In California, most recently, bipartisan folks from a wide spectrum of perspectives found that to make the death penalty work was going to cost a lot more money. As a public policy issue it was a failure. I think Oregon is in a lot worse shape than California.
- 17:21 P. Ozanne Matt, without the true life component wouldn't the argument from the prosecution be that we really will save money because otherwise if we don't have aggravated murder charges to induce these pleas, these cases will be tried as lesser levels of murder. You were saying earlier that this is an area in need of study. Has anybody studied the patterns in Washington or other states?
- 17:48 M. Rubenstein Not that I am aware of. There are many jurisdictions where they don't have a death penalty and the vast majority of cases across the spectrum are resolved by plea. I think of a jurisdiction that has gotten rid of the death penalty, that is only Illinois, but don't see a spike in cases going to trial. Mr. Ellis, just to answer your question, we have a very broad statute

and the cost to the county is very low. At the federal level when they are considering seeking a death penalty in a particular case, the defense has an opportunity to go to Washington and meet with the Authorization Committee with the Department of Justice. In that manner the prosecuting authority is being thoughtful and considered about selecting the cases they are going to pour a lot of resources into and actually try to get a jury to sentence this person to death. Under our Oregon scheme there are 33 ways to elevate a homicide to aggravated murder. Most prosecutors, most people in the system, if they are candid would say basically any murder case can be charged as an aggravated murder case. There is a brief by Professor Kanter and language in *Wagner II* noting that Oregon's capital aggravated murder scheme has far greater breadth than those in other states. The circumstances can be fairly characterized as insufficient to perform the merit function. Our capital scheme is modeled after Texas. We are the only other jurisdiction that follows Texas. The Supreme Court in 1976 approved three capital sentencing schemes - Georgia, which is a threshold scheme; Florida, which is a weigh in scheme; and Texas, which is a directed question scheme. That is what we follow. So our narrowing function is supposed to occur when the prosecutor charges agg murder, in the first phase. In the culpability phase they have to prove the aggravated facts. That is supposed to narrow potential death penalty cases from the larger pool of your typical murder case. Our statute is extremely broad and at this point many would argue there is no narrowing of the pool of death eligible cases. Our scheme, modeled after Texas, has four questions. The state has to prove the first three questions, if they can, beyond a reasonable doubt to obtain a death penalty. The first question is deliberateness. The defense community, of course, argues that to convict someone of aggravated murder you have to prove that it was an intentional murder and that there is no distinction between intentional and deliberate. That argument has not been persuasive but I am hard pressed to say that this performs any narrowing function. The second question that the jurors answer is whether there is a probability that the defendant would commit criminal acts of violence that constituted a continued threat to society - the so-called future dangerousness questions. The state has to prove this beyond a reasonable doubt and Professor Kanter quotes Yogi Berra, "90 percent of the scheme is half-mental." How do you prove that there is a probability that this person may commit criminal acts. You have to prove beyond a reasonable doubt that there is a probability of this person doing something. The social science research that has been published in journals suggests that it is unreliable to predict future dangerousness. Texas did a study of the men on death row. Experts have opined that most of these people do pose a significant threat into the future and they were sentenced accordingly. They find in 95 percent of those cases that the opinion was incorrect. The Oregon Psychological Association has come out with a position paper saying it is not appropriate for psychologists to opine on this. The third question is, "Was the killing an unreasonable response to provocation?" Again, from the defense perspective, if it is a provoked killing it should be manslaughter and we shouldn't even be in this penalty phase. From the defense perspective these three questions don't do a whole lot in a rational manner to identify cases that are appropriate for death, versus cases that are not appropriate for death. The last question, the fourth question, is whether the defendant should receive a death sentence. There is no burden of proof. The jurors are directed to consider aggravation, mitigation, victim impact, and circumstances of the events. If the jurors answer these four questions affirmatively, "yes," then the defendant receives a death sentence. If one juror answers "no" to any of these four questions it won't be a death sentence. There is a fifth question that then determines whether it is life without parole or life with the possibility of parole after 30 years. It takes 10 votes to get life with the possibility of parole after 30 years. It takes three votes for it to be life without parole. Our scheme is significantly better than Texas in some respects. Our jury instruction, on the verdict form it states that all 12 jurors have to vote yes for the answer to be yes to any of these questions. If one juror votes no than the presiding juror is to mark no. That is very helpful to us because it empowers the individual juror in the penalty phase to make this life or death decision. The decision in the penalty phase is different than in the culpability phase of any other kind of trial. It is like 12 angry men where the jurors are deciding what is the truth? There is an objective truth there. In a penalty phase when we are deciding life or death each juror makes an individual moral judgment. It is not a factual determination. I may have a different

religion than you but I can respect your right to come up with your own religious views, to raise your children in your faith. The same here on the death penalty issue. We have to respect each other. In Oregon our modern death penalty era started in 1984. We have had 72 death sentences. Fifty-five men have been sentenced to death. A number of them have had re-trials and that is why the numbers are not the same. There is obviously a trend down and that is consistent with our national trends. From the '90s there were about 300 death sentences a year; in 2006, about half that. Here is a chart showing the number of penalty phases per year for ...

24:57 Chair Ellis

Do you have a view why the trend?

25:00 M. Rubenstein

I believe it is because of all of the exonerations and a renewed public perception about the death penalty, and then life without parole means life without parole. Of the cases filed in 2004, for example, there were five cases tried. If it is blue these were life verdicts. We are getting a lot of life verdicts which is good. It suggests the defense function is effective. But remember if we are bringing 22, 28 cases a year, and we are trying two, three, four, five, we are settling most of our cases. That is a good thing too from the defense perspective. If these are very serious homicide cases, the worst of the worst, we do not want to go to a jury. In 2008, this year, we have tried three cases across the state and we have gotten life verdicts in all three of those. Just to show the types of cases that are being tried in Multnomah County. There is a double homicide dismemberment case from this year. A roommate that was convicted of killing two of his roommates. One juror voted that it wasn't a deliberate killing. Four jurors voted that there was not a probability of criminal acts of violence. He received a life sentence. There was a double homicide contract killing case. Two men killed six weeks apart. Again, the jury, a juror, found that it was not deliberate and there was no future dangerousness likelihood. This chart, which you also have a copy of, shows the 72 cases here in which death sentences were imposed. There were 55 men sentenced. Each red square is a death sentence and the green is where the sentence is reversed. These two men were executed because they volunteered and gave up their appeals. Mr. Isom died of natural causes. It shows these SRWs are sentence relief based on the *Wagner* case which followed the *Penry* case in the Supreme Court. Texas was not given an adequate vehicle for jurors to consider mitigation. So *Wagner* followed the *Penry* case. You can see there are 22 reversals based on *Wagner*. There were 13 other reversals in our modern death penalty. There are 34 men on death row. This is another chart that shows in red the death sentences imposed by the year. Here are the *Wagner* reversals after *Penry* and then the orange indicates the other reversals. As I understand it there has been one reversal in post conviction in the modern death penalty era. We currently have 34 guys on the row. Seven are in direct appeal. This number is significant - the number of post conviction trial cases. There is a huge plug of cases in post conviction at the trial stage. This is a critical stage. It is the opportunity to develop the record about the injustice, about ineffective assistance of counsel, and you are sort of stuck with this record in federal court so it is critical. One of the challenges we face is we have all independent contractors doing the post conviction work. We don't have an office like in Georgia. In Georgia they have the Georgia Resource Center which is a committed group of underpaid attorneys and mitigation specialists with way too much work. It is a culture of passion and commitment to this work and they do very, very fine work. In Louisiana I worked at the Louisiana Crisis Assistance Center, a non-profit group, a similar outfit with way too much work, but they are training specifically to death penalty. They are doing death penalty work 24-7. They are very, very talented. In Oregon we have some extremely talented attorneys who are doing some of our post conviction work but it is very uneven. There is some representation that is very poor in our capital cases. There is not a culture where we are learning from each other and there is a full-time commitment to bring this passion to this work. That is a challenge to us in the defense community and to you all. In the two cases that are in Federal District Court, the Williams case and the Pinnell case, there are issues about how well the record was developed in state court and how that will affect their litigation in federal court. In the Williams case, the record indicates that trial counsel in the aggravated murder death penalty trial hadn't read the discovery, which were the

police reports and the basic materials of the case. In the Pinnell case, the co-defendant was represented very well and got a murder conviction and he is going to be released from prison next year. He has testified to the Parole Board that he was responsible for hog-tying the victim and for killing the victim. The relative culpability of the co-defendants was not introduced in Mr. Pinnell's trial.

The personal services contract that you all extended to me permitted me to begin on May 1 of last year. I set up the Capital Resource Center which is dedicated to facilitating, coordinating high quality legal representation. I would like to discuss a little about the work that I have been doing and answer any questions. The bread and butter of my work is consulting with and training trial and post conviction teams. I meet with teams on a weekly basis. People call about all sorts of questions. I help them identify experts that could be useful. If they have problems communicating with a client I help meet with clients and persuade them to accept a guilty plea. I am involved in training at capital defense seminars around the country and have specialized in capital voir dire work. I have entered cases here in Oregon to lead the voir dire process. I have given portions of closing arguments. I have entered cases to argue motions for the defense team. I have been appointed as a guardian ad litem in two capital cases - guys on death row who are mentally ill. I have been appointed on a post conviction case and a trial level case. I have set up a program with the Department of Psychiatry at OSHU where we have a psychiatrist come once a month and teams come meet with us and discuss whatever mental health issues they have in the case, which might be having a hard time getting along with the client or building trust. It could be something about the mitigation case or something about the forensic experts they are using. We have put together a proposal for a homicide case early representation project. We realized that in a lot of our aggravated murder cases the detectives are contacting the district attorney's office right at the scene. The DAs are getting involved very early in the case and having suspects waive very significant constitutional rights. I used to be a public defender in Seattle. I think we all heard from Bob Boruchowitz earlier this morning. They have a contract where the public defender is notified when a person is arrested for a homicide. When I was on beeper duty at two in the morning I would go down to the jail and see my your client and have him sign a revocation of any waivers. I'd fax those off to the detective. From the defense function we should be asserting our client's right to representation as soon as possible. John Connors and Ingrid and I talked about Metropolitan Public Defender volunteering attorneys for beeper duty for a year as a pilot project. We proposed that to Judge Franz and are in the midst of trying to set that up. I sponsor a tri-county capital defender meeting once a month where we get together and discuss issues relevant to our community. It is very helpful to just build community here. Instead of reinventing the wheel there are a lot of pleadings, a lot of techniques, a lot procedures we can share. Knowing information about what district attorneys are resolving cases - we gain a lot from collaborating with each other and sharing this information. I am the expert referral bank and John Potter has shared the expert referral information that OCDLA has. OCDLA has been very supportive of my efforts and helps me communicate with the community to let them know that I am available to help them. I attend national seminars and bring some of those pleadings back. One example of that was in New Mexico they have been litigating a Capital Jury Project form motion which is arguing that research suggests that jurors in capital trials don't understand how the system works. They are not abiding by fundamental Eighth Amendment requirements. The scheme isn't working. One example of that is that almost the majority of jurors who sat through trials made up their mind about penalty during the first phase, during the culpability phase, and of course, under *Greg v. Georgia* they are supposed to listen to mitigation and consider the character and background of a defendant before they make that life or death decision. Jurors are not doing that so the scheme is not working as was directed by the Supreme Court. We have brought experts in from other jurisdictions, the top experts who have done research under the National Science Foundation. We have presented that here. I believe that later this month Gordon Mallon and Mark Radar will be presenting that in the Guzek case as a pretrial matter. If they make a good record then we can take that record and make that record in other capital cases. You save money by not calling the same experts over and over but preserving this issue for litigation. We made a grant

application, with Mr. Potter and OCDLA, to the Department of Justice for funds for a training program. We are requesting \$50,000 to set up a three phase capital defense training program - a mitigation program because we desperately need more mitigation specialists, a voir dire training program because we need our trial lawyers to know how to pick juries, and then a general trial advocacy seminar. These are not our traditional talking head conferences, but hands on, small group seminars, with very talented trainers. I meet with folks and try to find talented mitigation specialists and investigators and attorneys and encourage them to join our community. It is very challenging because we pay so little. We pay \$39 an hour for mitigation specialists. Attorneys are making \$60 an hour as lead counsel in capital cases if you are not a contractor. I have friends in Seattle who are very talented capital mitigation specialists. They don't have very many cases up there and they are interested in doing more death penalty work. I try to encourage them to come down. I think some of them would pick up some of our post conviction cases, but they can't do it at \$60 an hour. We are also sharing jury instructions, jury questionnaires; we are tracking capital case resolutions. We have this on a website so people can pull these resources down. We have transcripts of state experts. We are sharing work product from talented attorneys. Ms. Swenson asked me to share with you some of our website materials. This is a password protected website for anybody who is part of our community. It is co-sponsored with OCDLA. We have seminars and training where we discuss training opportunities from around the country. Here is our OCDLA seminar today and then capital defense training, guidelines and standards, the ABA standards that you all adopted, cases that we get that merit the ABA, that support this, voir dire materials. This is a training manual by Mark Olive, one of the nation's top capital litigators, works with the Habeas Assistance Training Program at the Federal Defender. This is a very detailed post conviction investigation manual. Sort of the soup to nuts how to do this work, legal summaries and scholarship. With all these pages you just click on the page and the you get the information that you can download as a PDF. Tracking and Statistics. We have our pending Oregon cases, cases that are resolved to non-death sentences so that if I am in Clackamas County I want to know about all the other cases that were resolved with non-death sentences. Race statistics that were sent to me. Here is an example of a cutout of our case tracking. I think this is the Williams case. This shows the trial stage on direct appeal, post conviction trial, post conviction appeal and federal habeas. This is helpful for folks to know. It is a way to make sure for purposes of our federal habeas clock we need to be careful about how much time is getting burned between cert denial and when the post conviction petition is filed. This is a way for me, and Billy, and folks at OPDS to make sure that petitions are filed in a timely manner. In terms of other advocacy resources, theory and theme development, mental health evaluation issues that are very rampant in our cases. Defense initiated victim outreach is an example. In the national community this is becoming a standard of practice where we hire folks who are trained in meeting with victims in our cases, to minimize the impact of our case on them. There is very frequently a significant collateral benefit to the defense team in reaching out to the victims. These are all pleadings, articles, and resources that teams can use in challenges on these different issues. The library catalog is something that Laura Graser set up with OCDLA that we now have on our site. The adoption by your Commission of the guidelines has been a wonderful thing. It sets these objective standards that folks have to meet.

The challenges that I have seen in the year that I have been involved in Oregon capital litigation is the dire need we have for more mitigation specialists. We have a lot of folks doing mitigation work. Many of them are talented and well-meaning and working hard, but they don't have the training or experience to do the work to the standard that is required. It is hard to attract more people to our community. One of our best mitigation specialists who has an MSW and is recognized – there are sort of three, four, or five people who are sort of mentoring a lot of other folks in the community. A friend was looking for a mitigation specialist in Oregon because his client in a federal death penalty case came from Oregon. I suggested that he call my colleague. She is making a \$100 on this federal death penalty case doing mitigation work. I'm thinking now that I made a mistake with the referral because now she is not going work with our Oregon cases. We have mitigation specialists here who don't

want to work in Oregon who are considering moving to Washington and California. In Washington they are making more like \$75 an hour. In California they are making \$75 to \$100 an hour. I think there have been two very talented mitigation specialists who have left our community. The other issue is the post conviction community, this lack of an office or lack of this community that is creating a culture of creative, effective, committed representation. To fix this I think we need to do more practical mitigation advocacy investigation training. If we get the grant from the Department of Justice that would be wonderful, but if we don't then ideally we will set this training up some other way.

- 43:13 Chair Ellis Going back to the PCR component, is there a sense among the PCR providers that so long as they preserve the right to federal habeas they have done their job, as opposed to really seeking relief through the state system?
- 43:34 M. Rubenstein It is all over the board. I worked as federal defender for a time here and did a substantial amount of habeas work where we are reviewing post conviction work done at the state level. The Oregon State Bar has put together a task force. Paul Levy is the reporter for that task force. The standard of representation in the state is very, very poor in post conviction work. Unfortunately, that is the case in some of our capital cases. I intervened in a case. A man was on death row for over four years and met with his attorney four times in that four-year period. I met with the attorney and the client in an attempt to see if I could help this attorney provide better representation and also to understand more about the relationship and the representation. The attorney told me that he didn't believe in holding hands. "I am a lawyer. I don't meet with clients much. I don't need to." Because you all have adopted the ABA guidelines I could say, "You know what? Objectively you are failing to do your job and you should withdraw from the case." It was a tussle but the judge ultimately removed him from the case and appointed a very talented post conviction attorney. We are very fortunate to be hearing from Sean O'Brien and Robin Maher who will discuss, more directly, how the ABA guidelines and the supplementary guidelines that we just published can help. The capital defense community can help your Commission in continuing to raise the standard. I will be happy to answer questions you all have now or at the conclusion.
- 45:45 Chair Ellis Any questions here? I want to go back to that subject you brought up early on about the Washington notice statute. What do you anticipate are the arguments the DA community and the victim's community might make against a notice statute?
- 46:09 M. Rubenstein I think the position would be that it adds complexity. It is already a very complex area of the law. The cases already take a long time, at the trial stage, on direct appeal, in post conviction and this is unnecessary. It just adds complexity and time. I think what the study commissions have frequently found is that there should be a more rationale system on the prosecution side in selecting the cases. That includes permitting the defense to have some input.
- 46:44 Chair Ellis Before they make...
- 46:44 M. Rubenstein ...before they authorize or seek death. Also, that the statute is modified so that it is a narrowing. So out of the pool of homicides you are narrowing a case to the worst of the worst - that is a statutory change - from a killing in prison, killing a police officer, torture.
- 47:10 Chair Ellis The data you gave contrasting Washington with Oregon was pretty impressive. Do you think much of that is attributable to that notice statute?
- 47:22 M. Rubenstein Very much. They have twice our population. They have less than a quarter of our cases. The prosecutor would make the counter argument and say, "We are only trying three, four, five actual death penalty cases a year. When Matt Rubenstein is saying that we have 54 cases, sure, but we are only actually trying three or four so it is not a big burden." If looked at in terms of the resources we have to use in all of these cases - we can't plead all those other cases with one attorney just going in and saying, "Hey, this is a death penalty case. They may

kill you. You need to sign up and plead guilty.” We can’t do that. It is wrong and it is not good legal practice. It doesn’t meet the Sixth Amendment requirements. We have to prepare the case fully as if this is going straight to a jury with the state seeking death.

48:25 Chair Ellis

I would be interested how other Commissioners are thinking about this. It does seem to me this is a huge cost area for us. We have known that. It has just been part of the hand we were dealt. I don’t know of a reason we couldn’t sponsor legislation of this kind. It strikes me that maybe what we ought to do, if there is agreement on this, is to schedule this at our next meeting. I’d invite the DA community to speak to us if we are way off base on this, and if there is a good reason not to do it let’s hear it. What is wrong with going to the legislature with just the cost saving? We are not here to preach one way or the other on the issue the voters chose to do back in 1980. This does seem to me a pretty rational thing - to put a period of time between the original charging decision and the election to go with it, give the defense side a chance to present to the prosecutor things that he is not going to get in any other way. The prosecutor still has the power. We are not trying to take that away. This does seem to me a very rational thing to do. If the data in Washington is as Matt says, which I’m sure it is because he knows it, and if there is other evidence of it I think it is right down the alley of the charge we were given in our statute which has got as much to do with cost as it has to do with anything else, cost and fairness and this seems to me fair. Any reaction?

50:36 J. Potter

I agree with the notion that it is a rational thing for us to do in that we are a neutral body that could potentially do that. OCDLA tackled this issue a number of years ago as Ingrid may recall. We didn’t meet with any success. What I might suggest is rather than this Commission doing it that the Chief Justice’s Criminal Justice Advisory Committee take a look at it. I say that because he has on that committee both the prosecution, and the defense, and the judges, and the bar all together. If they were to discuss it and agree that it really is an economic issue as you are suggesting, and I think it is, then it would come from a source that is even more neutral and more powerful than we would be in my judgment.

51:27 Chair Ellis

Any other thoughts on it? Peter?

51:27 P. Ozanne

I would support it. I hadn’t thought of what John is saying. I support it. The only thought I had is that before we brought prosecutors in, which I think makes sense, I would like to try to assemble the data and the arguments around the costs. It looks to me like there could be some dispute on the costs. Unfortunately, cost is probably the way we have to seek true justice these days. I think we have to be sure that our cost arguments are pretty strong. I hadn’t thought about John’s point. It would be up to the Chief. If the Chief and the group were willing to do it then obviously I would change my mind. I would be willing to do it here and support it.

52:14 Hon. Elizabeth
Welch

The only thing I would add to what is already being said is that it seems to me that Mr. Rubenstein spoke of a couple of other things that maybe need to be included. The issue of the automatic life sentence might be more of a quid pro quo, from a prosecution standpoint, what they get for backing off on using this method. If you are found guilty of aggravated murder you get a life sentence. Period. End of discussion.

53:04 M. Rubenstein

I think that is right because the prosecutor would say, “Now you can present whatever you want to us and we will take that into consideration in plea bargaining.” But they are leery of giving up the tool of seeking a death penalty because that is their ultimate bargaining power. The prosecutor can’t get a life without parole sentence unless they go through a sentencing phase right now. I think Ms. Welch is correct that the prosecutor in Washington State has a tool that our prosecutors don’t have. They can seek an aggravated murder conviction in Washington State without special circumstances. If they convict someone in Washington State they can get life without parole and they can use that as a bargaining tool that our prosecutors can’t use.

- 53:57 Chair Ellis Going to your point John, I am reluctant to just let someone else to do it. I have no real sense that that will happen. I think with Matt we have a resource that we could use to put together a package. Obviously that group is going to weigh in on it. I think the DAs will weigh on it. I would like them to have the opportunity to tell us if we are wrong. I don't mean to limit it to the notice provision. I would like to suggest that Matt put together specific proposals with the economic impact that Peter refers to. It takes us two meetings. We do that next meeting and if we are still thinking this is consistent with both our mission and our judgment, then at the December meeting we could take input. I see no reason at all that this Commission shouldn't propose to the legislature something that they may well find attractive. It is not, in my mind, inappropriate for us to jump into this arena. This strikes me as one we should. Any other thoughts?
- 55:42 P. Ozanne The only other thought and maybe this is for after our guests speak. This item on the agenda is entitled "the service delivery plan." Isn't that what it is? And I wonder how much Ingrid and the Commission are wanting to consider or reconsider the service delivery plan. I don't see how we can continue to pay the rates we are paying. I now see it was one thing when I was administrator of the resources. Now I see that I am the responsible authority to ensure the standards. I can't imagine that we can continue on with the rates that we are using. I don't know what the service plan looks like. We have an excerpt of it here. Again, I would like to hear from Ingrid about how high on the agenda the review of capital cases is going to be.
- 56:44 Chair Ellis Certainly the two are not inconsistent because if we went forward with proposals that had the potential of scaling down the number of cases that actually did have that sanction, those savings could be applied to make the representation of those cases at a higher level.
- 57:10 P. Ozanne I am not comfortable with the time frame involved though. Having struggled in another state with the mitigation experts, mitigations specialists, they are scarce everywhere. They are just not going to come here at the rates we are offering. Frankly, they are more difficult to find than attorneys.
- 57:36 Chair Ellis Why don't we come back to this after Professor O'Brien and Robin Maher. Are you a duo or a sequential?
- 58:00 P. Ozanne Matt, thank you for your work. It is really great to have you here.
- 58:02 M. Rubenstein Thank you for the opportunity. It has been a pleasure.
- 58:18 Chair Ellis Welcome to you both. Thank you for coming.
- 58:19 Prof O'Brien Thank you for inviting us. This is something that has been important to us for sometime. It is wonderful to me to be here in Oregon. If you get a chance to read the supplementary guidelines and some of the scholarship involved, you will see that some of your Oregon lawyers have their fingerprints all over the standards particularly from the earliest time of capital defense. I think I probably quote Dennis Balske 12 times in some of the articles and the work that he contributed to this and many others. Thank you for having us. I wanted to just start out with the big picture and then bring it down to the concrete level. How do we provide these services? My work over the last three or four years was concentrated primarily on developing standards for mitigation specialists to follow in capital cases. There were three decisions of the U.S. Supreme Court that are informing our efforts today. *Williams v. Taylor*; *Wiggins v. Smith*, and *Rompillar v. Beard*. I will go through some of these and I may go through some of these slides very quickly because Matt has covered quite a lot of ground. My Powerpoint is on his computer and I am happy for him to share it with you if you would like to see more. The focus on competent capital defense is on the investigation. *Wiggins* specifically said that *Strickland* doesn't allow a cursory investigation to inform strategic decisions of trial counsel. There has to be a thorough investigation and those are the words of

the court that the court picked up from the American Bar Association Guidelines on the defense function. The other thing I think is important for funders to understand in deciding how much money goes into the system is that what this is all about is giving the sentencer the maximum amount of information possible before he or she makes a life or death sentence. In most jurisdictions that includes the prosecutor. It includes the jury. It includes the judge. It includes appellate court judges and post conviction judges. The sentencer's possession of the fullest information possible is the goal of competent capital defense lawyers. The U.S. Supreme Court constitutionalized the concept in *Lockett v. Ohio*. I think the importance of that for this Commission is to realize that we are not just talking about local standards but we are talking about constitutional standards which have resulted in a national standard to which many Oregon lawyers have contributed. *Williams v. Taylor* is one of the first cases post the Anti-Terrorism and Effective Death Penalty Act which waters down habeas corpus relief for state prisoners. Yet it is an ineffective assistance of counsel case in which the U.S. Supreme Court granted relief under that watered down standard. There was mitigation evidence in the case that the trial lawyer simply failed to uncover. The court turned to the American Bar Association guidelines as guides for determining what is reasonable for defense lawyers to do. So here is a sample of the mitigating evidence that the lawyers at the trial level in the *Williams* case failed to uncover. Williams' parents had actually been sent to prison to serve time for child abuse. The jury that sentenced Williams to die didn't know that incredibly significant fact. There was a social worker report, and this is an exact quote from the Supreme Court's opinion which quotes verbatim the social worker report. The social worker walked in and found that there was feces on the floor. Urine was standing in the bedrooms. The place was a mess. The children were naked because the parents were too drunk to dress them. They were put in foster care where they were sexually abused. These are terrible facts that the Supreme Court has recognized that virtually any jury would want to know before sentencing someone to die. The court had no problem finding here that the trial lawyers didn't fulfill their constitutional obligation and in doing so look what they cite. They cite the ABA standards that this Commission has endorsed. *Wiggins v. Smith* was another case, again, under that watered down standard of review, the Anti-Terrorism and Effective Death Penalty Act. The Supreme Court found that the trial lawyers were ineffective. The basic notion here is that you can do it right or you can do it twice. That is what the Supreme Court is telling us loud and clear. In the *Wiggins* decision it provided us the impetus for looking specifically at mitigation specialists' performance because *Wiggins* recognized the importance of mitigation specialists and looked specifically again to the ABA guidelines and called them well-defined norms, not just guidelines but norms for governing the standard of practice. In this case and the next case, *Rompillar v. Beard*, I think it is important to look at what the trial lawyers actually did in those cases and yet nevertheless were found ineffective. In *Wiggins*, they hired a psychologist who did multiple interviews and testing. They hired a criminologist to talk about Wiggins' future dangerousness or lack thereof. They reviewed tons of records and then they fought like tigers on Wiggins' claim of innocence. This is not an open and shut case of guilt. Yet they were found ineffective because they failed to find this kind of mitigation in Wiggins' background. His mother abandoned him and his siblings for days. They were forced to eat paint chips, to beg for food, to eat garbage. She was having sex with strange men sometimes in the same bed with the children. These things have a powerful effect on a person's development. They do, in the minds of jurors, diminish culpability and this kind of evidence the Supreme Court recognizes leads to a life sentence in these cases. In *Wiggins* the Supreme Court noted that social history investigation is standard practice in death penalty cases. They quoted the trial court which said not to do a social history at least to see what you have got to me is absolute error. So mitigation is just absolutely critical in these cases. Finally, *Rompillar v. Beard* is a case in which the Supreme Court found mitigation in the evidence that the prosecuting attorney gave the defense lawyer and said, "This is what we are going to use in aggravation of punishment." There were things in there that put the defense lawyer on notice that there should have been a more thorough investigation. The interesting thing about the background here, referring back to the case that Matt talked about where the lawyer said, "I don't hold hands with my client. I'm not here to be a hand holder." This was what the lawyers got from the client. His contribution to the investigation they said was

minimal. He was totally uninterested in helping. While they were trying to develop a mitigation case he said, "I'm bored," and then got up and walked out on the interview. At times he sent the defense lawyers off on false leads. He was not at all helpful. The other thing that the trial lawyers did in addition to trying to get through to the client was that they hired three mental health experts. They gave them referral questions. They got back from their experts reports that revealed nothing useful to the defense. In fact they agreed with the state examiners that Rompilla was probably antisocial. That is what you end up with. They had two lawyers, an investigator, and three mental health experts but no mitigation specialist. Yet they overlooked, because of the lack of a qualified person on their team, multiple clues in the file that was pointing them to mitigation. He had a criminal record so there were correctional files. That was where the mitigation was found, in a correctional file with a psych report diagnosing Rompilla as having schizophrenia - very powerful mitigation evidence. There were police reports that showed intoxication and then again here is a quote from the court's opinion talking about the overlooked mitigation. "Mom was a binge drinker during Rompilla's pregnancy, a high risk factor for fetal alcohol syndrome. His mother stabbed his father. His father locked Rompilla and his brother in a wire mesh dog pen that was filled with feces." This is the kind of background and upbringing that Rompelier had and yet in spite of three mental health experts, a public defender investigator, and two lawyers they didn't find any of this stuff because Rompilla's parents said, "Well, we really don't know him all that well," which had been included but they missed it, following the trail that was pointed to by these documents. They did additional testing that showed organic brain damage, borderline mental retardation, fetal alcohol syndrome, so that after the Supreme Court granted relief Rompilla was given a negotiated life sentence. This is very powerful stuff, the lessons from *Rompillar* and *Wiggins*. Diligent skilled investigation is what is necessary in all of these cases. The other lesson that is important is that investigators and mental health experts are no substitute for a skilled mitigation specialist and that the American Bar Association guidelines, and our supplementary guidelines on the mitigation function of capital defense teams, provide a useful template for what is reasonable. As post conviction teams we look at what is left undone by the trial attorneys. We follow those threads and we invariably find powerful mitigation. If you don't find mitigation it is because you are not looking in all of the right places.

I want to talk generally about the supplementary guidelines and how they came into being. Largely it was because of cases like *Wiggins* and *Rompilla* and *Williams v. Taylor*, in which juries were sentencing people to death without the benefit of this kind of information. As a post conviction lawyer it is tragic when that happens. Sometimes you win those cases and sometimes people get executed. It is tragic to us when people get executed when their death sentence is handed down by a jury who knew none of this powerful information. That is why we looked at this, beginning with guideline 4.1 of the ABA guidelines. The defense team should consist of no fewer than two attorneys qualified in accordance with guideline 5.1, an investigator and a mitigation specialist and then it specifically provides that at least one member, and typically this is the mitigation specialist, must be qualified by training and experience to screen individuals for evidence of mental or psychological disorders or impairments. That is absolutely critical. To develop these guidelines we did a national survey of mitigation work. We talked to three to five people from every single death penalty jurisdiction in the United States and the U.S. military in order to find out what people were doing. We did legal research into performance standards. We looked for cases where lawyers were found ineffective by state and federal courts. Then we circulated a preliminary draft beginning in February of 2005 at virtually every national training event in the United States and we solicited feedback. We incorporated that feedback into what you see in the Hofstra Symposium Law Review issue along with this scholarship. We did find in the process of doing this that there are some common misunderstandings about mitigation work. We tried to dispel some of those misunderstandings. One is the notion that mitigation is separate from guilt or innocence. They really go together and for centuries it has been admissible that you could use a character defense in a homicide case to show lack of violence, lack of culpable mental state. The defendant's character can lead to either a partial defense or a complete

defense if it is likely, because of character, that this person couldn't do it. We even found cases in which a defendant's disability became relevant to the question of whether he or she did the crime, such as the many cases that have been documented now in which mentally retarded defendants have confessed to murders that they did not commit. Other cases in which people with other disabilities, such as autism or Asperger Syndrome, were accused of doing certain acts that they just weren't socially and physically capable of doing because of their disabilities. The other thing that we found is that some think there is a notion that mitigation evidence is quantitative and finite. Like in *Rompillar*, the defense lawyer talked to the nuclear family and they thought that that exhausted all of the possibilities. That is a misunderstanding. Mitigation evidence is really as broad as it can possibly be. Justice Kennedy used the term "infinite" when he was talking about mitigation in a recent case. Justice Rehnquist, albeit facetiously, said the defense gets to bring in anything under the sun as mitigation. He is absolutely right. That is what we get to do. The most important ones are the notion that mitigation specialists and experts are fungible. They are not. In the supplementary guidelines we talk about what is necessary for a mitigation specialist to be able to do. He or she has to understand the capital charges so that they know when they are talking to a witness whether they just uncovered a statutory, mitigating circumstance or a non-statutory, mitigating circumstance, or a potential defense. They need to understand the parameters of the diminished mental capacity defense or the insanity defense. They have to understand the constitutional principles involved in the presentation of mitigation evidence. Especially in post conviction they need to understand procedural bars. When you find a good mitigation factor you have to be asking, "Where have you been all my life?" Because the answer to that question will tell you whether or not you have can overcome a procedural bar. A procedural defense that the state has is they are commonly fact based. Your mitigation investigator, your mitigation specialist, needs to understand what the range of facts is that he or she needs to be exploring and, of course, they need to be strictly schooled in confidentiality. It is very dangerous when you are doing mitigation work to go out and tell a witness what the defendant has said about things. It can create some real serious problems, ethically, strategically, so it is very important that mitigation specialists understand these things - a mitigation specialist has to be able to understand and analyze all of the documents that touch on the defendant's life, to locate and interview the relevant persons, establish rapport with witnesses. When you look at the *Rompillar* case, if the defense had had someone like this on board then they would have been able to acquire the documents that showed that the defendant was diagnosed with schizophrenia and borderline mental retardation, and uncover the social history documents that established a strong likelihood of fetal alcohol syndrome. Establishing rapport with witnesses, multiple interviews with the family, might have gotten them through to some of that symptomology. Last but not least, there at the bottom, the ability to recognize and overcome barriers to disclosures. The very poorly understood fact about mitigation work is that the most powerful mitigation evidence is surrounded by layers and layers of psychological baggage against disclosure. There is the embarrassment of the abuser if you are talking about a parent who abused his or her children. There is ignorance. Often people don't understand that they have been abused because that is normal to them. They don't understand what is normal. There is the shame. There is the desire to protect the abuser. There are so many dynamics that prevent disclosure that even though the defense lawyers in *Rompilla* spent many hours with their client, they simply didn't have the skill, the clinical skill, to cut through those barriers and undercover that kind of evidence. We need a person on the defense team who is trained to recognize symptoms of mental and cognitive impairments, the consequences of neglect, the culture, the effect of alcohol abuse and drug dependence and very importantly, the consequences of exposure to trauma. These are all things that mitigation specialists have to be able to do. I am going into this level of detail because it is up to you, I think, to understand and be able to defend why is it that it takes so much time for a mitigation specialist to do this. It will take in person, face-to-face, one-on-one interviews to get *Rompilla's* mother to say, "Yes, I drank repeatedly while I was pregnant with him," and to be able to explore the why and the wherefore of those things - multiple interviews. *Rompilla's* lawyers were all lied to by the family and they needed to go back after they got the documentary evidence to focus in on those things and

very gently give them an opportunity to say, “Look we know more now,” and to get that information out. When you have a defense team that lets the family lie to you, you have built another barrier to disclosure. They have got to admit in order to disclose that they lied to you earlier. The hurdle just keeps getting higher with an unskilled investigation. It takes some conscientious work to establish rapport with the client and with the witnesses, also to have the skills to be able to come back and help the lawyers develop things like a genealogy and chronologies. A genealogy can be a wonderful exhibit when you show the family tree. Then you color code it according to mental health problems or substance abuse problems. It lights up like a Christmas tree in most of our cases. It is a very powerful piece that we can use. They can help us focus in on what the clinical problem might be with our client and help us identify the right expert to call, whether it is a medical doctor or an anthropologist. We have actually had anthropologists brought in on some cases to help us explain to the jury how to understand our client. These things are critically important which is why we focused heavily on workload. We make it very clear that the attorney is responsible for monitoring the workload of his or her staff and the people who are brought in to assist with the case. This is also relevant to what Matt was talking about and the problems you are having with \$39 an hour mitigation specialists. What is happening here is that you are experiencing what we call the federal brain drain. The federal courts will pay lawyers a \$163 an hour. They will pay mitigation specialists upwards of \$100 an hour. The best ones are being sucked away by the federal system and we are having people who are not as qualified doing those cases in state court. Instead, they are waiting for the federal habeas to be filed so they can make more money and make a living doing that. It is human nature that they are going to do those cases. Just in passing I will say that in addition to the hourly rate for mitigation specialists many defender offices, including the one I was a part of for years, struggle with this issue. Probably the best solution is the creation of full-time defender offices staffed by full-time defenders and mitigation specialists so that they can do this work at a rate.... The hourly rate the private lawyers have to charge really drives the cost up. It is the one thing you can do to increase the quality of representation without breaking the bank in the process. It is the best bang for the buck as far as providing these kinds of services. Training is critically important so that mitigation specialists understand the latest developments in mental health and the investigation of mental health issues. We track the ABA guidelines to say flat fees, caps on compensations and lump sum contracts are improper. We should fund the work. The most recent report that is available I thought I would share with you. This document is about two weeks old, I think. This was done by a committee of federal judges looking at federal capital cases and the costs. “Not authorized” here means that the death penalty was not sought by the prosecutor, not authorized. “Authorized” means the prosecutor decided to seek the death penalty. These are in federal cases in which there is that process that the defense lawyers have to go to Washington, D.C and make a pitch to the prosecutor why they shouldn’t seek the death penalty. This is the total cost for defense representation. You can see what seeking the death penalty does. The median, meaning half of the cases cost more than this, \$44,000, the mean, this is the average cost, \$76,000 a case, non-capital federal murder cases not authorized. Authorized, look what happens. It goes up many, many times. It is almost nine times higher when you are talking about seeking the death penalty case in the median. You can see also the difference between trials and pleas. A trial is more than twice as expensive as a capital plea. These are cost per case numbers that we are talking about. Granted these are federal figures. The one thing that I want to emphasize is that this is 1998 to 2004. These are at \$125 an hour for capital defense lawyers. The rate has since gone up but the increase isn’t reflected here.

- 1:23:54 R. Maher It doesn’t really reflect the results of the *Wiggins* case when people really started looking at mitigation and putting a lot more money into mitigation.
- 1:24:09 P. Ozanne Sean, what do mitigation specialists get paid in Missouri?
- 1:24:11 Prof. O’Brien In Missouri mitigation specialists range from \$80 to \$110 an hour.

- 1:24:16 P. Ozanne In the state system?
- 1:24:16 Prof. O'Brien In the state system. There is no cap. In the state system judges don't control the mitigation costs. It is done through a central budget in the State Public Defender's Office. Sometimes they have to go to outside mitigation specialists. If there is a conflict of interest counsel is brought in. That attorney still goes to the State Public Defender in those cases. In the vast majority of cases it is on-staff mitigation specialists who are doing the work. To look at the attorney costs, if we just break out attorney costs, then this is what we are talking about in those cases. As Robin said, these are largely pre-Wiggins figures. For us I think what is more meaningful is to look at the attorney hours involved. Where the death penalty has been authorized they increase significantly so that you have 2,815 hours per case. If you look here at the trial cases, this is the mean, this is the medium. In the big firms, what we like to call the sweat shops in Kansas City, they consider 1,800 hours a year to be the target for billable hours from a young associate. In many defender systems they use a figure between 1,450 and 1,500 an hours a year to define a full-time employee. As you are looking at this if you have two lawyers working together you can see the significance of this number of hours. Each lawyer is putting in 50 percent of his or her billable hours. Two lawyers working together can handle cases over the course of a year. Of course it does go way down if you have a plea. I think your instinct is to say we should have a process where the defense can have some input into whether or not the death penalty is sought. You can see the significant savings that are realized here. Expert costs. These are not the defense lawyer costs but expert witness costs. In a non-capital case, \$14,330 is the mean in federal court, \$5,200 is the median. In authorized cases you can see that figure goes up significantly in the mean and the median.
- 1:27:31 P. Levy Is that in addition to the authorized costs? I don't understand the difference between trial and authorized there.
- 1:27:34 Prof. O'Brien This is the average of all cases, trials and pleas. I should have explained that. We are talking about authorized cases generally here. This breaks down these numbers between trial cases and plea cases. Thanks for letting me clarify that. You can kind of see the significant impact of expert costs. Here is something that is very significant when we are talking about mitigation specialists. Mitigation specialists are 25 percent of your expert costs in federal cases and this is cases that actually go to trial. I am focusing mainly on that because look what happens when the client pleads. Typically your costs go down because you don't have a trial. I think it is illustrative of the role of the mitigation specialist. They are still the single largest, next to the investigator; the mitigation specialist is 27 percent of your total in a plea. When you take the case from a trial status to a plea status his or her percentage of the overall expert witness budget goes up. Their involvement is pretrial. When they do their work effectively often they avoid the trial. Finally, and this is the last comment that I have about looking at the report. There is a direct correlation between cost and outcome in the cases. In looking at the lowest cost cases, 44 percent result in a death sentence, 50 percent result in other verdicts. These are of the trial cases. If you look at the remaining two-thirds of the cases, 19 percent end in a sentence while 81 percent end in other verdicts, lesser charges. What this shows us is that when you spend the resources to adequately defend the client it makes a difference to capital decision makers. In this case these capital decision makers are all juries. Obviously funding, especially where mitigation specialists are concerned, is critical. I understand that this may be a counter-productive slide to show some decision makers when it comes to funding but for us it is what we are after. We recently had a case in Wyoming, in the district of Wyoming, a federal habeas case by a state prisoner. The judge who is presided over that case is a fellow named Clarence Bremer. I don't know if any of you know Judge Brimmer. He was a Gerald Ford appointee and was the Wyoming Attorney General when he was appointed by President Ford to be a district court judge. The words "Clarence Brimmer" and "liberal" have never uttered in the same sentence without the word "not" in between. He understood the mitigation function recently when he granted habeas corpus relief and noted that the defense attorneys, by trying to have the same person do both the investigation function and the mitigation specialist function, resulted in her inability to do

either of those functions sufficiently. In granting habeas corpus relief, the comment that Judge Brimmer...

- 1:31:32 Chair Ellis Is that just an issue of insufficient timing or different skill set?
- 1:31:38 Prof. O'Brien In this case it was both a function of insufficient time and insufficient funds. When you compress the trial date in there, there are only so many hours in a day as part of it. In this case the mitigation specialist had asked for funding to go do some out-of-state investigation. The state defender said, "No." They had asked for funding for both a mitigation specialist and an investigator. The state defender said, "Fine but you are limited to \$15 an hour for your investigator." They couldn't find an investigator who would work for that and then decided that the mitigation specialist would try to do both for a flat fee with disastrous results. They overlooked a really significant part of the investigation in the case. It presented some financial problems with the defense lawyer who came in and talked about the financial stress that doing a capital case for this hourly rate put on him and his family. In granting relief Judge Brimmer said, "You can be too budget conscious in these cases, resulting in habeas corpus relief." I think this statement is particularly significant when a man's life is at stake. There was surely \$20,000 to be found for such an important investigation. This is on top of \$80,000 that had been spent for the in-state investigation. It is hard to put a number on an adequate mitigation investigation. You just need to go where you need to go and do what you need to do to paraphrase the Mamas and the Papas. It is difficult to come up with an average number that will do justice in every case. That is kind of my broad overview. I am glad to answer any questions and also to have Robin address the ABA Guidelines.
- 1:33:57 R. Maher Sean's modesty is preventing him from mentioning that Carlo was his case and an amazing victory.
- 1:34:02 P. Levy I have a question and maybe Robin will be answering this, I'm not sure. As Matt has said we have very few, even among these five highly regarded mitigation specialists, who actually encompass this ability to detect and understand mental health disorders. We do frequently authorize mental health experts to assist capital defense teams. I'm not sure that I understand completely that that is not a sufficient substitute for this more talented mitigation specialist.
- 1:34:44 Prof. O'Brien What we find is that – Deana Logan wrote a wonderful article that talks about the defense team being the caretakers of the evidence of the defendant's mental condition. The defense team is going to be spending more time with the client than anyone else. You could not afford to pay a mental health expert to visit your client on a daily basis. Yet we found some of the best capital defense teams in the country have someone on the defense team in the prison or in the jail talking to the client almost every day. It is that steady baseline that you can establish by spending that time with your client if you are trained to see. Then they come back to the office and you debrief the individual. It is a training process, and if you don't have a person with the training that is where training comes in. There are some wonderful psychologists in our community, Kathy Wyland and others, who come in and they actually videotape client interviews where you can see different symptoms like tagential speech, or circumstantial speech, or blocking when someone gets to a point where they just can't continue a thought because we have touched on a dramatic subject, all of those subtle signs. It is partly training. It is partly having the people who have that ability to begin with. Somebody on the defense team has to have it.
- 1:36:22 P. Ozanne Any talk, Robin and Sean, about a national training center for mitigation specialist? Is there one in the making?
- 1:36:30 Prof. O'Brien We have been kicking this idea around. One of the things that we are trying to do is develop private foundation funding. We have had some limited funding available where some of the more experienced mitigation specialists in the country - there is an office in Houston, an office in New Orleans, an office in New York, in Georgia, my office - where they will fund a

mitigation specialist position and that person will essentially be an understudy to an experienced mitigation specialist. We are trying to do that. It is too little and it needs to be expanded. We are trying to see if we can find funding to do that.

1:37:14 R. Maher That is really the best model. There was talk early about some of this was social work. As Sean said the best way to learn this work is doing it and learning from someone who knows how to do it.

1:37:40 Chair Ellis Any other questions for our guests?

1:37:46 R. Maher Are we out of time? Do I have a few moments? I will try to streamline what I wanted to say today to get everybody out of here. First of all, I just wanted to say thank you. As I told John and Mr. Ellis, it was nice to meet you both in person after having so many exchanges by email and telephone. It is a very good reason to come to this beautiful part of the world. I appreciate it very much. I also want to congratulate the Commission. I do work around the country and in all different jurisdictions. I get a close up look at a lot of ways of doing things. I think Oregon has done a really tremendous job. Creating Matt's position and that resource center was an excellent decision. Designating yourselves as a responsible agency, also tremendous, and adopting the performance standards of the ABA Guidelines. I want to commend you for that. I wanted to come for two reasons today. One is to give you a little bit of a national perspective on what is happening in other death penalty jurisdictions and, secondarily, just to make sure that you know that I am a resource to you. Whatever you need we would like to help you get it. Just a little bit about what I do at the project. You know that we were created about 22 years ago. Our sole focus is counsel, the availability of qualified counsel and what kind of training they receive and what compensation they receive. It is all about the function, the constitutional function, of providing adequate, competent assistance to anybody who is facing a death sentence and after they have been sentenced to death. Along with that we do a few things. The big showcase piece of our work is to recruit and train civil volunteer lawyers like your firm and many others around the country to learn how to represent and ultimately represent people on death row in their post conviction proceedings. I also do a lot of speaking just to educate people about all the problems in the death penalty system. Returning to your earlier question I think Matt answered it very well. That is one of the reasons that I think you are seeing a decline in death sentences. The public is just getting more and more wary of a system that is producing so many errors. I think confidence has really eroded in the integrity of the death penalty system. That has certainly affected jurors' willingness to return a sentence of death. We also work toward reform around the country. We have recently expanded our work to include some litigation when my charms of persuasion fail, but we do hope that in working in concert with a lot of judges and prosecutors and defenders and legislators that we can cobble together some of the solutions for some of the profound and really long lasting systemic problems in counsel systems. Finally, and this was already touched upon multiple times, there are the ABA Guidelines which I am very proud of. I lead the project to revise these guidelines. My project was responsible for the revision. They are the result of an intense effort. I want to just explain that they are not guidelines that we came up with. You will see the history of all the guidelines. Every guideline has a reason, has a history, but more importantly this came from great minds and great experience, like Sean and a lot of members of capital defense community. What we really did is look at all of the cases and learn from our mistakes, learn what worked, and look at what previous standards have said and put them into the ABA Guidelines. We were thrilled to have the Supreme Court recognize them as they did in *Wiggins*. As Sean has already said they acknowledged that they were a guide to determining what is reasonable. Reasonableness, of course, is the touchstone for effectiveness. That is what you are going to measure a counsel's performance against. After that case we saw a real embrace of the guidelines around the country. There are 60 or 70 federal cases now that cite to the guidelines favorably. We track all of these and keep them on our website. You can come visit them anytime and see what the courts are saying. I think it is indisputable at this

point that the ABA Guidelines are the standard of care. They have been recognized by everybody. Along those lines we have been doing some work to implement the guidelines.

1:42:14 Prof. O'Brien

Excuse me just a second. I'm actually scheduled to present upstairs so I should excuse myself. I am available if you have any questions. My email address is on the PowerPoint here, if there is anything I can do at all.

1:42:33 Chair Ellis

Thank you very much.

1:42:35 R. Maher

I should add that after the *Wiggins* case and the *Rompillar* case my phone began ringing off the hook. There were calls from judges, mitigation specialists, from lawyers, judges wondering who do we appoint for mitigation, how do we know who is competent? "We have somebody who has just now declared themselves to be a mitigation specialist. How do I know if that is true, and how do I know whether I should be paying this person?" There were mitigation specialists who called and said, "My lawyer doesn't know the first thing about mitigation and said I should spend 50 hours and do my investigation my telephone. How do I educate him about what is necessary?" Of course lawyers have called and said, "How do I find somebody to do this work?" What we know, and what Sean and Matt both alluded to, is that there is a tremendous problem in finding a qualified mitigation specialist. I get calls all the time from our volunteer lawyers and from defenders who are looking for mitigation specialists. As you saw in the *Wiggins* case and in other cases, even when you have someone who calls themselves a mitigation specialist it is not always a person who can do the job. It is important that these guidelines, the supplementary guidelines that Sean just discussed, were issued to give guidance to judges, lawyers, and mitigation specialists.

1:43:56 P. Ozanne

So what do you say when they say, "I need a mitigation specialist?" Where are we going to get them? We had a problem in Arizona and they were holding up the 150 cases in Maricopa County mostly over the mitigation specialists.

1:44:09 R. Maher

I remember that well. The other problem is that any mitigation specialist really worth their salt is booked up for the next two years. There is no answer to the problem except to follow the model that Sean described and get more people interested in doing this work. It is incredibly compelling work. The other exclamation point I want to make here is the pay for mitigation specialists has got to make it worth their while. It has got to be a professional, meaningful wage for them to do the work that they are doing. I will talk more about some of the funding comparisons around the country in just a moment. I will just switch into the funding now. I want to talk briefly about it because it has really become the focus of the work that I do. After a number of years I realize I could talk myself blue in the face about how to be a better , what kind of training and what sort of things you should do. It doesn't mean anything if you don't have the money behind it. It really doesn't. You can't decouple performance from funding. They go hand in hand. There is just no two ways about it. I think we are entering an interesting time. My practice is consulting with a lot of folks around the country and what I am hearing everywhere is "funding crisis." It is going to get worse now that we are in a financial crisis on top of everything else, but all I am hearing from people is, "We don't have the money to do the job we need to do." I think part of that has been driven by a realization of really what it takes to defend these cases properly. Things like the ABA Guidelines have partly driven that, supplemental guidelines will drive that, *Wiggins* and *Rompilla* - the case law - really describing that it is not enough now to just phone it in as too many defenders did. You have to do the necessary work and that costs money. In a case that I testified in in New Mexico - and a decision was just issued in 2007 - the appointed lawyers there had contracted with the public defender for \$19,000 to represent capital defendants. They said that boils down to, some months into the case, a few dollars an hour for the amount of work that they needed to do. The judge called a hearing to see if he should set aside that contract and increase the fee. The public defender wanted to enforce it. I testified about the ABA Guidelines and what the ABA says about funding, which of course you all know is full payment for the work that is being done. The Supreme Court in New Mexico issued the

following decision. Basically they quoted the ABA Guidelines and talked about the extraordinary demands on capital defense counsel. They stressed that flat fees, or capped rates as in this case, were not appropriate and that counsel should be fully compensated. Then they said that, "You, government, need to come up with the funds that are necessary, and if you don't, you have to take death off the table." They gave them that choice, which I applauded, because I think that is the kind of decision making we need. In fact, the government withdrew the death penalty. They did not come up with the additional money for the court. All of these factors are driving us to an important point in time where we are all thinking seriously about the cost of the death penalty. There are a number of state studies that have emphasized this. New Jersey spent an enormous amount of time looking at just how expensive their death penalty was before they decided to abandon it. All of this is bringing us to the point where we need to make some hard decisions about how do we fund the defense function. Now I want to talk a little bit about Oregon versus the rest of the country. I am going to warn you that this is not good news for you. I looked at about 30 different states and looked at the kind of rates that appointed counsel is receiving. Do you know where you fell on the list? Not last, but in the lower ...

- 1:48:11 P. Ozanne This is the hourly rate?
- 1:48:15 R. Maher Hourly rates. The average out-of-court hour.
- 1:48:16 Chair Ellis Did you look at all the contract providers?
- 1:48:24 R. Maher The hourly rate, the \$60 rate, that is the rate I am using. I know there is a different rate for the contract attorneys, however, I have been told by Matt that the majority of death penalty cases in Oregon are handled by these hourly attorneys and that a smaller portion are handled by the attorneys that have the 1800 hour commitment. In other states they have a public defense system. They have offices that handle the majority of the cases. There appointed counsel are just handling conflict cases.
- 1:48:51 K. Aylward The majority of cases are handled by contract attorneys with the 1800 hours per-year at roughly \$90 an hour. A lesser proportion is at the \$60 rate.
- 1:49:06 R. Maher I stand corrected. Thank you.
- 1:49:12 K. Aylward I would say 80 percent are handled under contract.
- 1:49:13 R. Maher So 80 percent are handled by the 1800 hour contracts? Okay. Very different numbers than I was lead to believe.
- 1:49:23 P. Ozanne Historically, when we get ranked we get ranked on that hourly rate and we are not paying it very often. It is a statutory rate but we are paying a different rate under contracts.
- 1:49:32 R. Maher That is actually very good news. The numbers that I used for the analysis were the hourly rate of \$60 which put you are in good company with folks like Alabama and South Carolina. Many of the death penalty states, Georgia, Texas, Virginia, Louisiana, pay better rates and, of course, the federal government pays a better rate.
- 1:49:58 Chair Ellis If you were compare us at the \$90 rate?
- 1:50:03 R. Maher I can tell you right now. This is \$90 and it doesn't distinguish between in and out of court time?
- 1:50:05 P. Levy No.

1:50:06 R. Maher I will use the higher figure of in court time. Let me put it this way. I have an average for you. The average rate for in court time is about \$90. The average for out of court time is \$83. You are probably falling right around the average amount of hourly pay for the attorneys who have this contract. Now what happens if they need to spend more hours than the 1800 hour contract?

1:50:44 K. Aylward Well, it is not capped on a per case basis. We just assume that there are 1800 hours and if you have a time period where you work more than a 40 hour week, for example, those hours are carried forward until a time when you don't have a case and your workload is less.

1:51:00 R. Maher But if you see the 1800 hours in a calendar year are you compensated at the \$60 rate or additional hours ...

1:51:04 K. Aylward It would be at the same rate but the compensation would be further down the line.

1:51:16 R. Maher Does that answer your question about hourly rates? I think as Sean has said and as Matt have said, the mitigation rates, anecdotally - we don't have terrific data nationwide, but anecdotally - I think you are almost at the bottom if not at the bottom. I am not aware of any other state that pays less.

1:51:37 P. Ozanne Are we paying that under any contracts? Do we have contracts or is it all hourly?

1:51:38 K. Aylward We actually have one contract for mitigation. Then we have a death penalty contract that includes funding for an employed mitigation specialist.

1:51:52 P. Ozanne After Sean's description of what it takes I think we ought to pay them more than lawyers.

1:51:55 R. Maher It is an enormous amount of work. In some of the testifying that I do it has been really illuminating to talk about both what the guidelines say a lawyer's responsibility are and now what mitigation specialists' are. It becomes very apparent why you need the money and the time that is often requested and often denied. I want to also echo a few things I heard earlier and I know I am way over our time limit. I don't want to keep you and I am happy to answer questions. The ABA does recommend, and I would encourage you to consider creating a statewide defender office. It is, as Sean described it, the best and most efficient way to handle these cases with trained, competent folks who have resources in house, mitigation specialists in house, that is what the prosecutors have. The creation of that kind of office would be a very, very good idea to consider. I would also urge you to take a very close look, especially at this point in time where we are all talking about funding and understanding its meaning, take a very hard look at the mitigation rates, and even at your counsel rates, to try to attract and keep more qualified folks.

1:53:11 P. Ozanne Robin, I thank you and I laugh not because that isn't a very outstanding proposal, but we have a long history here in Oregon of not having even had consensus among the bar about your recommendation for a statewide office.

1:53:27 R. Maher What is the objection?

1:53:33 J. Potter There is a fiscal objection from the legislature because they would be paying PERS, and retirement, and benefits, and the total cost is significantly more expensive than the contract system than we have.

1:53:49 R. Maher Is that the only objection?

1:53:48 J. Potter There are those who make their living doing work under contracts who will see that they wouldn't be making a living because they wouldn't be hired under a full-time state trial level system. You would have fewer people in the mix.

- 1:54:05 R. Maher One thing that is interesting, and, Peter, maybe you could talk a little bit about this with your Arizona experience, we have implemented the guidelines meaning we have had State Bar Associations and courts adopt them and put some teeth into the guidelines to enforce them. Arizona is one of those places where we were successful in revisiting – was it Court Rule 6.2 - which requires all capital attorneys to be familiar with and be guided by the ABA Guidelines. We immediately saw a response by defenders saying, “If I have to do all these things I need more training. I need more money. I need more resources.” They really elevated the quality of work that they were putting into these cases. Do you want to talk a little bit about that? That is another idea to consider.
- 1:54:54 P. Ozanne We could talk about it maybe at a retreat. I only administered the public defense system down there for about a year and a half. They are paid quite well, parity with district attorneys, but I have to say, while I didn’t thoroughly survey all the public defender offices, there is an argument that there was a lot of creeping civil service mentality in those offices. I didn’t find the zealotness that one would like and that I see more in Oregon. Many of the defender offices aged over time. People stayed for a long time. There are some pros and cons to the civil service model or the government model for public defense. We will probably talk about Arizona another time.
- 1:55:37 R. Maher We are currently working in Tennessee asking the court there to adopt the guidelines. It also helps judges understand what the obligations are and gives them the cover to devote the necessary resources. It becomes not an option but a necessary thing to do in order to comply.
- 1:56:01 J. Potter Have you found across the nation greater or lesser desirability of having a statewide public defender system based on funding alone. That is, are legislators more or less favorably disposed to funding a statewide public defender rather than a system like we have?
- 1:56:16 R. Maher It is interesting. There are some states that want to be rid of the problem. They create a public defender office and they don’t fund it and they don’t devote the necessary resources. They tie their hands behind their back and say you are not allowed to recruit pro bono counsel. You have to handle every single case that comes your way and as expected, those offices fail miserably. The legislatures love it because they can give that office \$500,000 a year and not worry about any other costs and hope that that is enough to handle it and of course it isn’t. Most states use a combination of public defender systems and appointed counsel. I think the ABA for decades has been saying that the statewide office is by far the better model to deliver competent legal services to indigent defendants. So legislators are always going to grouse about spending money on defense. That is part of the problem with the death penalty. It is so politicized and it makes doing what needs to be done so difficult sometimes.
- 1:57:23 J. Potter That is interesting because while I understand the ABA’s rules and why we would agree that it is potentially a better model for service delivery, I am trying to figure out is it a better model, politically? Does it make more sense politically to do what we are doing even though service delivery may be tougher to achieve. Or do we push hard for a statewide public defense system that may not be as favorably received politically, but would be received by clients as a better delivery system?
- 1:58:00 R. Maher May I ask when the last statewide study of the death penalty was done with the discussion of all the different delivery systems?
- 1:58:05 Chair Ellis Your whole line of questioning is focused on death penalty only?
- 1:58:09 R. Maher` Right.
- 1:58:10 Chair Ellis Not the broader public defender system?

1:58:11 R. Maher No, death penalty only.

1:58:17 J. Potter We are mixing our discussions. We haven't had a discussion in the legislature that I am aware of that focused just on the death penalty. We have had it generally but not specifically regarding the death penalty.

1:58:40 R. Maher One thing to do possibly as I have seen other states do is to have a Commission take a look at these different options. Get some fiscal information about the impact and then be able to present that to the legislature as options with or without your approval.

1:58:52 J. Potter Are there states then, and maybe I missed this, that have death penalty only state employee providers, but who don't have state employee providers for trial level, non-death penalty cases?

1:59:14 R. Maher They have statewide offices for capital trial work. What was the second part of the question?

1:59:22 Chair Ellis But not in the non-death penalty cases?

1:59:27 R. Maher No. They have a defender system or a indigent defense system that handles those cases. They have both in some states.

1:59:37 J. Potter Is there any state that just has the one?

1:59:40 R. Maher Oh, I see, without having any sort of underlying indigent defense system.

1:59:47 J. Potter We have a defense system but not state employees.

1:59:57 R. Maher In California it is county by county.

2:00:02 Chair Ellis Colorado is a state that has an FTE state level defense system.

2:00:11 R. Maher Texas also. Well, many places are county by county for the delivery of services. There aren't enough states that have statewide capital offices if that is part of the question.

2:00:19 J. Potter It is. In Oregon we have a statewide PD for appellate services. It is just an interesting concept to consider having a statewide employee system that just focused on death penalty, that didn't do anything else. For misdemeanors, felonies, anything, we could say we will keep our existing system but in death penalty cases we want to make death penalty work state employee work.

2:00:50 R. Maher You have definitely politicized the question with the state employee piece of this. I think part of the answer might be a recognition of what is unusual about this work and that it demands a special level of care, and experience, and training. It is a recognition that I think you will find is well supported around the country, that this work should be done – there are those who say it is the brain surgery of the criminal world. You can rationalize this by partially explaining that information. I can't comment on your fiscal part of the question because the employee benefits issue I know is troublesome for a lot of legislators.

2:01:27 G. Harazarbedian Mr. Chair, I would just offer a comment in this discussion and that is if the Commission were interested in pursuing this my guess, and Kathryn and Ingrid would know, but my guess would be that taking the capital caseload and converting that to full-time FTE state office would represent less of an increase in funding than taking the trial level, non-capital caseload and converting to a FTE full-time. I think the numbers would come out differently. I defer to those with the expertise.

2:01:59 K. Aylward That is correct.

2:02:03 G. Harazarbedian Just throw that out.

2:02:06 Chair Ellis You would have the same problem with fluctuating caseloads if you have a built-in FTE group and the caseloads decline, or if the caseloads go above capacity. One of the strengths of the contractor system if you otherwise can meet quality is some ability to adjust up and down.

2:02:36 R. Maher Yes, but, I will say that in other offices they have an annual legislative budget session where they need to put forth a budget for their office which would reflect the current pending death penalty cases. I'm sure the budget contracts and expands based on the number of cases they need to handle. You could have an annual or every two years review of the budget. I don't think that is extraordinary at all among the capital offices that I have seen.

2:03:06 Chair Ellis It seems to me unlikely that we could do PCR that way.

2:03:09 R. Maher It has been done that way.

2:03:15 Chair Ellis I see an inherent tension because a lot of the PCR issues would relate to competency of counsel at the trial.

2:03:26 R. Maher Right. Well they won't be in the same office.

2:03:31 M. Rubenstein Mr. Chair, may I make one more comment The significant challenge in the next three to five years, are these post conviction cases that are at the trial stage in Marion County. Thinking outside the box, just inventing whatever system you could pick, if you had an office with three to five attorneys and three to five mitigation specialists, a very small office, that group could have a tremendous impact on five, 10, 15 cases.

2:04:13 Chair Ellis So take your job and expand it?

2:04:14 M. Rubenstein I am in a conflict. I am helping people at the trial stage and in the post conviction stage. Any trial stage case I work I am conflicted out of. I don't think you can have an office, a unit, that is doing both. I am just addressing the capital post conviction cases. A small office, three, four, five attorneys; three, four, five mitigation specialists could do tremendous work on ...

2:04:41 Chair Ellis You are preaching to the choir if the proposal is to have PCR FTE people. We have been pushing

2:04:51 M. Rubenstein It doesn't have to be – I am not sophisticated about public employee issues. In Georgia it is a private, non-profit that gets funding ...

2:05:07 R. Maher I think the legislature funds GRC. Are those folks state employees?

2:05:12 M. Rubenstein No.

2:05:17 R. Maher So that is a way of doing this and they handle all the post conviction.

2:05:21 M. Rubenstein In Louisiana after the Peart litigation the Supreme Court ordered the legislature to set a lot of money aside for capital trial post conviction. Again, that is private, non-profit with a board.

2:05:35 Chair Ellis That does a contract with the state?

2:05:38 M. Rubenstein Yes.

2:05:38 Chair Ellis That isn't very far from the model that we have right now.

2:05:57 M. Rubenstein Except it is an office with a director with standard practices and training that is localized. You have colleagues. When one case gets hot you can throw three mitigation specialists onto a case for a week.

2:06:17 R. Maher It is the difference between being a solo practitioner and being in a law firm. There are a lot of benefits that come from being in an office, the in-house training - you are learning from each others mistakes and successes - and we know that it raises the level of representation that our clients receive. There are many, many other benefits associated with having a public defender office.

2:06:41 Chair Ellis Other questions for Robin?

2:06:40 J. Potter Clearly the mitigation issue is - Matt started out early on saying it was problem. Sean talked about all of the qualifications necessary to be a mitigation specialist. You have talked about how we are in the bottom rates in mitigation pay. You also mentioned that mitigation specialists get their training by working with other mitigation specialists. Is there any university in the nation that is offering mitigation, death penalty mitigation certificates of some nature, degrees of some nature?

2:17:14 R. Maher I am not aware that any have gone through with those proposals. There are lots of ideas about this. When we first started talking about the guidelines I have to tell you that the community didn't like it very much, the mitigation community and the experts we consulted with. They told us that you can't come out of a training course and know how to do this work and we don't want to have some sort of bias against the mitigation specialists that have been doing this for 20 years who are incredibly well trained and successful but don't have a certificate and these folks popping out of the schools do.

2:07:47 P. Ozanne That is what they used to say about law schools too.

2:07:49 R. Maher We did have a very wholesome discussion on this point. I think we need more training for mitigation specialists and we are seeing that. The defender services are putting on an annual mitigation conference. It is just on mitigation, just for mitigators and defenders, to understand all the different components. Things like that, I think, need to be replicated and models like Sean's need to be expanded, and payment.

2:08:20 P. Ozanne We had 150 capital cases pending in Maricopa we were about to interest the community college in a training program. There, of course, the advantage, if you could say this, is you could bring local people in and they know they will have a job in Arizona given this caseload. In another place there is not going to be the local demand, like Washington with two pending cases.

2:08:50 Chair Ellis Thank you very much.

2:08:52 R. Maher Thank you. If you have any questions for me, or if I can send you any resources or data, I would be delighted to do that.

2:09:06 J. Potter Thank you for visiting us.

2:09:14 Chair Ellis We are about to wrap up this segment.

2:09:20 P. Ozanne Maybe I better do my homework. There is a report that the Commission did 07 and I will look at that report before launching off into a proposal to revise it.

2:09:40 Chair Ellis Ingrid, you assumed that chair which suggests you have something you wanted to tell us.

2:09:42 I. Swenson I was just going to suggest a break, Mr. Chair, because we need to set up some equipment.

2:09:47 Chair Ellis I have that right here in my notes. Kathryn is today's Shaun. Why don't we take our break now and come back in 13 minutes.

(break)

Agenda Item No. 5 Introduction to Drug Courts

2:32:26 Chair Ellis Can we get back to order here. Ingrid, do you want to introduce our next presenter?

2:32:44 I. Swenson I certainly do. I have indicated on your programs that Devarshi Bajpai would be here this afternoon. He is with the Criminal Justice Commission and is the grant supervisor for that agency and is handling all of the grant proposals for drug courts around the state. He brought with him Heather Jefferies from Clackamas County. I think they are going to provide you with a good introduction to drug courts and what they are and how successful they have been. The plan would be that next month we will come back to this topic and hear from some of our defense providers and others about details of particular drug court programs.

2:33:30 Chair Ellis Okay. Welcome to both of you.

2:33:32 D. Bajpai Thank you. I will just give you a basic agenda of what we are planning to talk about. We have a lot of slides and I don't know that we have all that much time. We will just get through what we can today. This is the basic agenda. I am going to turn it over to Heather. Like Ingrid mentioned I manage the grant fund for drug courts. I contract with drug courts across the state. The money for drug courts came with a methamphetamine bill in 2005, that created this grant fund. I know a lot about grant courts at the statewide level, but I haven't worked in a drug court so I think Heather is going to be great for answering questions about that. With that I think I will just turn it over to Heather.

2:34:36 H. Jefferis My name is Heather Jefferis and I am with Clackamas County Treatment Courts. We have a drug court. We also have six other specialty or alternative case processing treatment courts. They are the Mental Health Court, DUII Repeat Offender Court, which is the second one in the state, the first one being in Multnomah County. We also have a Juvenile Drug Court and a Family Dependency Court. We have a Community Court and one diversion program which is a Domestic Violence Diversionary Program. These courts are really geared toward taking a higher risk offender with a high level of addiction, a criminal history that is moderately significant, and also many identified social barriers that make it difficult for them to do well by themselves and they would really benefit from the structure of an intensive long-term program. Our model is not what everyone does in the state, but it is what people are tending to go to based on the resources that we have for participants. Today I am just going to talk a little bit about the basic structure and what all drug courts have in common. The other thing that is interesting about these ten components is you can look them up on the National Association of Drug Court Professionals' website. The other models, such as the Mental Health Court and Dependency Court, also have guidelines which were taken from the original adult drug court model with 10 key components. Adult Drug Court was the first model. It started in 1989. Drug Courts are made up of a multi-disciplinary team. What that means is that all the partners that interact with our folks, instead of doing it separately and over a long course of time we actually are partners on a team that meets weekly and discusses the client's case and progress in the program. We usually, of course, have a judge. Hopefully we have DA representation. Hopefully we have defense representation. Hopefully we have a treatment provider on that team, and a probation officer. If it is a juvenile case that would of course include the juvenile department. If there is a family dependency component we would like to have a DHS worker. Then we usually have a person who is in my role which is basically an administrator. Then I also do something that I call light case management. I help

set up referral systems to the other community resources and partners that we use including housing, food, employment and education. So drug court is really an old fashioned, wrap around service system besides being an alternative form of case processing. Our program is a minimum of 14 months. Programs vary and go from anywhere from nine months to – the longest we have ever kept someone in our program was almost five years. That is because that is as long as that judge had jurisdiction over that particular case. It is really about changing their life and helping them get the life skills, the practice, the support, housing and employment that they need to stay in recovery. All these people actually get together every week and talk about different cases. Because we have so many programs I included this slide. It gives you kind of the employee format. We call our courts an integrated court because some of our judges do two programs. I oversee several programs. Some of our DAs actually do more than one program. Our defense attorneys have decided to – there are different attorneys for the different programs. We have the adult drug court, which I talked about, and you can read more about that in the packet if you like. I am not going to spend a lot of time going over the different types. I talked about them previously. This just talks about the different types of case types and a little bit about our programs. These are also on a website, the Clackamas County Circuit Court, so you can take a look there or you can call me if you have questions about any of these models.

2:38:54 P. Ozanne

I have a question about at least one concern of the Commission here. The wave of drug courts across the country has been a big movement. We must, to some extent, respond to the reconfiguration of the court's systems and that will require us to maybe reallocate resources to staff drug courts. We just had a discussion about how little we are paying for mitigation specialists in death penalty cases. For us it is kind of moving limited resources around. One of the things I am particularly interested in is the demonstrated effectiveness of drug courts. I noticed in the report that we have here, that you were kind enough to send us, the Criminal Justice Commission Report - the national study that recited the USGAO report the results of which were fairly modest in what they said the effects of drug court were. The Commission also said – I am looking at the findings on page 29, "Adult courts are more cost effective than other interventions." I just wondered how, and I guess you are speaking to that, how the Commission really came to that conclusion. The studies I am familiar with - the Washington Public Policy Institute reviewed a number of interventions and I am sure you are both familiar with that work - the results were rather modest leaving me to wonder what direction we should be going here in Oregon. As far as we are concerned how much support should we be providing, given these competing interests? I wonder, both of you, what your feelings are about effectiveness.

2:40:54 D Bajpai

We are going to be coming back to the effectiveness issue. Could we address that in more detail?

2:41:07 H. Jefferis

I can say from a local perspective that my background is on the mental health professionals, therapists, and certified addiction treatment administrators. Just from a local perspective in our particular program we take folks who, on average, have an onset of substance abuse at about age 12 in our program. Even in their twenties they have a good 10, 12 years of serious drug use behind them, not to mention a juvenile record and an adult record. Using treatment as usual, like when I was working with adolescents or young adults in treatment, we had about a third of the people who signed up for treatment who completed. Out of that third of people who completed only about a third did not recidivate. That is in general population where you have a mix of some people with shorter period of chronic use and people with longer periods of chronic abuse. In our adult drug court where everyone has a significant history, at least in our program in Clackamas, we retain about 60 to 70 percent of the people who enter the program. Out of the 60 to 70 percent of the people who graduate, 60 to 70 percent do not recidivate. It is about the inverse. I also have worked in the Benton County Drug Court with a similar population in that particular drug court - pretty similar statistics. In fact, I think their statistics are a little bit higher than ours. From an on the ground perspective that is kind of what we are seeing in our local courts.

2:42:48 J. Potter

Is there a standard when you are measuring recidivism, the time frame for recidivism? Is it one year, two years?

2:42:52 H. Jefferis

I think he will talk more about that. These are the different types. National treatment courts impact both individuals who graduate and those who do not graduate. We actually found in most studies, in my own court and also nationally, that people who are terminated actually do better than their peers who never had contact with drug court. They actually do well by just having contact with our court even though they weren't successful. I see that locally in my own program in that I have people that have served a penitentiary sentence and they failed drug court. They come back clean and sober and they have a job and they have a house. One of the main reasons that people get terminated from our program has to do with non-compliance, not necessarily a relapse. Sometimes we terminate people for lying about going to their meetings. We terminate people who have new drug use, but not being honest about their new drug use and lying about it. That is a much more severe sanction than new use. If a person has a relapse in drug court, depending on what their history is and how well they have done we work with them and we hope that we can get them back on track. Treatment courts are one of the few programs that provide consistent structured care longer than one year. I like to remind everyone in Oregon that we have always ranked in the top 50 for the worst addiction rates in the United States. We are always ranked in the top 10 for the worse access to treatment. It is not a good combination. Team structure makes it more difficult for participants to manipulate information. The program partners are all meeting every week. We get to talk about these people. We are in their business like crazy. We are there to support them when they need support and help them. We are there to give them a consequence when they need to be put back on the right path. As a mental health person, that is called "behavioral intervention," which is very effective. Participants are required to create a stable life. Again, as I said it is not just about getting clean but changing your entire life style and making a new peer group and trying to do better for yourself. We have a gal right now who is getting ready to graduate. She is returning to her family and she has her kids back. She started college and she is the first person in her family to ever go to college. She wants to go to school to be a paralegal. The first class she took was criminal ethics which she thinks is quite the hoot. She is doing great. These are the 10 key components. That was just a brief overview. If you have anything please let me know. "Defining Drug Court" – these come from the National Association of Drug Court Professionals as I mentioned. This is basically the federal guidelines of what you really need to do to have the basic core structure of a drug court that works. Every drug court that the National Drug Court Institute has done research on has followed this. This is what they say when they talk about research. This is the structure that we know will have a certain kind of effect. If the program does not follow this structure we don't know what the outcome is likely to be because there is no research if the program does not follow this basic structure. Key component #1 - drug courts integrate alcohol and other drug treatment services with justice system case processing. That is really working together to make a united front. We develop a trusting collaboration both with our community partners and with our participants. So drug courts are effective not only in that they work with the participants and help them with access to a variety of systems, but it also keeps our community partners talking to each other, streamlining our systems, getting rid of things that don't work and including things that do work. From a system's perception I think drug courts are very beneficial in that they help you use resources in a very efficient manner because you have less duplication of services. Establishing clear lines of communication, information and change; developing an understanding of your different team partners' priorities. Each person on that team, even though they want to see this person get clean, they don't necessarily have the same way of thinking about how that is going to happen and what that is going to look like. Again, its good education about this process. We are all working with people that have addiction and we can all learn from each other. So that is again all the different types of partners and all the different components that make up drug court. Key Component #2 - using a non-adversarial approach. Defense counsel promote public safety while protecting participants' due process rights. This is where it really is so different from a

normal case processing avenue. It is that the DA and the defense attorney and all the other partners are sitting at the table and looking at what they can provide for this person to keep them out of the system and to get them where they need to go. Of course the DA is always really interested in keeping them out of the system and getting them where they need to go. Our defense attorneys tend to be more, you know, "Let's get everything we need so the person can do good." We all have the same goal. It takes time. I have worked with a couple of different teams and in the beginning it takes time for people to understand this. This is when I play my traditional role. "This is when I can talk about my client in a way that is going to be in their best interest in the long term." I think that is a really good thing. You also have a leap of faith with your mental health and your addiction professional to be so open with the legal world and law enforcement world, when you have law enforcement on your team, because of confidentiality and all of those kind of components. That is the challenge of the team, to learn to trust each other. How do we still protect confidentiality? How do we still protect due process? How do we all share information and make this thing work? Key Component #3 – eligible participants are identified early and promptly placed in the drug court program. This can be the tricky part because as I mentioned participants are screened for mental health. They are screened for their criminal history and different types of drug courts take different types of cases. Our adult drug court originally took only lower level cases. At this time we have been around since 2000. We now take cases that are more severe. We actually have some low level person to person crimes. It just really depends on the situation and we do it case by case. That is because all of the team members, our defense, our DA, our law enforcement, our mental health providers are comfortable with each other and the structure of the program. They are willing to take a look and screen all these prospects. The screening process can take up to two to four weeks depending on the person. They do have to get all of these different screenings. Probation also does what they call a risk assessment. Again, our court takes people with more significant barriers and more significant problems. We do try to be as cautious about the screening process. Key Component #4 – drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services. As I said this isn't just about being clean and sober. It is about changing your life and the more services you have the better relationship you have with community partners and the better your outcome is going to be. Treatment Option – all the drug courts have different options. Here in Clackamas County our county keeps all of its treatment dollars in house. They don't subcontract to private providers. Our county actually provides the treatment for our drug court which is great for us. We don't have to go through another party. There are pros and cons to both situations. In some counties treatment is subcontracted so it goes to the county and then they subcontract that out to a private, non-profit providers. In those cases the drug court has to choose one of those providers or find one of those providers who is willing to work with them. It can make it a little more complicated but sometimes it can be better. Maybe they are willing to fund in a different way or provide a different service. It just depends on the situation. Again, in-county has been good for us because most of our folks are single adults in adult drug courts. They do not qualify for OHP nor do they make enough to have insurance. About 90 percent of our people are un-insured. The county has been able to cobble together some indigent funds. They have more flexibility than the private, non-profits do. We have been very fortunate in Clackamas County. That is actually why we are capped at 50 because we do not have the resources to have another therapist. We would have to have another therapist if we had more people. We also have an assigned probation officer and we would need more money to get another probation officer. Even though we could serve many more than 50 based on how many cases come through Clackamas County court, that is really all we can do with the resources that we have. Key Component #5 – abstinence is monitored by frequent alcohol and other drug testing. Test, test, test, test, test, test, you can never test enough. For all my participants, when they graduate, one of the number one things they say is, "I am so glad you gave us all of these random drug tests." Random means that the person literally has no idea when they are going to get a drug test. If a person goes to treatment on Monday, Wednesday, and Friday and they know that they are going to get a UA on a Monday, Wednesday, or Friday, but they are not sure which day, that is not random. Random means you have no idea when you are

going to get called. We didn't have this ability, because this is an expensive resource, for a long time. One of the things I do is grant writing for the program and I wrote a grant. There is some money now that comes through the Criminal Justice Commission, but that funds about half the programs in the state. We were able to help our probation department write a grant so that they could get a color system to use for drug court people and other high risk offenders that come through probation. That is the kind of collaboration we do. We help our program and we also try to help the larger the system work better. "Characteristics of a good drug test" – and I'll skip through that. Again, if you want to learn more about drug testing there are lots of the things on the internet. Key Component # 6 – a coordinated strategy governs drug court responses to participants' compliance. What that means is that when you are in drug court things are done in a timely way. When somebody does well we give them an incentive, we clap, we give them a clean time coin, we tell them "great job," and good things start to happen for them, when they don't they get a sanction. In our court it could be jail, it could be community service, it could be homework assignment, and it could be increased meetings. We get pretty creative. There are lots of things we do to take up people's time and make their life a little uncomfortable for awhile to remind them that they need to get back on track. The method of the delivery of the response is as important as the response itself. This is one of the things that is so important about drug court - the relationship with the judge. In watching and having provided treatment for years I think that one of the most amazing things I see in drug court is the relationship of that participant to the judge. When they come in they have no experience with drug court and wonder, "How is drug court different from normal court?" and all that kind of thing. Then over time they get to see this authority figure, and authority figures have not been a happy thing in their lives, actually be concerned about them and develop a relationship with them and actually create a safe environment for them where they have to be accountable. It doesn't mean the judge is always going to be nice and they know that. In fact, one of the best things that we see in our program is when we have people come in who know they did something against the rules in the program. They go up to the judge and say, "I am here to report that I missed group, I slept in and I know I need a sanction and I deserve to have a sanction because I screwed up." The judge says, "Okay, well what do you need?" They say, "Well, you usually give people eight hours of community service for that." "You are right." That is the kind of interaction that happens in drug court. That is how we teach people to be accountable. It is a totally different relationship. We never know who the person is going to bond with on the team. We have folks talk about how they have never had a DA actually be interested in them, obviously in traditional case process, but we have had some folks say, "You know, this DA actually cared about what happened to me and it changed my world." That is kind of the ground work, the nuts and bolts part of the program, that is really amazing. "Participant testimonials" – again, those are the kinds of things I was talking about that showed that relationship with the judge and other team members is so important. Key Component #8 – monitoring and evaluation measure the achievement of program goals and gauge effectiveness. That is what Devarshi is going to be talking about. He is doing it on the statewide level. On the local level that is part of my job. What I do is I keep statistics on the program. I monitor different types of things. With my mental health background I am looking at different categories of age of onset. I am looking at personality traits. What we found in our drug court is that really the only denominator that is different is young adults. Our younger clients do not do as well as our older clients, which in the land of addiction and mental health is actually counterintuitive. It should be the other way around - teaching young dogs versus old dogs. We find that it is actually the opposite. We do ongoing evaluation of our program. If your program stays the same forever it is not going to be as effective. Key Component #9 – continuing interdisciplinary education promotes effective drug court planning, implementation and operation. We have got to train our teams. Our teams have to have cross-discipline training. They need to learn about each others' jobs. They need to learn about addiction. They need to learn about recovery. Today I had to leave early. I had Dr. Toivola from Sterling Reference Laboratory in doing a training for all of our teams and community partners at the court. That is another way that we bring together the community. Key Component #10 – forging partnerships among drug courts, public agencies, and community-based organizations. Again,

that is how drug court works. There is no funding, there was no funding in the State of Oregon. These programs grew up from the grass roots because people saw that it was an efficient use of limited resources. We were all working with the same people that were going through the system over, and over, and over in a circle. Drug court actually provided an opportunity for some of these people to get off the treadmill and for us to use our resources in an efficient manner. I also attend a lot of community meetings and commissions. I am on the Housing Commission in our community and a lot of others. That is where we can write grants or use resources wisely and know which programs are in the community and how we can access them. They learn more about the criminal and the justice system which is good for them. That is drug court in a nutshell and I talked really fast. Devarshi has a half an hour and I might have to jet out early because I have to pick up my children. I do have a card and I will leave a stack of cards here if anyone has questions or would like to talk about drug court.

2:59:49 P. Ozanne Just a quick question. Is your participation charge driven or risk assessment driven? How do you decide who gets in there?

2:59:53 H. Jefferis As with any drug court it is either a probation violation or a new charge. That is how the person is flagged. We have a new charge or we have a probation violation. At that point what happens is that either the defense attorney or the prosecution - that is why education is so important - says, "Hey, you look like you have an addiction probation. I have known you for a long time. I have seen you around." And they say, "Let's explore drug court." So then either the defense attorney or probation or sometimes even the DA will make the referral to drug court. I get that person's name; we arrange a mental health screening and if they are already on probation the probation officer will write up a recommendation or a report if they think it is a good idea. Sometimes they may already be on probation and they have a new charge. That is very common. Then our DA does the criminal background to make sure. They have to go through all of those processes.

3:00:59 P. Ozanne So would it be fair to say it is amenability to treatment not risk that you are looking at?

3:01:01 H. Jefferis Well, it is both. We actually turn people away in our program that we think could actually give regular probation or regular treatment a try. We have a cap on our program and so we really only want to serve the folks who have tried those things and not done well in the past. Very rarely are people going to come in and say, "Please, I need treatment." They are going to say, "I want to do drug court because I won't have to serve penitentiary time because I can serve this like a downward departure." We are very flexible in how we take people in. Some courts are not. Or, "I don't want to have another PV violation, another felony probation violation charge so I would rather do drug court. I don't want to go to jail. I probably need to get clean. That would be helpful." For a lot of people that is how they come in, but eventually we see a shift. I would say that the majority of the people come in that way. Does that answer your question? That is our program. Some programs are more diversionary so they take people at the lower end. Our kind of a program takes a little more supervision, and because we have probation on board, we can actually take those offenders. Some communities don't have the resources to have probation on board so they don't get that benefit. That allows us to make home visits. It allows us more access to drug tests and those kinds of things. We also have money to do intensive treatment and we just got a federal grant for our programs for residential care because 70 percent of our participants are high risk and meet criteria for residential care. In Clackamas County we have only eight indigent residential treatment beds for the entire county of maybe 390,000 people.

3:03:09 Chair Ellis What role do defense lawyers play?

3:03:10 H. Jefferis They do the referral. They would do the referral in the beginning. We have one assigned defense attorney and he has been doing it since we started. We are very lucky in that regard so everyone knows who he is. People know about our program so what they generally do is to contact Scott Thompson who is our assigned defense attorney and talk about the person.

Then Scott will bring that forward to the rest of the team for their evaluation. If it is a probation violation case only the probation officer can bring that forward to the team and send us a report on the violation.

- 3:03:54 Hon. Elizabeth Welch Is a referral an alternative to being prosecuted on the new charge or the PV?
- 3:03:55 H. Jefferis That is correct. It is totally voluntary.
- 3:03:59 Hon. Elizabeth Welch But not only is it voluntary but the diversionary element is an attraction to the offender?
- 3:04:07 H. Jefferies We are very flexible in how we process the cases. In some cases the DA says, "You look acceptable to drug court but you still are going to have to plead guilty", because we have everyone plead guilty initially, "but you won't serve time you will serve drug court instead." Sometimes we will look at the case and the case history is a low level case and we will actually do a dismissal if they successfully complete. With probation violations obviously nothing can be done about that previous charge but they serve drug court instead of going through the normal probation violation procedure.
- 3:04:54 Chair Ellis What happens if the defendant pleads guilty and comes into the drug court program and drops out, fails, doesn't complete?
- 3:05:08 H. Jefferis They get a package in the beginning, and that is why we take our time in screening people, they have an offer from the DA's office. They know what they will be facing if they fail and they have conferred with their defense attorney and decided that that is agreeable to them or not. People understand what they could face if they fail and what they face if they succeed. I am often very surprised because we have very few people who refuse to come in. We also have a probationary period of one month where they can opt out and go back to normal case processing.
- 3:05:47 Chair Ellis And withdraw their plea?
- 3:05:48 H. Jefferis Yes, and act like they have never ever come to drug court and go back to normal case processing. In that one month we can also decide if it isn't working for us either, so maybe they should go. It is the defense attorney who will examine and discuss all these options with them. Again, we try to be very open and transparent as much as we possibly can about the process. It is a rigorous program and it is a lot of work. The judge is always very honest. He says, "Are you sure you want to do this because normal case processing is going to be a lot easier for you."
- 3:06:24 Chair Ellis What do these pending ballot measures do to your program?
- 3:06:30 H. Jefferis Different measures are going to do different things. In our program, if 61 passes with the mandatory minimums, that would wipe out half of our participants. They would not be eligible.
- 3:06:53 Hon. Elizabeth Welch Because they will be going elsewhere?
- 3:06:51 H. Jefferis That is correct.
- 3:07:00 H. Jefferis That is unfortunate to me because I like serving the higher risk folks. I think it is a better use of state money.
- 3:07:12 Chair Ellis Your funding source is all county and you said you had a federal grant.

- 3:07:17 H. Jefferis Funding for drug courts is a very weird beast. My position was originally funded by a Bureau of Justice grant. After that grant ran out OJD agreed to keep and fund my position. Only because the program works here, the Probation Department carved a position out of their own budget to serve our program. The county said, "This program works. We will give you one treatment provider out of our own treatment budget." We have no grant funds that support the positions that make the program. That is all agency personnel budgets. Even our indigent defense, and you would have to talk to Scott about the specifics about how they did that, but they actually made arrangements for him to be funded out of their pot of money. It is just the normal money that they have channeled to support the drug program. That is how drug court has worked. Of course we have only had state money for three years. Again, that gives some money to only about half of the drug courts. It really has been up to the local agency budgets to support. That is how Clackamas County has done it. I have gotten some small grants that have been for services such as the UAs. I wrote a grant through HUD and we opened up a women's house that is run privately. We don't touch that money. We don't run it. I just wrote the grant and helped them get it. It has really been about using local resources. It is an efficient use of resources because we are taking money that was spent in one way and shifted it to serve a particular population.
- 3:09:02 Chair Ellis Are the defense lawyers doing a good job? By that I mean are they referring people that truly are qualified that you accept, and are they representing drug court to their clients in a way that is not misrepresentative of drug court?
- 3:09:18 H. Jefferis We have been around for about eight years. We do a good job in our county. We are at our cap. We get plenty of referrals. I don't have to worry about not having enough people in my program. Some of the defense attorneys do more referrals than others. That is just the way it is going to be. People are very clear about it and we have Scott who has a history. He is able to do a lot of education and communication with other attorneys about that. We are very fortunate in our county. I know some other counties, especially with new programs, that are not really at that point yet. I think that education and working together and taking people like Scott or other people who have been doing it for a while and doing some mentoring is the key. I am one of the older coordinators. I have been doing it since 2003. It wasn't really a funded thing. How I got trained is, "Here is the grant book. I don't really know much about this program so good luck." I think cross training is very, very valuable.
- 3:10:48 D Bajpai Okay. Can I ask what kind of time I have?
- 3:10:54 Chair Ellis We are running a little tight. How much time do you need?
- 3:11:02 D. Bajpai I'll go through it quickly.
- 3:11:06 Chair Ellis About five minutes. Is that enough?
- 3:11:11 D. Bajpai I was planning on more than that. Maybe 15 or 20?
- 3:11:14 Chair Ellis Let's go for 10.
- 3:11:17 D. Bajpai Heather mentioned that the first drug court started in Miami in 1989. What is arguably the second drug court in the country started in Multnomah in 1991. We have a long history of drug court. This chart shows the exponential growth of drug courts throughout the country. The *New York Times* just had a story about drug courts on Tuesday, and they said, I think, there are 2200 drug courts nationally. Drug courts have grown very quickly over the last 20 years. They have been studied probably more than any correctional intervention has ever been studied. This is from the Washington State Institute of Public Policy that Heather referred to earlier. The meaningful number I want to point out on here is 57. That is the number of drug court studies that were reviewed in this analysis. The other numbers there

relate to some flaws in the methodology that I could talk about, but not in 10 minutes. I'll talk about the general effectiveness of drug courts. Because there have been so many studies I am not talking about any one specific study. There are a number of researchers that have taken all of the studies that are out in the field and done meta analysis - an evaluation of the evaluations. The Washington State Institute of Public Policy, for example, looks at drug court research and looks at how good each of the studies was, how well it was conducted and how well the comparison group was matched up. It discounts studies based on that and comes up with a very, very conservative estimate on how effective drug courts are and that is the 11.7 percent that you see there. That means that drug courts are 11.7 percent more effective than business as usual – those who go through probation and get treatment also. Drug courts add an 11.7 percent to that. Other studies have ranged from 18 to 26 percent.

3:13:21 P. Ozanne

Meaning that 11 do better than business as usual?

3:13:28 D. Bajpai

Fewer arrests following drug court. Whatever that time period is.

3:13:34 H. Jefferis

The success ratio in treatment is very small when you look at the number of interventions. On average it takes five to seven interventions for someone to get clean and sober. That is actually pretty significant.

3:13:47 D. Bajpai

So we use that 11 percent as kind of the cost benefit analysis. That 11.7 percent, like I said, probably underestimates the actual effect of drug courts but it is a very conservative estimate. The Government Accountability Office has conducted three large scale reviews of drug courts. Their basic findings are that drug courts are effective in reducing recidivism. They have gotten mixed results from (inaudible) substance abuse through all the studies that they looked at.

3:14:19 P. Ozanne

The comparison groups were just people that were doing business as usual?

3:14:20 D. Bajpai

Yeah.

3:14:22 P. Ozanne

The key really for policy makers, not necessarily us, is what other kinds of treatment are effective or not. Among the various kinds of treatment which ones, drug courts or typical corrections team approaches are the most effective?

3:14:38 D. Bajpai

It is kind of hard to find somebody who has received nothing to compare the drug court person to. We can't get an absolute effect size but we can get a relative effect size and that is what we are looking at. That is why we also look at relative costs too. Some of the cost estimates that I may or may not get to tend to be very low. That is not an absolute cost it is relative cost. Most studies, the vast majority of studies, I would say 99 percent of the studies that I have read have shown that drug courts were more effective than business as usual in reducing recidivism. There have been a couple that showed no effect. None of these were in Oregon. There were two studies now that I have seen that actually show that drug courts increase the risk of recidivism for participants. Both of those drug courts didn't follow the 10 key components. It was very clear why their recidivism was high. I'll skip through this just because of time. Right now our estimate, based on that Washington State estimate of 11.7 reduction of recidivism, is that each participant in drug court avoids .09 felony convictions. Out of 100 drug court participants we are avoiding nine felony convictions. Estimated taxpayer and victimization savings are \$4,400. We believe the cost benefit of drug courts in Oregon at this point is \$38.74 for each dollar invested. Heather mentioned their focus on high risk offenders. High risk offenders tend to have better outcomes in drug courts, as do meth users. That is why this drug court money is tied in with the response to meth. What makes drug courts effective? I have to credit MCP Research. MCP has been a national leader in drug court research and they happen to be located in Portland. Here are some of the things that lead to an effective drug court. They work with a single treatment agency so rather than contracting with a number of treatment agencies they work with one. Heather mentioned

some of the problems that come up with confidentiality where treatment providers don't want to share information with drugs courts, with judges, with DAs, when a person has a dirty UA. With a single treatment agency there is a good relationship and treatment providers feel comfortable sharing information, which leads to better outcomes. Court sessions are required every two weeks or less in the first phase. That results in better outcomes. They are seeing the judge very frequently and that interaction with the judge is a very, very powerful motivator. The longer that a judge spends on the drug court bench the better the client's outcome. The courts that perform drug testing two or more times per week cost less than other drug courts because they were quicker at catching people that are using drugs. Drug courts that require 90 days clean at exit had larger cost savings. These next three slides are very interesting. Drug courts that require treatment providers to attend the sessions have much higher outcomes. Drug courts that require the prosecutor to attend drug court meetings had much higher outcomes. Drug courts where the public defender attended meetings had much higher outcomes and eight times greater savings. That is a very significant effect right there. In Oregon we have a lot of drug courts, somewhere in the 50s. There are different kinds of drug courts all over the state. There are a couple of counties that don't have them yet but they have discussed it. We looked at what is going on statewide with drug courts. We looked at adult drug court participants from 2001 to 2006. We have the national studies that have been conducted. We have smaller studies that have been conducted in Multnomah County, Clackamas County, Malheur County, Benton County and I think a couple of others but we don't have any statewide evaluation. One thing that you mentioned about the cost of drug courts, in Multnomah County they found that the drug court actually costs less than business as usual. In most places drug courts cost a little bit more. The Washington State estimate was about \$1,600 more than business as usual.

3:19:15 H. Jefferis

That may be based on the type of population we are serving. If we are serving a more diversion eligible population we can use less resources. If you are serving a higher risk population they need a lot more support. Even though our high risk programs are effective they are a little more expensive but then again the people we are serving spend a lot more of our tax dollars.

3:19:42 D. Bajpai

All these slides are in your handouts and I am just going to skip through to some of the more important ones. The average time in drug courts until graduation was 15 months. For people who were terminated it was about 10 months. Even the people that terminated early got pretty heavy exposure to drug court before they left, which usually results in is better outcomes. "Graduated" versus "terminated." There is a wide range of graduation rates among drug courts. You can see it here and I won't go through each county. You asked about the recidivism and how we measure that. In every study that has been done I think they have looked at recidivism in a different way. As long as they are comparing two like groups and they are comparing the same amount of time that is what we generally look for. We have been looking at people who graduated anywhere between 2000 and 2006. We are looking at their entire time at risk. If somebody graduated in 2001 we would match them to somebody from 2001. If somebody graduated in 2005 we would match them to somebody in 2005. We have a wide range of time at risk. This is just for one year. You can see that about 20 percent of drug court participants were arrested within one year of being discharged from drug court.

3:21:09 Chair Ellis

The county there is the county of the original case?

3:21:11 D. Bajpai

It is the county where they participated in the drug court.

3:21:15 Chair Ellis

I assume your graphs include anywhere in the United States?

3:21:25 D. Bajpai

Anywhere in the world. So different ways of looking at recidivism are 21 percent after one year, 33 percent after two years, and 40 percent after three years. After that it levels out and doesn't keep going up. If they are not arrested after three years they tend not to be arrested after that. The three year conviction rate is 27 percent for felony convictions. That is the

measure of recidivism that Department of Corrections usually uses. It is in some ways comparable. Graduates tend to be arrested much less frequently than people that are terminated from drug court. That is something you should expect. Younger people tend to be rearrested much more frequently than older people. Males tend to recidivate slightly more than females. African-Americans and Hispanics tend to recidivate at slightly higher levels. They are arrested for a number of things, not necessarily drugs, although that is the highest category. That is it very quickly. Did I answer your question about recidivism and cost?

3:23:04 P. Ozanne Yes. When there are 36 counties with 36 separate programs, different ways, approaches, it is difficult for a researcher to evaluate them statewide.

3:23:19 Chair Ellis Other questions? Thank you both.

Agenda Item No. 6 Approval of 2009-11 Budget Binder Narrative

3:23:32 Chair Ellis Ingrid and Kathryn, do you want to walk us through the budget binder narrative.

3:24:00 K. Aylward Not surprisingly we took the budget binder from last time and changed some numbers. It is not significantly different from our previous budget binder. With all of the budget binders for state agencies the format is already established. "These are the headings you shall have. These are the graphs and where you will put them. If you don't like the style, too bad." Our long-term plan, it used to be a six-year plan and now they are referring to it as a long-term plan. I don't think I need to go through a lot of this. If you read it and you have questions...

3:24:53 I. Swenson Our main hope is that we satisfactorily expressed the Commission's view on some of these issues. One of the things that we did talk about when we submitted the budget was not looking for parity with DAs as a distinct goal in itself.

3:25:15 Chair Ellis I saw the way you phrased that and I thought it was fine.

3:25:16 I. Swenson Okay. Those kinds of things were what we trying to do and then just articulate, as best we could, what our operations looked like, what we do, and what our needs are.

3:25:29 P. Ozanne John and I were talking and one of the things that I am obsessed with in Multnomah County is the almost certain impact that is going to come from Ballot Measure 57 and 61. I would have thought that under "environmental factors" you would have referenced the likelihood, or something, about assuming while not being certain that it was going to be passed, that this is going to have a tremendous impact on the budget and our needs, etc. I didn't see that anywhere. There must have been some strategic reason that you two decided to keep it out.

3:26:10 K. Aylward By November we will know. We actually put together separate materials for our Ways & Means presentation. I think for the budget binder for most agencies had to have theirs in by September 1. We could certainly put a reference in there that says that this budget does not include any anticipated cost increases for ballot measures and new legislation.

3:26:45 Chair Ellis I was very excited about the draft on page 16.

3:26:53 K. Aylward Let me guess.

3:26:54 Chair Ellis Appeals pending more than 210 days.

3:27:00 K. Aylward Well, since we are in Key Performance Measures if I could just briefly say that Ingrid and I meet with Legislative Fiscal Office and Budget and Management in January or February. We talked about changes to our Key Performance Measures. You will see at the beginning of this Annual Performance Progress Report that a lot of our key performance measures say "delete" next them, all for good cause. We have got two that we are adding. One is a composite of

three that we are deleting. As we have learned, if you can shift resources to three different things you have to look at them in toto to figure out if you are actually improving your performance. You pick one and say, "Now we will improve this one and then another one." I think that is good. One of the new ones - the capacity for providing quality representation - we talked about earlier. This was a suggestion of Budget & Management's Key Performance Measure coordinator to say that you don't have to a goal, you can have a reporting measure, not a target but just something that you report to the legislature that says, "Here is how good we are now. If you continue to give us five, 10, 15 percent increases we will stay at this level. If our funding stays the same our quality will drop down, and down, and down." It is just another way to look at measuring quality. We will be discussing our Key Performance Measures with Legislative Fiscal Office in the next couple of weeks. We will see if that one stays in.

- 3:28:39 P. Ozanne I liked it a lot but where it is now?
- 3:28:44 K. Aylward If you will look on page 12 at the top of the page. That is the new one. We had talked about using the site reviews, the volunteer committee, to take a look and sort of say that they have the skills, they have the zeal, but the caseloads aren't manageable therefore they get a low score and need more money.
- 3:29:11 P. Ozanne That is good.
- 3:29:11 K. Aylward It may be difficult to put into practice. The appellate backlog is a moving target because if the Court of Appeals moves the no further extension date from 250 days where it currently is back to 180 days, then our definition of a backlog is going to have to be pulled back even shy of that figure, of the 180 days. We have in this budget included a request for additional positions for the Appellate Division to address that change in the court's procedures. It is not zero but from 228 down to 49 in two years is pretty good. The rest of the report includes what we have done on our existing key performance measures. If they are going to be deleted it is not so crucial to see how we are doing if it is just a graph that reflects a key performance measure that is not useful. The one for the Boards and Commissions is a new one. This is the first time we have reported on it and guess what? You met the target 100 percent.
- 3:30:29 Chair Ellis What page are you on?
- 3:30:32 K. Aylward That is on page 36. This is our first reporting year, 2008, and as you will recall we went through this at a Commission meeting and determined that you did indeed meet all of the best practices. You voted that we did.
- 3:30:49 Chair Ellis We were our own judge.
- 3:30:50 K. Aylward After the Annual Performance Progress Report - now I am on page 40 - are the reduction options. The budget requires you to put forward reduction options for 10 percent. The Governor is requesting a 10 percent reduction. The language in there is the same as in the past. The next page - the House Bill 3182 reductions - this is the one where they try to get you to prioritize. What would you get rid of if you didn't have enough money?
- 3:31:37 Chair Ellis Sounds like the presidential debate. I think we gave as responsive an answer as the two candidates.
- 3:31:47 K. Aylward They are all equally important, is the Commission's position. They are constitutionally mandated and far be it from us to question the framers' priorities. Org chart, revenue discussion - the interesting thing about revenue, I'm on page 43 right now, is the Application and Contribution Program which has been quietly building. Now it is starting to look more significant and eventually someone will say we should do something with that. For now it is just sitting there accumulating. This is the Judicial Department's revenue forecast. I would

like to see the cash before I spend it. It is their projection of what will be coming in. Then the budget narrative moves on to the separate divisions. We talk about the Appellate Division, the narrative, the organization chart, a description of our positions. We talk about the backlog and *Blakely* and mention the juvenile section which is new. Then, of course, there are the backlog charts, the case assignments chart. For the Appellate Division the essential packages are just the standard ones. I actually am going to make a change to this. We actually have not just package 031, which is the standard inflation, we also have a certain amount of money in package 032, which is non-standard inflation, which we get because we are leasing a building that is not DAS property. We get a special exception to increase more than the 2.8 percent because we are in a privately owned building. We put the figure in there that we anticipate we think our lease is going cost us.

3:34:07 Chair Ellis

Is there an escalation clause?

3:34:10 K. Aylward

Our existing lease has a three percent increase every single year. The current lease expires June 30, 2009. I don't know what the rent will be but I suspect that if he has been getting a three percent increase for the last 10 years that a three percent increase would be sufficient.

3:34:32 Chair Ellis

It is a down economy. He might worry about his alternatives.

3:34:38 K. Aylward

That could happen. His alternative could also be a totally empty building. I think we will be okay there. We don't have a basis for putting in a higher number because we think he is going to be difficult. Then for the Appellate Division is goes into policy option packages that you are familiar with. The post conviction relief package is the only one. I also have a technical adjustment that I failed to put in. It is a technical adjustment that has a net zero effect. I will be making some changes beyond what you put in here but they are not significant. The budgeting system requires you to use a technical adjustment when you have to move something from one expenditure category to another. We had funds in an expenditure category called "professional services." We now have to separate IT professional services from all other professional services. We have to get a technical adjustment to move the \$7,000 from one category to another. You don't need to worry about. Tell me if there is anything you want to change along the way. The account is a separate allocation. We talk about the program description. We talk about verification and financial eligibility guidelines. That hasn't changed. Program services delivery - I don't think there were significant changes in this. The program costs almost the same, probably identical to our last budget binder. I haven't updated those figures because I don't know yet what the 07-09 budget is going to be. Rather than guess and put a figure in there I would really rather work with actual numbers. I am on page 59 now. The chart just goes through the 05-07 biennium. That is all I know for sure. Likewise on the next page. This chart compares caseload to expenditure only through 05-07 because I don't know for sure where we are going to end up in this current biennium. Mandated caseload for the account - we talked about this a lot. It has all those categories of expenditures. It describes the personal services adjustment as well. Then it goes into policy option packages. The juvenile dependency package is the \$17 million to reduce the caseloads by 30 percent. The PCR package appears here as a negative number. It is a positive package for the Appellate Division and a negative package for the Public Defense Services Account. That narrative is identical for both. Public Defense Provider Compensation, package 102, pretty much the same discussion as we have seen before. It has been updated for changes to the consumer price index but the argument is still basically the same. I am on page 71 now. Contract & Business Services - I don't think that changed at all. We have no policy option packages. Nothing has changed for us. Then the affirmative action plan and that is the end of the materials that are different. I apologize for the bizarre number system but the budget binder itself is thick and it is crammed full of technical printouts, orbits, and pics, and spreadsheets that they like you to insert in particular locations in the materials. We tried to just cull the part that was easy reading and not give you a ton of paper. That is why this is not exactly a finished product. Any suggestions?

3:39:01 P. Ozanne I was rather surprised in my current county employment to find the changes of law with respect to affirmative action. That is not even a reference we use in Multnomah County anymore. Is this policy...

3:39:15 I. Swenson ...still in place for state agencies? Yes.

3:39:19 P. Ozanne Still approved and consistent?

3:39:21 I. Swenson If anything I think the Governor's Office has become more active in promoting affirmative action. There were some legislative changes that added, for example, sexual orientation as class against whom discrimination is prohibited. Those changes have been made.

3:39:42 P. Ozanne Not affirmative action but discrimination?

3:39:49 I. Swenson The Governor is very much supportive of those goals. For example, there is a statute that requires state agencies to measure the performance of their managers by their ability to achieve the affirmative action goals of their agencies.

3:40:13 P. Ozanne Based on race?

3:40:12 I. Swenson No. All the categories - race, religion, national origin, sexual orientation, etc.

3:40:19 P. Ozanne I am a fan of it the law is just shocking in how it has changed.

3:40:27 I. Swenson All of those materials ultimately talk about what are acceptable goals. In order to create a workforce that represents the public at large, but never to discriminate against a particular applicant.

3:40:49 Chair Ellis Any questions, comments, suggestions for change?

3:40:55 J. Potter I am impressed on page 26 that you made 40,000 payments for expenses and didn't receive a single complaint. I can't even imagine doing 40,000 of anything and not receiving a complaint. That is pretty impressive.

3:41:11 K. Aylward I have to give Lorrie Railey a shout out for that. She is gone already but she is wonderful, a big asset to our agency.

3:41:23 I. Swenson Would you recommend that we add references to the measures, specifically 57 and 61? We talked about the environment and the fact, and I forget the term that we used, but in any case we did talk about legislative measures and voter initiatives as things that are budget drivers for our agency, but we did not refer to those measures in particular and we certainly could.

3:41:53 P. Ozanne I don't feel strongly. I probably would have drafted it that way and you would probably have told me to take it out. I don't feel strongly about it. As you say, we will know in November. How these budget binders are used is always kind of a mystery. Does some first year legislator take it home on a Friday night?

3:42:22 J. Potter Is there any value in having it there, Ingrid, because it is a heads up and then you can refer to later on in the budget process?

3:42:31 Chair Ellis "We told you so."

3:42:31 J. Potter "Yeah. It was there. We thought of it but we didn't develop it because we didn't know but we did tell you that it was a factor. It should be obvious."

3:42:41 I. Swenson I suppose potentially as Kathryn indicated we will have an answer about which, if either of those, is going to be a factor. At least last session I was amazed that this binder was left on the shelf and we produced an entirely new one for the budget presentation. The text is different, and the context.

3:43:09 Chair Ellis I don't think you ought to spend a lot of time on it, maybe in a footnote or somewhere. It would show we are aware of what is happening out there. If either of these measures does pass it has an effect. It shows you didn't just give them last biennium's report.

3:43:39 I. Swenson We will do that.

3:43:42 Chair Ellis Do you need from us a motion to approve?

3:43:50 I. Swenson I don't know if we need formal approval.

3:43:53 K Aylward The chair of the Commission is required to sign a certification that says that you have read and vouched for the contents of this. We are going to give that to you at some time between now or even at the next Commission meeting I guess it is a comfort level issue.

3:44:13 Chair Ellis I want to share. Is there motion to assure me that I would be alright saying that?
MOTION: Hon. Elizabeth Welch moved to approve the budget; Peter Ozanne seconded the motion; hearing no objection the motion carried: **VOTE 4-0.**

Agenda Item No. 7 Approval of Service Delivery Plans for Jackson and Josephine

3:44:38 Chair Ellis I don't see that what is presented here is controversial. The only part I am inclined to get the Commission's response to – I was not enthusiastic about Bert Putney's mega agency proposal. I think he had forgotten he once made it. I personally would not support that.

3:45:11 P. Ozanne First of all it is kind of presumptuous of me to even be talking about this. I wasn't at the meeting down in Jackson and Josephine. There was a reference to it and then just nothing said in the service delivery plan. I guess anyone can infer. Just reading it it sounded, not hearing the testimony, it sounded like a plausible proposal. I guess I thought the report ought to say we considered it and it is not appropriate.

3:45:49 Chair Ellis That is fine.

3:45:55 P. Ozanne It seemed kind of interesting but maybe it wasn't as interesting as it sounded on paper.

3:46:01 Chair Ellis With that are we at a point that we prepared to approve Jackson?

3:46:22 P. Ozanne That is the one, Jackson. Again at the risk of being presumptuous, Mr. Burkhalter here, nothing personal. I remember there was a big caseload but this part where they say, "Juvenile lawyers aren't social workers." You very diplomatically include a paragraph there that explains if social work means these things we need to be doing them. That is how I read this. I, for one, would like to send a message in the service delivery plan that picks up on this exchange to say that we as a Commission believe that these things that you mention in your narrative are things the lawyers should do. I would even say – and if people are saying by "social work" you mean these things, you should be doing it. I have seen that attitude a lot around the state where people say we don't do social work, but yeah, a lot of it is. I guess I would have thought that this was an opportunity to put it in the plan. Though you seemed to handle it very well at the hearing and then in this paragraph, but it is not technically part of our service delivery plan. A presumptive one but ...

3:48:01 I. Swenson How do other Commissioners feel? Is that a comment that reflects your view or do you need some additional information before you could ...

3:48:05 J. Potter I think what lawyers do is social work.

3:48:14 Chair Ellis Certainly juvenile lawyers.

3:48:14 J. Potter I have heard that about police officers. Police will often say, “We don’t do social work.” Well, of course they do. Judges do social work. Lawyers do social work. It is part of the job.

3:48:30 P. Ozanne Of course, Judge Welch, I would like to see whether you concur with that perspective. I think you would.

3:48:42 J. Potter The definition needs to be clarified. What is social work? What are we talking about here? Mark made the comment and he may have something in mind about his comment that is different from what we are thinking about in terms of social work. It may need some clarification.

3:49:02 I. Swenson Sure. I will be glad to do a draft for the next meeting.

3:49:08 Hon. Elizabeth Welch I am curious how Ingrid feels about what has occurred since we actually had the hearing in Medford. I don’t remember what month that was.

3:49:19 I. Swenson I think April.

3:49:22 Hon. Elizabeth Welch My sense from what you reported from meeting to meeting was that the questions that got raised were taken seriously. We got some numbers and some promises of new numbers and some shifts and so forth. It seems to me like what was done by the Commission has had some positive impact. Is that your sense too?

3:49:53 I. Swenson Yes, I think that is correct, especially over the longer term. I know Billy Strehlow has compared data with Mark Burkhalter and determined that in fact their case assignments per attorney have been significantly reduced because they have increased the full-time attorney positions that handle this work. I have had a few conversations with Mark Burkhalter and other members of that consortium. I do think there is an increased sense of a need to do some of the things we have been talking about over this whole period of time, in terms of representation between the time of jurisdiction and whatever the ultimate outcome of the case is, and that they are having better client contact during that period, and initiating it on more occasions rather than just responding when clients happen to call. Judge Orf, prior to the last meeting, said that she felt there had been some improvements as well.

3:51:00 Hon. Elizabeth Welch Has the issue of the definition of caseload evolved at all as a result of the work your staff has done on this?

3:51:11 I. Swenson I think we were talking the same language. We deal with case credits in juvenile cases and case credits are different from cases. They are also different from clients. There can be multiple case credits in each case and for each client - for appearing at CRB hearings, review hearings and the like. We compared both their new case credits and their review case credits. The conclusion was that they were exceptionally high. They were the highest in the state. We could quibble over a few things and we certainly did. For a period of time they had a fourth lawyer who was doing more work under the contract than we were aware he was doing. There were some minor differences. On the whole, I think the terminology, in terms of what we pay people and what we pay them for is pretty clear.

- 3:52:17 Hon. Elizabeth Welch Good. Did Judge Orf quit yet?
- 3:52:20 I. Swenson I think December.
- 3:52:26 Chair Ellis So are we at a point we can approve Josephine?
- 3:52:32 I. Swenson Josephine? Yes, I think so.
- 3:52:32 Chair Ellis Is there a motion to that effect?
MOTION: Hon. Elizabeth Welch moved to approve the Josephine County Service Delivery Plan; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**
- Then on Jackson we will do a revision?
- 3:52:52 I. Swenson Yes.
- Agenda Item No. 8 Approval of Amendments to Complaint Policy and Qualification Standards**
- 3:52:52 Chair Ellis Paul, do you want to – we are obviously running out of time.
- 3:52:58 P. Levy This should be quick. I will put my social worker hat on. As you know we are recommending changes to both our complaint policy and the provisions of the qualification standards that deal with how we handle concerns and complaints about attorney performance. As you know we have increasingly urged providers to deal with their quality assurance issues and complaints, but when they are either unwilling or unable to do that, we want to have the authority to deal effectively with attorneys who work with providers who are not providing adequate representation. The problem that we are trying to fix with these proposals is that the suspension from eligibility for appointment in both of these documents merely talked about removing attorneys from appointment lists. Attorneys who are part of provider groups, whether they be public defender offices or consortia, do not receive their appointments through an appointment list. With the complaint policy it is a matter of making sure that we have the authority to suspend an attorney’s eligibility to receive appointments not merely from a list. With the qualification standards we could have addressed this issue by removing one word from the title of the section dealing with what we do with concerns. The section is entitled “suspension from an appointment list.” We could have just taken out the word “list.” We have done a little bit more to ensure that it is very clear that we are not going to pay for an appointment by a judge to an attorney who we have determined is not qualified to accept that case. It makes it very clear. If the court wants to appointment them, okay. We are not going to pay for it. It also reflects a little bit more what we are actually doing these days. We are approving attorney’s certificates; we are approving them for particular case types. I think it is a pretty simple change.
- 3:55:53 Chair Ellis Any questions or comments? Is there a motion to approve the proposed changes?
MOTION: Peter Ozanne moved to approve the changes; Hon. Elizabeth Welch seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**
- Agenda Item No. OPDS Monthly Report**
- 3:46:13 Chair Ellis Ingrid, do you want to do the report of the management team?
- 3:56:19 I. Swenson Actually we can do that very quickly. Paul is here so he can talk about the research he was able to do in terms of identifying additional recruitment events. As you will recall that was one of the things that the Commission asked us to put more effort into. I think we have identified a few more That is separate from creating more opportunities for reaching out to

students, both law students and pre-law students, and we need to do that as well. Paul, is there anything you want to say about that list?

- 3:56:55 P. Levy Well there are lots of opportunities to recruit lawyers and law students especially at events that focus on diversity. A lot of these events happen in the fall and I have the dates for the events that have just happened. We don't have dates for next year. I have also written to the Career Services Offices of the three Oregon law schools just to make sure that we are in contact with them. This is an ongoing project.
- 3:57:44 J. Potter Does anybody else have this, a list put together like this?
- 3:57:48 P. Levy Well, this list is not unlike what you will see, I think, on the U of O Law School Career Services website. In looking at websites around the country many of these events are sort of standard in terms of what they are telling their students about. It is larger than any one. Many of these are posted on law school websites. We still need to search and find out when the law student recruiting events are. It is not that easy to find out. That is my report. Ingrid, are you going to talk about *Ice*? I think it is worth noting that a year ago during this meeting our Supreme Court decided *Ice*. Some of us have read the transcript and had some reports about our argument, Ernie Lannet's argument, in the United States Supreme Court.
- 3:59:12 Chair Ellis I was on the moot court panel but I haven't read the transcript. I would be interested what your sense was?
- 3:59:20 P. Levy My sense is that he did very well.
- 3:59:25 Chair Ellis He did very well in his moot court.
- 3:59:26 P. Levy I participated in one of those as well. The sense of some of the national blogs that I have seen is that he did well and that he should win.
- 3:59:43 Chair Ellis Those two are not necessarily the same. I do want to say publically that I was very pleased with Pete and Becky letting a younger lawyer handle a US Supreme Court argument. I think it is going to do a lot for morale in that whole group. I think it speaks well of him, but I think it speaks very well of them. I think it is a sign of a good appellate group.
- 4:00:20 I. Swenson I think, Mr. Chair, that it speaks well of their training opportunities for lawyers too. He was able to do that capably because he has been trained and the process is there to develop new lawyers.
- 4:00:33 P. Ozanne Great story on the recruitment trail for law students.
- 4:00:39 Chair Ellis I am thinking of the younger lawyers in that division. That is just a great thing, to think that could happen.
- 4:00:51 I. Swenson I do have one other thing that I would like to mention. All of you are fully aware of the multiple functions that Kathryn performs in our agency and for this Commission. It is absolutely remarkable that she can accomplish the things she does. I don't know if you know the kind of hours she puts it but you may have a good idea what those look like. In any case, we have been talking over the last couple of years about the burden that she has and have been encouraging her to look at assigning a deputy to assist her with at least some of those functions. I think we are ready to say that that is something we want to move forward with and hope that it meets with your approval. We are not overstaffed in terms of management in that division. I don't think it is the least bit controversial to think that we need some additional management help. Anything you would like say?

4:02:00 K. Aylward Just that I was holding back a Defender II that Mr. Gartlan was unaware of and that is the position I am going to use for my deputy. I have been hoarding it so there is not any additional cost for funding it. I am going to steal one of his attorneys that he never knew he had.

4:02:21 P. Ozanne Makes sense.

4:02:21 Chair Ellis Sounds good. Any other piece you want to add?

4:02:29 I. Swenson I don't believe so, Mr. Chair.

4:02:30 Chair Ellis Anyone, for the good of the order? We have the new executive director of MPD here. Congratulations and welcome.

4:02:42 Lane Borg I would have one comment from my prior experience – of those 40,000 requests I think I had maybe three of them as a private practitioner. It was done very quickly, efficiently.

4:03:05 Chair Ellis We need to hear from the other 39,997.

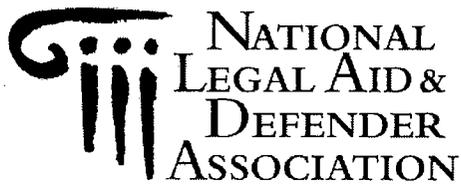
4:03:16 Hon. Elizabeth Welch Mr. Chairman, I hesitate because of the hour of the day and all of that, but I have a concern about the focus of this drug court presentation that we have coming up next time. Maybe everybody else knows the answer to this question. Why are we doing this?

4:03:40 I. Swenson Mr. Chair, Commissioner Welch, over the course of the last several structural reviews that you have done we have heard about drug courts in different jurisdictions. They certainly do have different approaches to how they handle these things. It was in Umatilla County that we were surprised to learn that drug court applicants were required to plead guilty to all counts in the indictment before they were allowed to participate in drug court. The people who fail that court not only fail it but they are doubly punished because they suffer additional consequences. The proposal was that we take a look at the defense function in drug courts and decide whether this is an area where the Commission might want to create some standards as it did with early disposition programs for the defense participation in these. Today was merely a beginning point for that discussion and it doesn't connect very well with the defense piece. I thought it might be help to start with an overview of the courts and what they look like statewide. Next time we plan to invite defense providers and others who are knowledgeable about the specifics of the programs. There are a number of publications that deal with the role of defense counsel in these. That is what I would propose that we focus on in our future meetings. It wasn't clear where we were going from today's hearing.

4:05:17 Chair Ellis Any other questions, comments, or speculations? If not I would entertain a motion to adjourn. **MOTION:** John Potter moved to adjourn the meeting; Peter Ozanne seconded the motion; hearing no objection, the motion carried: **VOTE 4-0.**

Meeting was adjourned.

Attachment 2



American Council of Chief Defenders (ACCD)

Ten Tenets of Fair and Effective Problem Solving Courts

Introduction

“Problem Solving Courts” are spreading across the country. Though the current wave of interest started with the creation of Miami's Drug Court in 1989, the nation's courts had a long prior history of seeking to solve the problems of offenders and communities through the imposition of sentences with rehabilitative conditions or indeterminate sentences with a chance for early release based on rehabilitation. The advent of mandatory minimums and determinate sentencing foreclosed many such options, leading to the establishment of Problem-Solving Courts as a new vehicle for effecting established rehabilitative objectives.

There currently are more than 500 drug courts operating, and more than 280 others currently in the planning process, in all 50 states. Although drug courts have existed the longest and been studied the most, “Community Courts,” “Mental Health Courts,” and other specialty courts are beginning to proliferate.

Despite Department of Justice and other publications that urge inclusion of defenders in the adjudication partnerships that form to establish “Problem Solving Courts,” the voice of the defense bar has been sporadic at best. Although defense representation is an important part of the operation of such courts, more often than not, defenders are excluded from the policymaking processes which accompany the design, implementation and on-going evaluation and monitoring of Problem Solving Courts. As a result, an important voice for fairness and a significant treatment resource are lost.

The following guidelines have been developed to increase both the fairness and the effectiveness of Problem Solving Courts, while addressing concerns regarding the defense role within them. They are based upon the research done in the drug court arena by pretrial services experts and others and the extensive collective expertise that defender chiefs have developed as a result of their experiences with the many different specialty courts across the country. There is not as yet, a single, widely accepted definition of Problem Solving Courts. For the purposes of these guidelines, Problem Solving Courts include courts which are aimed at reducing crime and increasing public safety by providing appropriate, individualized treatment and other resources aimed at addressing long-standing community issues (such as drug addiction, homelessness or mental illness) underlying criminal conduct.

The Ten Tenets

1. **Qualified representatives of the indigent defense bar shall have the opportunity to meaningfully participate in the design, implementation and operation of the court, including the determination of participant eligibility and selection of service providers.** Meaningful participation includes reliance on the principles of adjudication partnerships that operate pursuant to a consensus approach in the decision-making and planning processes. The composition of the group should be balanced so that all functions have the same number of representatives at the table. Meaningful participation includes input into any ongoing monitoring or evaluation process that is established to review and evaluate court functioning.
2. **Qualified representatives of the indigent defense bar shall have the opportunity to meaningfully participate in developing policies and procedures for the problem-solving court that ensure confidentiality and address privacy concerns,** including (but not limited to) record-keeping, access to information and expungement.
3. **Problem solving courts should afford resource parity between the prosecution and the defense.** All criminal justice entities involved in the court must work to ensure that defenders have equal access to grant or other resources for training and staff.
4. **The accused individual's decision to enter a problem solving court must be voluntary.** Voluntary participation is consistent with an individual's pre-adjudication status as well as the rehabilitative objectives.
5. **The accused individual shall not be required to plead guilty in order to enter a problem solving court.** This is consistent with diversion standards adopted by the National Association of Pretrial Services Agencies. See Pretrial Diversion Standard 3.3 at 15 (1995). The standards stress, "requiring a defendant to enter a guilty plea prior to entering a diversion program does not have therapeutic value." *Id.*
6. **The accused individual shall have the right to review with counsel the program requirements and possible outcomes. Counsel shall have a reasonable amount of time to investigate cases before advising clients regarding their election to enter a problem solving court.**
7. **The accused individual shall be able to voluntarily withdraw from a problem solving court at any time without prejudice to his or her trial rights.** This is consistent with the standards adopted by the National Association of Pretrial Services Agencies. See Pretrial Diversion Standard 6.1 at 30 (1995).

8. **The court, prosecutor, legislature or other appropriate entity shall implement a policy that protects the accused's privilege against self-incrimination.**
9. **Treatment or other program requirements should be the least restrictive possible to achieve agreed-upon goals. Upon successful completion of the program, charges shall be dismissed with prejudice and the accused shall have his or her record expunged in compliance with state law or agreed upon policies.**
10. **Nothing in the problem solving court policies or procedures should compromise counsel's ethical responsibility to zealously advocate for his or her client, including the right to discovery, to challenge evidence or findings and the right to recommend alternative treatments or sanctions.**

Excerpts from:

Critical Issues
for Defense
Attorneys in
Drug Court

MONOGRAPH SERIES 4



NATIONAL
DRUG COURT
INSTITUTE

BJA



Critical Issues for Defense Attorneys in Drug Court

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April 2003

THE ROLE OF THE DEFENSE ATTORNEY IN DRUG COURT

Since the inception of the drug court movement in America, arguably no player on the drug court team – be it judge, prosecuting attorney, probation officer or treatment provider – has struggled more with his or her own identity and often conflicted role than the defense attorney. The desires of the treatment team and the drug court client are, at times, conflicting and can seemingly put the defense attorney in a box with no way out.

Understanding the role of the defense attorney in a drug court requires an appreciation of what is probably the court's most critical feature. Drug courts were created in response to the perception that the traditional, adversarial criminal justice system does not adequately address the issues of nonviolent drug offenders. Drug courts reject the adversary model – where an impartial judge resolves conflicts between the parties' chosen, stated interests after hearing presentations from the parties' lawyers – in favor of a system where the universally shared goal, the defendant's recovery from drug addiction and increased public safety, is expressed at the outset and shared by the parties and the court alike. In such a system, the judge is responsible not just for resolving disputes identified by the parties but also for actively directing, controlling and supervising the defendant's rehabilitation from drug addiction. Thus, with far fewer procedural limitations, the drug court judge controls the agenda; has informal conversations with the parties, the treatment providers and correctional officials; and ultimately does almost "whatever is needed" to ensure that everyone promotes the shared goal of, among other things, helping the defendant recover from drug addiction.

Arguably, no player on the drug court team – no judge, prosecuting attorney, probation officer or treatment provider – has struggled more with his or her own identity and often-conflicted role than the defense attorney.

This sort of informal, flexible system can work toward the long-term benefit of defendants by increasing the chances that they will be able to overcome drug addiction. However, this system of increased power and authority for judges presents, at least, some increased risks for the defendant as well, since drug court judges retain the power, albeit after discussing issues among all team members, to impose a variety of punitive sanctions, which often include removing defendants from the program entirely and requiring them to serve lengthy criminal sentences. Thus, while everyone enters the drug court system with the same stated interest, the interests of the defendant may eventually diverge from those of the judge and the treatment team, especially if and when the judge resorts to the variety of punitive sanctions available in a drug court program. The tension between the need for increased judicial flexibility and authority on the one hand and the risks inherent in this same flexibility and authority on the other, requires a defense attorney participating in the drug court system to strike a constant balance

between acquiescing to informal procedures and practices that would not be tolerated in the traditional criminal court system and trying to protect the client from the severe punishments that remain available.

Balancing Competing Concerns

Properly balancing these competing concerns gives rise to a host of complex, ethical questions and challenges for the defense attorney. In the traditional adversary system, the defense attorney's role is clear and well established: The defender is required to act as a zealous, partisan advocate for the client's interests, to avoid taking actions that might conflict with the client's interests in any way and to carefully guard and maintain the secrecy of all information learned about the client or from the client during the course of the representation. The drug court system, however, challenges all of these duties. In a drug court, the "proper role" of the defense lawyer remains ambiguous, and the institutional pressures on a defender to be seen as a "team player" by modifying or adapting many of the traditional ethical rules that govern in the adversary setting are significant. In short, the goals and aspirations of the drug court system may appear to conflict with well-established ethical rules formulated in the adversary context and require defense attorneys to try to reconcile their behavior with these competing goals.

Addressing Competing Concerns at the Outset: The Defense Attorney's Role in Providing Sound Advice and Setting Clear Boundaries for the Process Before a Client Chooses Drug Court

A defense attorney can reduce (but not eliminate) some of these dilemmas by providing sound advice and representation at the time when a client must decide whether or not to participate in the drug court process. This includes providing information not only about the benefits of drug court, which include potential leniency and significant assistance in overcoming addiction, but also about the potential costs of participating in drug court. Before choosing drug court, defendants should be made aware that the drug court treatment system could require them to spend substantially more time under the court's supervision than would be required after a negotiated plea bargain or even after a conviction at trial. Defense attorneys also should make their clients aware that, should they choose to enter a drug court program, the court is substantially less likely to allow them to change the individual goal of the litigation than it would be in the adversary context: The only permissible goal of the drug court program is to work toward overcoming addiction, and one of the fundamental premises of this program is that the judge and the treatment team "know best" what actions are necessary to achieve this goal. Thus, drug courts provide judges with the power and the flexibility to "force" a defendant to overcome a powerful addiction despite the difficulty of doing so, and the concerns expressed by defendants may be treated not as true expressions of their legitimate interests but rather as the complaints of addicts in denial about the scope of their problems.

Before any decision on participation is made, the defense lawyer also should raise and address with the client the confidentiality consequences of entering drug court. Drug courts often require defendants to execute confidentiality waivers that allow relevant portions of their medical treatment information to be distributed not just to the court but to prosecutors, as well. Clients should be made aware of the potential dangers of disclosing such information and informed that it is to help them on the road to recovery. They also should be informed that they have complete power over whether or not to do so and that other than under limited circumstances, disclosure of such information would not be permitted if they were to secure treatment without court supervision. In addition, every defendant needs to know that participation in the drug court system may compel a formal admission of guilt and may result in the waiver of legal defenses should treatment fail and the defendant is eventually brought to trial. Unfortunately, providing competent advice on all of these subjects may be further complicated by the desire of the drug court to place a defendant in treatment as soon as possible after the defendant's arrest. Although this speedy treatment may provide therapeutic benefits, it may hinder the ability of a defense attorney to conduct a factual and legal investigation into the merits of the case. Nevertheless, without such an investigation, it is impossible to make a reasoned assessment of what a likely criminal court disposition would be or to assess the costs of waiving various legal defenses. Lacking some reasonable projection of the possible penalties and the possible defenses at trial, a client cannot make a meaningful decision as to whether to participate in drug court.

Another important function of defense counsel is to investigate and negotiate at the outset the contours of the treatment program that the drug court would provide for the defendant. In some jurisdictions, counsel has some ability to negotiate the drug court "contract," and defense lawyers working in these jurisdictions should attempt to obtain the treatment guarantees and options that will provide their clients with the best possible chance for overcoming their drug addictions. Defense counsel also should attempt to negotiate complete confidentiality of information provided to the court and to the government during the course of drug court proceedings, complete immunity for information provided and the most favorable results for the client upon successful completion of treatment. Defense counsel also may attempt to place some limits on the participation by counsel in the treatment process, so as to ensure that the treatment providers are not expecting counsel to act in a way that is inconsistent with ethical rules, especially those governing the confidentiality of client confidences and secrets. In jurisdictions where the defense attorney is part of the treatment team, the attorney must mediate any tensions between the treatment team member and defendant's counsel by referring to that jurisdiction's relevant ethical rules. See Chapter 2 ("Ethical Considerations in Drug Court") and *Ethical Considerations for Judges and Attorneys in Drug Court*, National Drug Court Institute (2001).

The Defense Attorney's Role after a Client Chooses Drug Court

Even with solid, complete advice and a sound treatment program, complex ethical problems may still remain for the drug court defense lawyer. In many jurisdictions, the drug court model contemplates a defense attorney who acts as part of a team devoted to ensuring the defendant's rehabilitation. This role is far removed from that of the traditional criminal defense attorney, whose sole obligation has been seen as protecting the client's immediate, stated interests. Given these different roles, the drug court judge may try to redefine a defense attorney's duties to conform to a model that may not be considered in a traditional criminal court.

In most drug courts, for example, the defense attorney's active participation in the court as an advocate is discouraged; the judges in these jurisdictions prefer to converse directly with defendants. However, in these courts, there are staffing conferences in which the drug court team meets and discusses each participant's case. It is here where the defense attorney can advocate for his or her client. Nonetheless, a defense attorney faces a host of competing considerations in determining how to handle situations in which he or she cannot actively participate in the courtroom. On the one hand, the unique nature of drug court provides a defense attorney with several sound reasons to acquiesce. The expressly nonadversarial nature of the proceedings makes it less important for the client's interests to be stated to the judge. Moreover, because there is generally no current criminal prosecution, the risks of allowing the client to speak directly with the judge are substantially reduced in drug court, especially if a defendant is granted complete confidentiality and immunity for statements made during the course of the drug court process. Thus, it may often be in the client's best interest to allow direct interaction with the judge. In fact, it can demonstrate that the client is fully cooperating with the drug court team by providing honest and candid information about how the course of treatment is progressing.

Some believe that there is a potential down side of reducing or eliminating the defense attorney's in court role as an advocate, however, even in the nonadversarial context. A client who is progressing well may not be able to articulate and emphasize his or her accomplishments in the same way a skilled defense lawyer could. The same could be true for a drug court defendant who has legitimate complaints about a treatment program or about the manner in which treatment is progressing. Even in cases where defendants are able to articulate their concerns, a drug court judge may not take them as seriously as concerns raised by a lawyer, because the judge can and should properly presume the lawyer has screened out the frivolous complaints. In addition, in those jurisdictions that do not provide for complete confidentiality and immunity for statements made during the course of the drug court process, a drug court defendant may take a substantial risk by speaking directly with the judge and other "team" members, especially when the treatment process appears to be failing. Under such circumstances, the potential for miscommunication and the danger that statements

will be used in criminal proceedings become heightened, and there will be strong incentives for the defense attorney to intervene in order to protect a client from the potentially serious consequences of misspeaking.

Another concern arises when a client's expressed interests change during the course of the treatment process. Drug court teams expect this to occur and often operate on the premise that, because most drug addicts do not understand the existence, nature and scope of their problem, drug court defendants are not capable of recognizing what is truly in their best interests. Indeed, one of the primary reasons for reducing a defense counsel's role as an advocate is to prevent the concerns expressed by the client during drug court proceedings from interfering with the treatment plan. Although this approach is undoubtedly sound from a therapeutic standpoint, it nevertheless places an obligation on the defense attorney to examine closely the ethical rules in his or her jurisdiction that require an attorney to work toward achieving a client's stated interests and to attempt to reconcile the defense attorney's representation of the client in drug court with these ethical concerns.

The defense attorney's participation as a treatment team member may also create concerns in terms of both confidentiality and client perceptions. With regard to confidentiality, the attorney's participation as a full-fledged "team" member creates the risk that the drug court judge will count on the attorney to provide information that might otherwise be deemed privileged and confidential in the traditional criminal court context. Such requests must be handled very carefully. Although some ethical rules and precepts designed primarily for the adversary context (*e.g.*, the duties of zealous, partisan advocacy) may be adapted to the legitimate goals of the drug court process, requiring a lawyer to disclose confidences and secrets against the client's stated wishes should raise red flags for any defense lawyer. *See* Chapter 2 ("Ethical Considerations in Drug Court"), *Ethical Considerations for Judges and Attorneys in Drug Court*, National Drug Court Institute (2001) and *Federal Confidentiality Laws and How they Affect Drug Court Practitioners*, National Drug Court Institute (1999). Apart from the ethical concerns presented in such circumstances, clients who see their lawyers disclose secrets and confidences to the treatment team over their objections may believe they cannot trust anyone in the process because no one is truly on their side. It is important, therefore, for defense lawyers participating in the drug court process to draw firm boundaries about the nature and scope of their participation. If a defense attorney, however, practices in a jurisdiction where confidentiality must be waived, the attorney must explain this, and the extent to which confidential information may be used, fully at the beginning of the representation, after consulting the local ethical rules.

ETHICAL CONSIDERATIONS IN DRUG COURT

Drug court models vary considerably, but they typically involve informal proceedings, require a waiver of certain confidentiality rights for the defendant, have a goal of the recovery of the defendant and, to varying degrees, promote the concept that all the players, including the defense attorney, are part of a team seeking the defendant's recovery.¹ This "problem solving" model presents defense attorneys with difficult choices in formulating an appropriate role for themselves. First, attorneys must decide what posture to take when their clients must choose between entering a drug court program and staying in the traditional adversarial system. When a client chooses to enter into a drug court program, the defense attorney must then determine what role to play during the course of the program. Should the attorney seek to structure the client's involvement in drug court (e.g., the extent of any waivers, the scope of possible sanctions)? If so, what interests should direct the attorney's efforts to structure the program? Should the attorney intervene between the client and the treatment court judge? If so, when and how? How should the attorney handle confidential information or potentially damaging information? Should the attorney play an active or passive role in securing the client's successful completion of the program? What constitutes an active role? Should the attorney encourage the client to work toward sobriety and a drug-free existence, or should the attorney use his or her skills to minimize both poor behavior by the client and the impact of sanctions on the client? What is the attorney's role in advocating for a successful termination?

The problem solving drug court model presents defense attorneys with difficult choices in formulating an appropriate role for themselves.

Although drug court programs may provide an attractive alternative to a traditional resolution of a criminal charge, defense counsel cannot lose sight of the fact that it is a criminal charge that brings the client to drug court and that liberty interests remain throughout the duration of the drug court program. The state's involvement in the development of the program, in determining the conditions of the program and in assessing a client's participation in the program likewise requires that defense attorneys provide competent and careful advice to their clients about the program and that they guard their clients' interests and rights throughout their involvement in the program.

This chapter explores the guidance that certain ethical rules established by the American Bar Association (ABA) provide to defense attorneys who advise clients whether to enter drug court programs or represent clients in drug court programs. At this writing, the ABA has yet to issue any formal opinions regarding

¹ Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 Wash. U.L.Q. 1205, 1210 (Winter 1998).

ethical considerations in the drug court context. In the absence of such specific guidance, this chapter examines how the *ABA Model Rules of Professional Conduct* and the *ABA Standards for Criminal Justice* inform the advice that defense attorneys give to clients as to whether to enter drug court programs and how the rules and standards affect a defense attorney's representation of a client participating in a drug court program.

The ethical rules and standards explored in this monograph are national in scope. Defense counsel serving clients who are considering, or are already participating in, drug court programs, however, should be familiar with applicable ethical rules in their jurisdictions. (For more information, *see also, Ethical Considerations for Judges and Attorneys in Drug Court*, National Drug Court Institute (2001)).

Competence

Rule 1.1: Competence – A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.

Standard 4-6.1: Duty to Explore Disposition Without Trial – (a) Whenever the law, nature and circumstances of the case permit, defense counsel should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies.

Standard 4-8.1: Sentencing – (a) Defense counsel should, at the earliest possible time, be or become familiar with all of the sentencing alternatives available to the court and with community and other facilities which may be of assistance in a plan for meeting the accused's needs. Defense counsel's preparation should also include familiarization with the court's practices in exercising sentencing discretion, the practical consequences of different sentences, and the normal pattern of sentences for the offense involved, including any guidelines applicable at either the sentencing or parole stages. The consequences of the various dispositions available should be explained fully by defense counsel to the accused.

Commentary. Competence to represent a client who may be eligible for a drug court program requires that the attorney be familiar with the program. The attorney must know the eligibility requirements, the nature of the various treatment programs, the sanctions and incentives that can be imposed and the circumstances of their imposition, circumstances leading to termination from the drug court and the confidentiality waivers and restrictions placed on the government's use of information obtained in drug court. The defense attorney also must be familiar with the charges the client faces, the client's potential sentencing exposure, potential suppression issues and the possible legal defenses to the charges. Facility with both the drug court program and the traditional adversary resolution of the underlying charges renders defense counsel competent to advise the client on the merits of his or her case versus the option of entering into a drug court program.

Communication

Rule 1.4: Communication – (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Commentary. ABA Standard for Criminal Justice 4-5.1 (Advising the Accused) instructs defense counsel to “advise the accused with complete candor” and not to “understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused’s decision as to his or her plea.” Taken together, the rule and the standard require attorneys to give their clients sufficient information and to impart that information in such a manner as to ensure that their clients have a genuine choice. A client’s choice must be informed by the defense attorney’s professional judgment of the case and the client’s options, coupled with the client’s (not the attorney’s) aversion to risk and the client’s (not the attorney’s) objectives. There are no “client decisions,” unless the client has the information and the time to make a genuine choice about how to proceed.

Even fierce drug court proponents recognize the importance of voluntary choice as the first step in the therapeutic process.² Defense attorneys’ adherence to the rules and standards governing communication and the scope of representation (see discussion below) ensure that the choice made by a client is, in fact, a choice based on the client’s assessment of the long-term and short-term costs and benefits of the available options, given the facts of the criminal case, the parameters of the drug court program and the client’s personal goals and desires.

An attorney’s method for imparting information in order to ensure that a client has a genuine choice will vary from client to client. At a minimum, however:

- Non-English speaking clients must be afforded a bilingual translator or attorney.
- Forms (*e.g.*, waivers) should be read to clients.
- Explanations should be clear and should contain specific examples (*e.g.*, sanctions imposed for the third relapse, prohibited behavior, how the client will be tested for drugs, what will happen if the client “water loads,” what will happen if the client fails to submit a sample, the maximum penalty for a conviction on the underlying offense, and trial rights).

In all cases, the defense attorney should probe as necessary to develop a clear understanding of the client’s circumstances and objectives.

² Hon. Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 *Notre Dame L. Rev.* 439, 521 (January, 1999).

The duty to communicate is a continuing one, and the defense attorney must continue, throughout the client's participation in drug court, to consult, advise, explain and counsel the client in a manner consistent with helping the client obtain his or her objectives. This should be done in a manner that protects the client from producing potentially harmful or self-incriminating information absent immunity, waivers or agreements to the contrary.

Disposition

Standard 4-6.1: Duty to Explore Disposition without Trial – (b) . . . Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including analysis of controlling law and the evidence likely to be introduced at trial.

Commentary. Many drug court programs require the client's decision whether or not to participate shortly after arrest. Drug court and other treatment experts contend that this allows the program to intervene while the client is still in the midst of a "crisis."³ Under these circumstances the rules and standards require that the attorney conduct an immediate investigation and attempt to gain early access to discovery in order to be able to competently inform the client of the viability of all options. Defender organizations should be vigilant in protecting the ability of defenders to provide advice consistent with the rules and the standards when participating in the design of such programs or in negotiating discovery practices for clients who are eligible for drug court programs. Likewise, the individual defense attorney must make efforts to ensure that a client is fully informed before entering into a drug court program or that entry into such a program is conditional and allows for a withdrawal that does not harm the client's ability to proceed on the merits of the criminal case.⁴

Scope of Representation

Rule 1.2: Scope of Representation — (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Rule 1.3: Diligence – A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment – [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take

³ See Boldt, *supra* note 1, at 1258.

⁴ See *id.* at 1289-90; Karen Freeman-Wilson, Robert Tuttle, Susan P. Weinstein, *Ethical Considerations for Judges and Attorneys in Drug Court*, National Drug Court Institute (2001).

whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with a commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

Commentary. Once a client has received competent advice and has rendered a decision about whether to enter into a drug court program, the defense attorney shall abide by the client's decision. Upon selecting the drug court option, the client still defines the objectives of the representation. Whether the client's objective is sobriety and recovery or simple avoidance of a criminal conviction, the lawyer "shall abide" by the client's decisions concerning the objectives of the representation,⁵ absent some agreement to the contrary.

Diligent defense counsel should stay apprised of the client's goals and objectives throughout the client's involvement in the drug court program. The client's goals and objectives are reasonably subject to change, and it is the duty of the defense attorney, in consultation with the client, to devise the means to achieve the client's goals. Because drug court programs operate differently than a traditional adversarial proceeding, defense counsel may have to be creative or "think out of the box" when assessing means to achieve the client's objectives. However, this difference between a drug court and the traditional system does not change the defense attorney's duty of loyalty to the client's goals and objectives.

For example, should defense counsel encounter a client who desires sobriety above all else, who believes that sanctions will assist his or her recovery and who trusts and wants to confide in the treating judge, then a passive role as a virtual spectator in the courtroom (but still more active in the staffing meetings) may be appropriate for defense counsel. On the other hand, should defense counsel have a client who desires above all else to avoid a criminal conviction, or for whom short-term sobriety is simply a means to this end, then competent defense counsel may seek to modify his or her client's participation in the drug court program in myriad ways in order to limit the possibility that the client will be terminated unsuccessfully and/or to minimize the period of treatment. Either role may be inconsistent with the attorney's belief of what is in the client's best interests.⁶ The rules of ethics, however, do not distinguish between such clients – both are owed their attorneys' diligence and zeal.⁷

In some instances, a client's objectives may appear to defense counsel to be contradictory, such as the client who desires both sobriety and a minimum of sanctions. Many drug court experts state that sanctions are key to the successful

⁵ See Boldt, *supra* note 1, at 1289-91.

⁶ For more about the importance of zealously pursuing client objectives throughout participation in a drug court program, see Boldt, *supra* note 1, at 1287-1300.

⁷ The primary limitation on the diligence and zeal with which defense counsel shall pursue a client's objectives is found Rule 1.2 (d), which states that "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

treatment of the addiction.⁸ Nevertheless, upon consultation with the client on the consequences of pursuing potentially conflicting objectives, the defense attorney must pursue these goals diligently and as effectively as the circumstances permit.

Whether he or she acts as a passive participant or as an active advocate, counsel must be present at all staffings and court proceedings in order to provide competent and diligent representation. Without being present, counsel cannot know if a client's objective changes as a court proceeding evolves. Nor can counsel intercede to communicate with the client if the client's conversation with the judge is thwarting the client's aims.⁹ Nor can counsel intercede if the client's discussions with the judge cross into areas not covered by the client's waiver or into areas not protected from use by the government. Some jurisdictions that have institutional public defenders are able to provide "stand-in" counsel to ensure that a lawyer is present at every hearing. That is, the local public defender's office provides a lawyer for every time that the drug court is in session. To the extent that the assigned lawyer is not, or cannot be, present, the public defender represents the drug court participant. After the hearing, the public defender conveys the substance of the hearing to the assigned attorney.

Confidentiality, Candor

Rule 1.6: Confidentiality of Information –

- (a) *A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).*
- (b) *A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:*
 - (1) *to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or*
 - (2) *to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.*

Standard 4-3.1: Establishment of Relationship – (a) Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation and whether defense counsel will continue to represent the accused if there is an appeal. Defense counsel should

⁸ See Hora, et al., *supra* note 2, at 526-27; See *Effective Use of Sanctions in Drug Courts: Lessons from Behavioral Research*, Douglas Marlow, JD, Ph.D. and Kimberly Kirby, Ph.D., National Drug Court Institute Review, Volume II, Issue 1, Alexandria, VA. 2000.

⁹ See Boldt, *supra* note 1, at 1295 (illustrating the importance of counsel's presence in various drug court scenarios).

explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures.

Rule 3.3: Candor toward the Tribunal –

(a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;*
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;*
- (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or*
- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.*

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Commentary. Rules 1.6 and 3.3 produce ongoing tension for the defense attorney in both the traditional adversarial system and a drug court program. The opportunity for expression of this tension in the drug court setting is enhanced by the informality of the proceedings and the frequency of contact between the client and the judge. Rule 3.3 prohibits a lawyer from deceiving the court or “assisting” a client or witness to do so. It does not, however, require full disclosure by the lawyer of all information about the client, even if the information would be material to the proceeding. For example, if a client informs the lawyer that the client has suffered a relapse and used either drugs or alcohol but the client’s use has not been detected, neither the lawyer nor the client is obligated to disclose this fact.¹⁰ Where a client unambiguously lies under oath to the court, however, Rule 3.3 imposes a duty of candor that supersedes the lawyer’s duty of confidentiality.

More perplexing situations arise when an attorney is acting in a passive role, virtually as a spectator to a narrative conversation between the court and the client, when the client shares information but is not placed under oath or when the client speaks with the judge outside the presence of defense counsel and the conversation is only later reported to the attorney. In each instance, defense counsel is not assisting the client, either by questioning the client or by presenting arguments on the client’s behalf using information that the client has supplied. If defense counsel is not “assisting a fraudulent or criminal act by the client,” then

¹⁰ See Freeman-Wilson, et al., *supra* note 4, at 50.

the obligations of Rule 1.6 would appear to control, requiring defense counsel to maintain his or her client's confidences.

Conflict of Interest

Rule 1.7: Conflict of Interest: General Rule –

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and*
- (2) each client consents after consultation.*

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and*
- (2) the client consents after consultation.*

When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Commentary. The most likely conflict that defense counsel might encounter in drug court is that between clients whose adversity originates in the underlying criminal case. The most obvious example is a pair of co-defendants who both choose to enter the drug court program. An argument could be made that if each client's goal is to achieve recovery and sobriety, then no adversity exists between the two. However, the possibility of a variety of future actions that could create adversity (*e.g.*, termination of one or both clients from the program) suggests that the best course of action is for co-defendants to have separate counsel. There also may be adversity when one client is a witness to another client's relapse or to other behavior that violates the rules governing participation in drug court. Under such circumstances, the attorney cannot provide either client with conflict-free advice and must withdraw. The defense attorney must withdraw from representation of both clients because the attorney is in possession of client confidences from each client that cannot be shared with the other client's attorney without violating Rule 1.6.¹¹

Ability to Make Adequately Considered Decisions

Rule 1.14: Client under a Disability – (a) When a client's ability to make adequately considered decisions in connection with the representation is

¹¹ Although some jurisdictions may permit defender organizations to wall off information between divisions or between attorneys, a single attorney clearly cannot create a system to ensure information will not be shared during the course of representation of either client.

impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client/lawyer relationship with the client.

Commentary. Intoxication or withdrawal may affect a client's ability to make adequately considered decisions. Defense counsel should be familiar with the signs of intoxication and withdrawal and be prepared to seek additional time to allow a client to recover from the immediate effects of intoxication or withdrawal before he or she must decide on a specific course of action. When seeking additional time, defense counsel should be mindful of the tactical and ethical considerations involved in revealing information about the client's current mental or physical state to the court or the state (*see* Rule 1.6). However, in no event should an attorney substitute his or her own judgment of the client's best interests for an informed choice by the client.

APPENDIX 3

**MISSOURI DEFENSE ATTORNEYS' GUIDELINES
FOR REPRESENTATION IN DRUG COURT**

XII. DRUG COURTS

12.1 Guidelines for Representation in Drug Court

(a) Unless different guidelines are established within this section XII. Drug Courts, the general Guidelines for Representation represent what is expected of the Public Defender in drug court.

(b) The focus of these Guidelines for Representation in Drug Court is on adult drug *treatment* courts, not on expedited case management docketing systems for drug cases.

12.2 The Role of the Public Defender in Drug Court

(a) Chapter 600: The Missouri State Public Defender System is obligated to provide representation to an indigent person with a case pending in drug court so long as the case is encompassed by Chapter 600 RSMo. Persons are represented only after having been determined indigent by the Public Defender or thereafter by the court. If a case is concluded in drug court, then the Public Defender shall seek a lien against the client at the conclusion of representation unless a promissory note for Public Defender legal services has been secured.

(b) The Public Defender has dual roles in drug court: attorney for the client; and participant in the planning and operation of a drug court.

12.3 The Public Defender as Attorney for the Client

(a) The paramount role of the Public Defender in drug court is to act as attorney for the client, maintaining the traditional defense attorney's function of protecting the client's legal interests, while adding the dimension of promoting the client's physical and mental well being and any interest the client has in recovering from his or her substance abuse. While strategies and approaches in fulfilling that role may be nontraditional and less adversarial, the Public Defender is not a guardian ad litem, but is representing the client as his or her attorney. The Public Defender should never abandon his or her role as attorney for the client and is bound by the same ethical obligations as any other criminal defense attorney. At the same time, the Public Defender is a member of the treatment team, in regards to his or her clients, working in collaboration with the judge, prosecutor, and other members of the criminal justice system and the treatment community in advancing shared objectives, including providing a beneficial legal disposition and tending to the client's substance abuse. However, for participants in drug court who are not

Public Defender clients, the Public Defender should not participate in proceedings regarding those defendants and should not advise those defendants. For those participants, the Public Defender is not the attorney and is not a member of the treatment team.

(b) Initial client consultation: The Public Defender shall meet with the client in an appropriate and private setting prior to a client's decision to enter the drug court treatment program. The Public Defender shall:

1. Secure a completed application for public defender services and client initial interview form.
2. Provide the client with a copy of all available legal documents and discovery, and review those and the charges with the client.
3. Discuss with the client the drug court program, its nature and purpose as well as the rules governing eligibility and participation, fees, the therapeutic courtroom, staffings, and the adversity or nonadversity of the process.
4. Review with the client any drug court contract and related documents.
5. Discuss with the client the consequences of complying with or failing to comply with drug court rules, including any system of graduated sanctions and rewards, and discuss the nature of any proceedings to impose sanctions or to terminate the client's drug court participation.
6. Discuss with the client the legal consequences of successful completion of drug court or voluntary or involuntary termination from the program.
7. Explain any requirement that the client waive preliminary hearing, waive speedy trial, waive jury trial, stipulate to facts or evidence, or plead guilty prior to entering into drug court and explain any other rights that the client will give up by entering drug court.
8. Explain to the client the role of the Public Defender in drug court, both in court and in staffings, including any departures from a criminal defense attorney's traditional role, his or her role as a member of the treatment team, his or her possible agreement to or advocacy of sanctions, and possible disclosures of attorney-client communication in the course of representation.
9. Explain to the client the nature and extent, if any, of investigation and other trial preparation that will occur prior to or during the client's participation in drug court.

10. Discuss with the client whether certain pretrial motions, including motions to suppress physical evidence and statements, may be litigated prior to entry into or during participation in drug court.

11. Review the client's alternatives to drug court, discuss his or her likelihood of success, explain the advantages and disadvantages of drug court, and offer advice on whether to enter drug court, focusing on the client's legal interests and the client's interest in recovering from substance abuse.

12. Encourage, if sufficient legal protections exist, the client to be open and truthful with the judge and with treatment staff regarding substance use.

13. Secure an informed and voluntary decision from the client on whether to enter drug court, unless the drug court program is not voluntary, explaining to the client that entry into the program is a commitment to recovery from substance abuse and is an acceptance of the role of the Public Defender as explained to the client.

14. Explain that, unless the drug court program is not voluntary, it is the client's decision whether to enter drug court and whether to continue in drug court.

(c) Continuing client consultation: While a client is in drug court the attorney shall consult with the client as necessary.

(d) Obligation to maintain a complete, organized and current file: For drug court clients a Public Defender has the same obligation as for those clients not in drug court to maintain a complete, organized and current file on each client. In addition, insofar as pertinent, the file must contain a copy of any drug court contract, available progress and treatment records, and summaries of staffing comments and court action.

(e) Preliminary discovery: The Public Defender should ensure that, prior to a client waiving any significant rights and before entering drug court, discovery is received or reviewed by counsel. Where such prior receipt is not feasible, the Public Defender should strive to ensure that, once such discovery is received, a client is able to withdraw his or her waiver of any significant rights and reverse any decision to enter drug court without any negative consequence.

(f) Investigation: As necessary for a client to make an informed decision of whether to enter into or continue in drug court, and as necessary to preserve exculpatory evidence in the event of termination, the Public Defender shall conduct independent investigation of a client's case. The extent, if any, of the investigation will be influenced by the nature of the drug court program, the

benefits of participation, the consequences of failure, what rights are required to be waived, whether a guilty plea is required, and the immediacy of entry into drug court.

(g) Representation within drug court: The Public Defender shall ensure that he or she is fully prepared for all drug court proceedings, shall ensure that all beneficial information is presented if permitted, and shall advocate on behalf of the client where appropriate and reasonable.

(h) Conflicts: All ethical rules apply in drug court, including those pertaining to representation of clients with conflicting interests. Generally, however, the representation of a client in drug court will not be directly adverse to other drug court clients.

12.4 The Public Defender as a Participant in the Planning and Operation of a Drug Court

(a) The Public Defender also has an institutional role in drug court: to ensure that a drug court is designed and operated to serve the interests of Public Defender clients, to ensure rights are fully protected and advanced, and to promote recovery from substance abuse. In this role, the Public Defender shall work in cooperation and collaboration with other members of the criminal justice system and the treatment community to promote recovery through a coordinated response to offenders dependent on licit and illicit drugs. The Public Defender's institutional role shall continue so long as in the interests of his or her clients.

(b) The Public Defender shall strive to ensure that a drug court is planned and operated by an interdisciplinary team from the criminal justice system and treatment community. If a drug court is being designed or operated without Public Defender participation, the Public Defender shall strive to include himself or herself in the planning and operation.

(c) In planning for a drug court, the Public Defender shall attempt to ensure that all major policy issues of importance to the defense are resolved before supporting the program and before commencement of the program. The Public Defender shall strive to resolve these issues most beneficially to the participants' interests. With individual issues each Public Defender will have to gauge whether something less than the optimum still provides a better legal alternative than traditional local practices. Issues to consider include:

1. *Pre-adjudication versus post-adjudication, and the legal benefits of successful completion:* Strive to maximize the legal benefits of successful completion, optimally a pre-adjudication, diversionary drug court that results in dismissal of charges (with no prerequisites of a stipulation of

facts or evidence, waiver of jury trial, or guilty plea). If necessary to broaden eligibility requirements, strive for a program that includes both elements, pre-adjudication and post-adjudication. Strive to guarantee the promised benefits to participants successfully participating in a program that ceases to exist.

2. *Negative consequences of failure:* Strive to impose no negative consequences upon voluntary or involuntary termination from the program, beyond the negative consequences of termination itself, the loss of the potential benefits of completion, and the time and energy of the attempted completion. A drug court should not punish a participant's failed attempt at completion. Minimizing negative consequences will encourage entry into drug court and thereby promote the community's safety and well being by maximizing the number of persons benefiting from the program.

3. *Eligibility:* Strive for broad participant eligibility requirements, including prior criminal histories, more serious offenses, and non-drug offenses, without sacrificing the likely success of participants and the viability of the program.

4. *Immediacy:* To promote the therapeutic value of the drug court, strive for early intervention, without unduly sacrificing participants' legal rights and with sufficient time to consult with an attorney before deciding whether to participate, and strive for personal recognizance bonds.

5. *Voluntary versus involuntary participation:* Strive to allow potential participants to decide whether to enter and whether to continue in the program.

6. *Guilty pleas and waiver of rights:* Strive for no requirement of a guilty plea, no stipulation of facts or evidence, and no waiver of jury trial as prerequisites to entry into drug court. Otherwise, the negative consequences of failure may be severe and participants may be deterred from entering drug court. It likely will be necessary to agree to waive rights to speedy trial and perhaps to preliminary hearing.

7. *Legal protections:* Strive to ensure that evidence as well as statements secured as a result of a participant's involvement in drug court are not admissible against a participant outside of the drug court program, both to protect the participant's legal interests and to encourage openness and truthfulness. Strive to ensure to the extent possible that all promises of benefits are legally enforceable by the making of an adequate record, including the prosecutor's signed agreement to any promised benefits through a drug court contract. Where necessary, strive to ensure that by agreeing to enter into a drug court overseen by a certain judge, a

participant is not waiving his or her rights to a change of judge from that same judge in the event of termination from drug court.

8. *Costs and fees:* Strive to ensure that the costs of participation and associated fees are not unduly burdensome and that no person is prohibited from participating due to poverty.

9. *Evaluation and monitoring:* Strive to design and implement a system of effective evaluation and monitoring of the performance of the drug court measured by agreed-upon criteria, including, for example, completion rates, failure rates, and recidivism rates.

(d) Once a drug court program is implemented, the Public Defender should continue his or her involvement in its operation and continue to move the drug court to the desired ideal and to strive to make other changes in the drug court deemed necessary through experience. The Public Defender, through careful review of cases, also should guard against prosecutorial dumping of otherwise weak evidentiary cases into drug court.

12.5 Guidelines for Representation in Other Therapeutic Courts

(a) These Guidelines for Representation in Drug Courts offer guidance for Public Defender representation in other therapeutic courts such as juvenile drug courts, family drug courts, parenting courts, DUI courts, mental health courts, and domestic violence courts.

Attachment 3

**OPDS's Draft Report to the Public Defense Services
Commission on Service Delivery in Baker County
(November 20, 2008)**

Introduction

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

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

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the public defense system in Baker County, a summary of the testimony received at PDSC's public meeting in Baker City on Wednesday, August 14, 2008, a summary of the PDSC's discussion at its September 11, 2008 meeting, and a proposed service delivery plan.

PDSC's Service Delivery Planning Process

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

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

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

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

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

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

Background and Context to the Service Delivery Planning Process

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

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

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

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. Since 2004 site teams of volunteer public defense managers and lawyers have visited contractors in Benton, Clackamas, Columbia, Deschutes, Douglas, Clackamas, Jackson, Lane, Lincoln, Linn, Multnomah, Umatilla and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. Although a report has not yet been prepared, a site team recently visited contractors in Crook and Jefferson Counties.

In accordance with its Strategic Plan, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

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

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

The Commission is also concerned about the “graying” of the public defense bar in Oregon and the potential shortage of new attorneys to replace retiring attorneys in the years ahead. More and more lawyers are spending their entire

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

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

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

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

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

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

responsibility of addressing structural issues with policy implications and assign to OPDS the tasks of addressing performance issues with operational implications.

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

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

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

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

lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county's or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

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

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

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

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

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

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

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

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

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

In addition to the access to experienced public defense lawyers they offer, consortia offer several administrative advantages to PDSC. If the

³ Id.

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

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

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

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

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

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

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

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

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

OPDS's Preliminary Investigation in Baker County

The primary objectives of OPDS's investigations of local public defense delivery systems throughout the state are to (1) provide PDSC with an assessment of the

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

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

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

This report is intended to set forth the information received in those interviews and in testimony provided to the Commission about the public defense system in Baker County, and to recommend a plan for the continued delivery of services in the county.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in Baker County's justice system could turn out to be the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for Baker County.

OPDS's Findings in Baker County

Baker City is the county seat for Baker County. The county population in 2006 was 16,243.

The Circuit Court

Judge Gregory Baxter is the only circuit court judge for the county. There is a justice court which handles most misdemeanors except those involving domestic

violence and non diversion eligible DUIIs. It was reported that some cases that were previously being filed in the justice court are now being filed in the circuit court.

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

District Attorneys Office

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

Criminal Case Processing

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

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

Juvenile Case Processing

Dependencies:

The Juvenile Department in Baker County prepares most of the documents in dependency cases. They draft petitions that are then reviewed by the district attorney. Parents in dependency cases are notified to appear for shelter

hearings a half an hour early in order for them to be able to confer with counsel before the hearing. Attorneys are appointed in virtually all juvenile dependency cases but there are usually only one or two cases filed per month. The county had a Juvenile Court Improvement Project (JCIP) model court program but it was recently discontinued because the judge and the other members of the team, including the attorneys, felt that they had done everything they could to accelerate case processing, and although the average period from first appearance to jurisdiction is still more than 90 days, they don't believe they can improve significantly on that number.

Delinquencies:

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

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

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

PDSC Contract Providers

Two providers contract to handle public defense cases only in Baker County. **Dan Cronin** contracts for 122 juvenile and drug court cases per year. His office is in John Day and he was formerly the primary public defense provider there but because the only circuit court judge in the county is his brother-in-law he now contracts with PDSC to handle cases in Baker County and some conflict cases in Malheur County. He reports that the rate he receives for drug court cases is not sufficient to cover the many appearances that are required in these matters, over a period that is often as long as eighteen months.

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

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

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

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

Comments regarding structure and number of public defense contractors

Judge Baxter reported that, structurally, the current system is working well. He likes to have providers from the immediate area if possible. He is concerned when a large volume of cases is moved from the justice court to the circuit court as has been happening recently. Other members of the court staff indicated that they do not have enough local attorneys and need more due to the high number of conflicts in juvenile cases. The district attorney said that he believes clients would benefit if the lawyers didn’t have to handle civil cases since these cases limit the time they have available for their public defense clients.

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

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

Comments regarding quality of representation

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

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

According to the Citizen Review Board (CRB) coordinator attorneys have recently started meeting with clients before CRB hearings. Some attorneys are excellent advocates, others provide minimal representation but, unlike what occurs in other parts of the state, all of the attorneys participate in CRB hearings and have had contact with their clients beforehand. They still need training about how to conform to the Oregon State Bar's Performance Standards⁴. On the whole she believes Baker County attorneys are stronger advocates than attorneys in the other counties with which she is familiar.

In juvenile delinquency cases lawyers are properly challenging competency to proceed in some matters. It was reported that in some alleged sex abuse cases they provide copies of psycho-sexual evaluations to the state even when they are harmful to the client. It is not clear whether such disclosure is made with the client's approval and in furtherance of the client's expressed wishes or as part of a best interest approach to representation.⁵ A couple of the attorneys are so overwhelmed that they usually meet with their clients only 10 minutes before court. Even if the case is resolved after these brief meetings, disposition cannot occur until a later date.

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

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

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

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

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

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

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

The structure:

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

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

Need for Additional Attorneys:

A number of commentators noted a need for additional attorneys to handle public defense cases in the county. While the need may be somewhat less urgent in Baker County than in some counties, it is a region-wide problem and not a new one.

In January of 2001 the Oregon State Bar Indigent Defense Task Force III report identified a number of problems in the delivery of public defense services in Oregon. It noted that in some districts it has been difficult to attract satisfactory candidates to handle indigent defense caseloads and that "[a] few districts have

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

reached a crisis point in recent years, finding no attorneys available to accept appointments for the compensation offered.”

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

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

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

Summary of Testimony at August 14, 2008 Meeting of the Public Defense Services Commission in Baker City, Oregon

At its August 14, 2008 meeting in Baker City the Commission received testimony relating to the delivery of public defense services in Grant and Harney Counties (Judicial District 24), Baker County and Malheur County. Although each judicial district is unique, many of the public defense providers serve more than one county and the comments of the witnesses tended to relate to practice in the entire region rather than in individual districts.

Chair Ellis opened the meeting by noting that the needs of each geographic region of the state are different and that the Commission welcomed comments and recommendations that would assist it in identifying a service delivery plan that met the needs of the local justice systems.

Circuit Court Judge William Cramer (Judicial District 24) provided written testimony. He said that the circumstances faced by public defense providers in

Eastern Oregon are unique. Currently he believes that although public defense attorneys are overworked and stretched thin, indigent clients are receiving adequate representation in Grant and Harney Counties. Having only one primary contractor and one conflict contractor in each county creates scheduling issues for the court. Also the court is unable to use the pro temp time to which it is entitled because there are not enough attorneys to appear in two courtrooms at the same time. Both counties would be better served if there were more local attorneys available to handle conflicts and to take over when the current providers retire, in approximately five years. There is no current pool from which to draw additional attorneys. He recommended that PDSC work with current contractors to allow them to hire associate attorneys who would be able to take cases now and be in a position to replace retiring attorneys in the future. He agreed that there would be a benefit to having an additional local office to handle conflict cases. Attorneys now have to travel a hundred miles or more to cover conflicts in the district. The court has been trying to get attorneys appointed for both parents and children at shelter hearings. That would be possible in more cases if there were more local attorneys. Attorneys are willing to come to Eastern Oregon to practice. The district attorney's office has been able to attract them because it provides better compensation than the defense does. In order to attract attorneys to defense practice in eastern Oregon adequate compensation would be necessary. If a law firm could count on a reliable income over an extended period of time it would be in a better position to hire one or more associates. Payment to contractors based solely on caseload causes a significant fluctuation in income from month to month. Of the possible approaches identified by the Commission in 2003, subsidizing firms that are willing to bring in additional attorneys appears to be the best.

Commissioner Welch inquired whether technological solutions are being evaluated. Judge Cramer noted that video appearances are sometimes possible. They can be used effectively only when the attorney and client have been able to meet and confer before the hearing.

Gary Kiyuna, a member and the administrator of the Baker County Consortium, said video equipment could be installed in a law office for the cost of approximately \$3,000 that would allow the attorney to appear in court or confer with clients in prison by means of an in-office video system. The circumstances in some cases require that the attorney be in the same location as the client.

He said there are four members of the consortium, all of whom are sole practitioners. Many new attorneys have significant educational loans but are ineligible, as consortium members, to benefit from many of the existing loan repayment and loan forgiveness programs.

Gordon Mallon testified that his firm had lost a shareholder because of inadequate income. Both he and the other remaining shareholder expect to retire in approximately six to seven years, which would leave one public defense

provider in Judicial District 24. It would be difficult to start a new law office in the area in view of the limited caseload and there are not a sufficient number of conflict cases to warrant an additional office. His recommendation to the Commission would be that it provide sufficient compensation to existing offices to permit them to hire one or more additional attorneys. In the most recent contract negotiations he proposed that PDSC pay a flat amount for public defense cases, regardless of the number of cases. Payment according to the number of cases per month makes the income vary significantly from month to month. The costs of operating an office are fixed costs and cannot be adjusted in accordance with a fluctuating caseload. A number of eastern Oregon providers have reported that case-based funding has not worked well for them either. His firm's proposal was not accepted because the Commission had not approved a flat rate system. The Mallon and Lamborn firm is not currently seeking to add any attorneys. It had sought to do so for approximately eight months but could not attract an associate with the salary it could offer.

Dan Cronin testified that he is currently a sole practitioner who handles public defense cases principally in Baker County. He has practiced law in the area for twenty-seven years. Over that period of time he has seen an erosion of the services provided to public defense clients. There should be at least three providers in each county. It would be financially impossible for him to hire another attorney in his office. Attorneys have to handle civil cases in order to be able to hire associates. That means that they cannot specialize in criminal law. Despite his deep commitment to public defense he plans to take fewer and fewer public defense cases in the future.

Matt Shirtcliff, the Baker County District Attorney, said that public defense attorneys in the area do good work. The court, the district attorney's office and the public defense attorneys all work hard and they all get along with each other. They meet together to resolve any issues relating to the operation of the criminal and juvenile court systems. His office is able to recruit new lawyers who spend a couple of years there before moving on. He would prefer to keep them longer but he and other district attorneys offices are not able to pay a high enough salary. His office has a strong relationship with the Department of Justice. He can get help on research issues and on some types of cases. The state benefits from good representation for defendants. It would be good for defense attorneys to be able to specialize. They do better work if they handle only criminal cases and this benefits the attorneys, the clients and the system. In Baker County the district attorney's office files most misdemeanors in the county justice court, excluding domestic violence and DUII cases. He tries to use the courts efficiently. Diversion eligible cases and non-chronic offender cases are offered early disposition treatment in the justice court. Ideally, however, there would be two courts of record in the county. His office has one fewer deputy than usual and as a result they currently have a backlog of cases. In Baker County, all cases are filed, even "bad check" cases which are not prosecuted in some jurisdictions.

Judge Burdette Pratt testified that the attorneys in Malheur County and in the other eastern Oregon counties do good work under the circumstances. Attorneys must travel significant distances and, in Malheur County, there is the added challenge of handling a significant number of cases arising within the Snake River Correctional Institution. It takes time for attorneys to get into the prison to see their clients, especially if the client is in administrative segregation. Often the witnesses are also incarcerated. Prison cases go to trial more often than other cases. Attorneys have to handle too many cases in order to make it feasible for them to take public defense cases. Attorneys are constantly scrambling from one case to another without being able to spend the time they would like, and need to on these cases. The best solution is to increase compensation.

Dennis Byer testified that, although he has been an investigator with the Coughlin, Leuenberger & Moon firm in Baker City for ten years, he only recently investigated some public defense cases. He has found the OPDS staff to be helpful in answering his questions. He charges \$90 per hour for private cases and is paid \$28 per hour on public defense cases. Most investigators charge between \$65 and \$75 per hour in private cases.

Mark Rader, a shareholder in the Rader, Stoddard and Perez firm, testified that his firm is the primary public defense contractor in Malheur County where he has practiced since 1988. The firm has two associates who were hired directly out of law school. Both of them live in Idaho as do two of the shareholders in the firm. For each of them it is an hour's drive each way between home and the office. He worries that his associates will decide to practice in Idaho where the counties pay a higher hourly rate than PDSC does. Unlike the situation in Grant and Harney Counties, the caseload in Malheur County does not fluctuate dramatically. He suggested that the Commission consider assisting public defense providers in two ways: with the cost of health care coverage for employees and with educational loan repayment assistance for attorneys. Mr. Rader said that cases arising in the prison are significantly more time consuming than other cases. The Malheur County District Attorney prosecutes all prison felonies in the circuit court. The prison handles only misdemeanor matters internally. The additional time it takes to represent imprisoned clients may affect the relationship with the client and result in more bar complaints and post conviction relief petitions. Responding to these allegations in turn consumes even more of the attorney's time. In order to meet with imprisoned clients it generally takes an hour to get from his office into the area where the interview occurs. It takes approximately an hour to get out of the prison and back to the office once the interview has occurred. Witnesses are often inmates as well so it requires a similar amount of time to meet with them if they are in the same institution. Very often, however witness inmates are moved to prisons in other parts of the state. Prisoners also receive a lot of advice from other prisoners that is contrary to the advice from their attorneys. More of the attorney's time is required to counter the advice

received from others. Currently, Rader Stoddard and Perez is receiving a higher rate for prison cases but a much higher rate is needed.

Paul Lipscomb said that in Marion County the most serious prison cases are prosecuted in circuit court but most cases are handled within the institution. Marion County attorneys also report to him that prison cases require more time.

Krishelle Hampton, a member of the Baker County Consortium, testified that she opened her own law practice in Baker City immediately after graduating from law school. Another local attorney, Bob Whitnah, provided office space for her without charge and he and the other lawyers in town were willing to mentor her. She would like to be able to afford better legal research tools and insurance for her staff. She spends more than 50% of her time on public defense cases but receives less than 30% of her income from those cases. In juvenile cases she attends team meetings with her clients and in DUUI cases she appears at DMV hearings on her client's behalf. She loves doing public defense work but may not be able to afford it in the future. If PDSC could help with employee benefits it might be more feasible. Last month her income from public defense cases was \$1,903. Insurance coverage for her employee would have cost her \$700. She knows other young attorneys who would be interested in practicing in eastern Oregon if the conditions were right. She does not believe that PDSC should have a policy against paying twice in conflict cases. It is an inappropriate incentive for lawyers to remain on cases in which they have an ethical obligation to withdraw. Mr. Cronin agreed with Ms. Hampton on this issue and said that the attorney who withdraws should at least get paid some compensation. Ken Bardizian, another member of the Baker County Consortium, said that in Baker County conflicts are not often identified early in the case because discovery is not provided until after an indictment has issued. The attorney can't wait until then to begin work on the case. In addition, in some cases the district attorney doesn't identify some witnesses until just before the trial date. Both Mr. Whitnah and Mr. Bardizian indicated that they had not been free to bargain for the contract terms they wanted because there were attorneys from another county who would have used the opportunity to contract for Baker County cases. Mr. Bardizian contracted with PDSC to handle Measure 11 cases on an hourly basis because he can bill for the actual number of hours each case required.

Bob Whitnah said he grew up in Baker City. He started practice at District Attorney Matt Shirtcliff's office in 2001. After four and a half years in that office he opened his own practice and began handling public defense cases. He likes doing these cases but the compensation is a significant issue. If better legal research tools were available to the defense they could be more efficient. In the district attorney's office he had approximately 150 open cases at a time. For the defense the caseload has to be a lot smaller because they don't have the same advantages and tools that the state has. The search and seizure manual prepared by Department of Justice attorneys is well organized and thorough. Defense publications are prepared by volunteers and are not as thorough as the

state's material. OPDS Appellate Division attorneys provide information in response to questions forwarded to them. Mr. Whitnah would like the Commission to assist attorneys in accessing better legal research tools and in finding a way to make health insurance affordable. If compensation is not increased he may not be able to afford to do public defense cases any longer.

Commissioner Potter said that the Oregon Criminal Defense Lawyers Association had explored the possibility of insurance pooling for members in the past and at that time found that it was not feasible but that it might be appropriate to look into it again in the future.

Chris Zuercher, an associate of Coughlin, Leuenberger and Moon was a deputy district attorney in the county before going into private practice. He likes doing public defense work and finds that he spends a higher percentage of his time on these cases than on his private cases. Mr. Moon has always had a commitment to criminal defense, which he sees as a kind of community service. Now would be the best time to start bringing in new lawyers to replace the older attorneys as they leave practice over the next several years.

Summary of PDSC Discussion at September 11, 2008 Meeting

The Commission discussion at its September meeting focused on four potential strategies for supporting its eastern Oregon providers: (1) promoting the increased use of technology as a means of improving communication and facilitating participation in court hearings, (2) exploring opportunities for insurance pooling among public defense contractors, (3) creating a resource center for defense attorneys that would offer materials and support services similar to those provided to district attorneys by the Department of Justice, and (4) increasing recruitment efforts and providing financial incentives to attorneys willing to practice in the area.

Chief Justice Paul De Muniz offered to convene a meeting of interested groups, including the courts, the Department of Corrections, local sheriff's offices, defense providers, district attorneys and others to explore improvements to and expansion of the use of video equipment for court appearances and communication with incarcerated clients.

John Potter reported that OCDLA had previously explored the possibility of insurance pooling for its members. He had not been able to locate the research previously done but was willing to discuss the issue again with his board of directors.

Rebecca Duncan described the services that are provided by the Department of Justice to district attorney offices throughout the state and noted that OPDS's Appellate Division responds to telephone and email inquiries and makes presentations at numerous seminars but is not funded to provide the same level

of services as the Department of Justice. Commission members discussed some of the resources that are available to defense attorneys, including the OCDLA list serve, its Criminal Law Reporter and other publications, and Willamette University's advance sheets.

With respect to recruiting additional attorneys to practice in eastern Oregon, Commissioners discussed a number of possible approaches, including increasing recruitment efforts at the law schools. Commissioner Stevens noted that there are additional challenges involved in recruiting attorneys to practice in less populated areas of the state and that some kind of special incentive might be needed. Jack Morris commented that there also have to be retention incentives to prevent lawyers from coming to the area for training and then leaving after they have become experienced. Bert Putney concurred and said that in southern Oregon he had experienced similar losses. Proposed incentives included a scholarship fund for law students who would commit to spending a specified number of years in one of these areas, increased rates of compensation (particularly in prison counties where providers have to spend significant amounts of time getting into and out of prison facilities to visit clients and interview witnesses), a specified minimum level of compensation to cover overhead regardless of fluctuations in the caseload, a single rate for all case types, continued flexibility in carrying over caseload shortages and overages, and providing a guaranteed income for a period of years in order to persuade experienced attorneys from the more populated areas of the state to relocate their practices to less populated areas.

Of the three judicial districts discussed by the Commission, it appeared that Judicial District 24 (Grant and Harney Counties) was experiencing the most severe attorney shortage of the three and probably needed an additional attorney in the immediate future to cover the existing caseload. The service delivery systems in Baker and Malheur Counties appeared to be appropriate for these counties.

A Service Delivery Plan for Baker County

The current service delivery system, which includes a consortium and a number of individual providers, appears to be working adequately in Baker County. While there is no public defender office to provide initial training for lawyers, it appears that newer attorneys are receiving information and advice from more experienced providers. The Commission received some reports indicating that additional local attorneys are needed in order to allow them to appear more often in person and to provide representation for all of the parties in juvenile cases without using attorneys from other areas.

At its September 2003 retreat and at the September 11, 2008 meeting, Commissioners identified a number of possible strategies for attracting, supporting and retaining new attorneys in lower population areas of the state,

including eastern Oregon. The possible strategies identified at the September 2008 meeting were:

(1) Increased use of video technology. Chief Justice Paul De Muniz offered to convene a multi-disciplinary group to explore expanded use of such technology in appropriate circumstances.

(2) Insurance pooling. OCDLA will explore the availability of insurance pooling for its members and report back to the Commission.

(3) Access to legal research tools. The Oregon State Bar's Casemaker online legal research system is available to all bar members. There are a number of other available resources for attorneys performing legal research, even if they do not subscribe to Westlaw or Lexus/Nexus. OCDLA members have access to online and printed resource materials and a Criminal Law Reporter as well as a list serve that permits them to seek advice from other OCDLA members in specific cases. OCDLA also maintains a list of expert witnesses. Willamette University School of Law publishes a summary of Oregon appellate court decisions along with copies of the full opinions which are also available on line through the Judicial Department's website. OPDS's Appellate Division (AD) is not able to provide the same level of support to defense attorneys as the Department of Justice provides to district attorneys but it does have an assigned attorney on call every day to respond to emails and telephone calls from attorneys who are seeking legal memoranda or assistance in assessing legal issues that arise in their cases. Some public defense providers are not aware of this resource. AD attorneys have made presentations at numerous CLE events throughout the year but should increase its efforts to publicize the availability of attorneys for telephone and online consultation. When it establishes its priorities for use of funds in 2009-11 PDSC could direct OPDS to establish one or more resource attorney positions, either within the Appellate Division or under contract, to assist providers with particularly complex legal matters.

(4) Attorney recruitment and retention. For providers in less populated counties one of the challenges many face is the fluctuating caseload. To permit these providers to continue to operate and to allow them to hire additional attorneys, OPDS may need to share the risk that the caseload will not fully support necessary operations. Some contractors already receive the same rate for all cases regardless of seriousness but OPDS recommends against the use of "output" contracts that would guarantee a monthly payment regardless of how many cases were assigned. One solution would be for OPDS to "share the risk" by providing a certain monthly payment to cover overhead and paying an additional amount for each case assigned. Because it is difficult for sole practitioners or small firms whose members who are approaching retirement age to bring in and train new associates, one option for OPDS might be to identify a metropolitan area attorney who would be willing to take over the practice with a guaranteed income for a period of time. When it establishes its priorities for

2009-11, PDSC may direct OPDS to use particular approaches as discussed above or to use a combination of approaches as needed to assure the continued delivery of public defense services in Baker County.

OPDS is directed, in cooperation with OCDLA, to institutionalize its involvement in established recruiting events by maintaining contact with law schools and other organizations which sponsor these events, and to develop additional recruitment opportunities including presentations to college students and others to inform them about careers in public defense.

Attachment 4

**OPDS's Draft Report to the Public Defense Services
Commission on Service Delivery in Judicial District No. 24
(November 20, 2008)**

Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. From 2004 through October 2998, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Coos, Curry, Jackson, Josephine, Lane, Lincoln, Linn, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of the public defense systems in Grant and Harney Counties, a summary of the testimony received at PDSC's public meeting in Baker City on Wednesday, August 14, 2008, a summary of the PDSC's discussion at its September 11, 2008 meeting, and a proposed service delivery plan.

PDSC's service delivery planning process

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

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

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

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

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

Background and context to the service delivery planning process

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

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

public defense services in the most cost-efficient manner possible. The Commission has undertaken a range of strategies to accomplish this mission.

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

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

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

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

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

The Commission is also concerned about the “graying” of the public defense bar in Oregon and the potential shortage of new attorneys to replace retiring attorneys in the years ahead. More and more lawyers are spending their entire careers in public defense law practice and many are now approaching retirement. In most areas of the state, no formal process or strategy is in place to

ensure that new attorneys will be available to replace retiring attorneys. The Commission has also found that the impact of such shortages is greatest in less populous areas of the state, where fewer lawyers reside and practice, but where the demands for public safety and functional justice systems with the requisite supply of criminal defense and juvenile attorneys are as pressing as in urban areas of the state. As a result, PDSC is exploring ways to attract and train younger lawyers in public defense practice across the state.

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

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

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

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

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

to OPDS the tasks of addressing performance issues with operational implications.

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

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

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

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

PDSC intends, first, to review the service delivery system in each county and develop service delivery plans with local conditions, resources and practices in mind. Second, in conducting reviews and developing plans that might change a local delivery system, the Commission is prepared to recognize the efficacy of the local organizations that have previously emerged to deliver public defense services in a county and leave that county's organizational structure unchanged. Third, PDSC understands that the quality and cost-efficiency of public defense services depends primarily on the skills and commitment of the attorneys and staff who deliver those services, no matter what the size and shape of their organizations. The organizations that currently deliver public defense services in Oregon include: (a) not-for-profit public defender offices, (b) consortia of individual lawyers or law firms, (c) law firms that are not part of a consortium, (d)

individual attorneys under contract, (e) individual attorneys on court-appointment lists and (f) some combination of the above. Finally, in the event PDSC concludes that a change in the structure of a county's or region's delivery system is called for, it will weigh the advantages and disadvantages and the strengths and weaknesses of each of the foregoing organizations in the course of considering any changes.

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

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

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

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

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

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

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

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

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

In addition to the access to experienced public defense lawyers they offer,

³ Id.

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

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

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

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

certification outlined above.

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

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

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

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

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

OPDS's Preliminary Investigation in Judicial District 24

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

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

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

This report is intended to set forth the information received in those interviews and in testimony provided to the Commission about the public defense system in Grant and Harney Counties, and to recommend a plan for the continued delivery of services in the county.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in Judicial District 24's justice systems could turn out to be the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for Grant and Harney Counties.

OPDS's Findings in Judicial District No. 24

The Circuit Court

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

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

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

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

Grant County

Canyon City is the county seat of Grant County. In 2007 the population of Grant County was 6,904. The primary industries in the county are forest products, agriculture, hunting, livestock and recreation. More than 60% of the land is publicly owned. Grant County was not an "O&C" county but did receive federal forest payments. The loss of those payments represented a 22% reduction in the county general fund and a 73% loss in its road fund. These payments have now been temporarily restored.

Ryan Joslin is the District Attorney. His only deputy left at the end of July when the domestic violence grant that helped fund his position expired⁴. In general, he expects the caseload in the county to remain flat even though, over time, the population of the area continues to decline. Recently Mr. Joslin has been filing more misdemeanor cases in the Justice Court and fewer in the Circuit Court⁵.

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

⁴ He has been hired as a deputy district attorney in Morrow County.

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

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

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

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

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

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

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

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

Harney County

Burns is the county seat of Harney County. The population of Harney County was 6,767 in 2007. The primary industries in the county are forest products, manufacturing, livestock and agriculture.

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

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

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

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

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

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

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

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

Public defense contractors

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

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

Mallon and Lamborn, PC. John Lamborn handles the great majority of public defense cases in Judicial District 24 since Gordon Mallon devotes most of his time to his death penalty contract. The firm currently has two members and maintains its office in Burns. Gordon and Mallon gets a higher rate for cases in Grant than in Harney County. The firm has contracted to handle 180 cases in Harney County and 48 in Grant. Mr. Lamborn is the defense attorney for the new Harney County drug court.

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

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

Comments on quality

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

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

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

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

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

other counties. One of the attorneys is prepared 99% of the time but juvenile work is not his preferred area of practice. There are no juvenile law specialists in the area. Attorneys are not meeting with child clients in dependency cases or delinquency cases. One person's biggest frustration is that most of the lawyers never meet with child clients at all, even over the course of multiple years of representation. Another said that when they represent children most attorneys have done nothing but read the DHS court report and often say nothing in court. Some are not prepared to represent parents either and their clients are confused about what is happening in their cases. Juvenile dependency cases are not a priority for these lawyers. One attorney, however, was singled out for having particularly strong trial skills and for fighting vigorously for his clients at trial.⁸

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

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

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

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

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

1. Need for additional attorneys

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

"I am very concerned in both counties that there is an insufficient number of attorneys to do the required work. We need the assistance of the commission in recruiting attorneys to do work here in our counties. I am very concerned that even the current contractors and att[orney]s won't continue to take cases unless there

⁸ Most of the persons who provided information about the quality of performance of the public defense attorneys in these two counties attributed the deficits in representation to a lack of adequate time, and not to a lack of skill or zeal.

is a real and substantial raise in their wages. This latter point may be my greatest concern for the criminal and juvenile systems and their efficient functioning.”

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

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

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

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

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

2. Representation in juvenile cases

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

Summary of Testimony at August 14, 2008 Meeting of the Public Defense Services Commission in Baker City, Oregon

At its August 14, 2008 meeting in Baker City the Commission received testimony relating to the delivery of public defense services in Grant and Harney Counties (Judicial District 24), Baker County and Malheur County. Although each judicial district is unique, many of the public defense providers serve more than one county and the comments of the witnesses tended to relate to practice in the entire region rather than in individual districts.

Chair Ellis opened the meeting by noting that the needs of each geographic region of the state are different and that the Commission welcomed comments and recommendations that would assist it in identifying a service delivery plan that met the needs of the local justice systems.

Judge Cramer provided written testimony. He said that the circumstances faced by public defense providers in Eastern Oregon are unique. Currently he believes that although public defense attorneys are overworked and stretched thin, indigent clients are receiving adequate representation in Grant and Harney Counties. Having only one primary contractor and one conflict contractor in each county creates scheduling issues for the court. Also the court is unable to use

the pro temp time to which it is entitled because there are not enough attorneys to appear in two courtrooms at the same time. Both counties would be better served if there were more local attorneys available to handle conflicts and to take over when the current providers retire, in approximately five years. There is no current pool from which to draw additional attorneys. He recommended that PDSC work with current contractors to allow them to hire associate attorneys who would be able to take cases now and be in a position to replace retiring attorneys in the future. He agreed that there would be a benefit to having an additional local office to handle conflict cases. Attorneys now have to travel a hundred miles or more to cover conflicts in the district. The court has been trying to get attorneys appointed for both parents and children at shelter hearings. That would be possible in more cases if there were more local attorneys. Attorneys are willing to come to Eastern Oregon to practice. The district attorney's office has been able to attract them because it provides better compensation than the defense does. In order to attract attorneys to defense practice in eastern Oregon adequate compensation would be necessary. If a law firm could count on a reliable income over an extended period of time it would be in a better position to hire one or more associates. Payment to contractors based solely on caseload causes a significant fluctuation in income from month to month. Of the possible approaches identified by the Commission in 2003, subsidizing firms that are willing to bring in additional attorneys appears to be the best.

Commissioner Welch inquired whether technological solutions are being evaluated. Judge Cramer noted that video appearances are sometimes possible. They can be used effectively only when the attorney and client have been able to meet and confer before the hearing.

Gary Kiyuna, a member and the administrator of the Baker County Consortium, said video equipment could be installed in a law office for the cost of approximately \$3,000 which would allow the attorney to appear in court or confer with clients in prison by means of an in-office video system. The circumstances in some cases require that the attorney be in the same location as the client.

He said there are four members of the consortium, all of whom are sole practitioners. Many new attorneys have significant educational loans but are ineligible, as consortium members, to benefit from many of the existing loan repayment, loan forgiveness provisions.

Gordon Mallon testified that his firm had lost a shareholder because of inadequate income. Both he and the other remaining shareholder expect to retire in approximately six to seven years, which would leave one public defense provider in Judicial District 24. It would be difficult to start a new law office in the area in view of the limited caseload and there are not a sufficient number of conflict cases to warrant an additional office. His recommendation to the Commission would be that it provide sufficient compensation to existing offices to permit them to hire an additional person or persons. In the most recent contract

negotiations he proposed that PDSC pay a flat amount for public defense cases, regardless of the number of cases. Payment according to the number of cases per month makes the income vary significantly from month to month. The costs of operating an office are fixed costs and cannot be adjusted in accordance with a fluctuating caseload. A number of eastern Oregon providers have reported that case-based funding has not worked well for them either. His firm's proposal was not accepted because the Commission had not approved a flat rate system. The Mallon and Lamborn firm is not currently seeking to add any attorneys. It had sought to do so for approximately eight months but could not attract an associate with the salary it could offer.

Dan Cronin testified that he is currently a sole practitioner who handles public defense cases principally in Baker County. He has practiced law in the area for twenty-seven years. Over that period of time he has seen an erosion of the services provided to public defense clients. There should be at least three providers in each county. It would be financially impossible for him to hire another attorney in his office. Attorneys have to handle civil cases in order to be able to hire associates. That means that they cannot specialize in criminal law. Despite his deep commitment to public defense he plans to take fewer and fewer public defense cases in the future.

Matt Shirtcliff, the Baker County District Attorney, said that public defense attorneys in the area do good work. The court, the district attorney's office and the public defense attorneys all work hard and they all get along with each other. They meet together to resolve any issues relating to the operation of the criminal and juvenile court systems. His office is able to recruit new lawyers who spend a couple of years there before moving on. He would prefer to keep them longer but he and other district attorneys offices are not able to pay a high enough salary. His office has a strong relationship with the Department of Justice. He can get help on research issues and on some types of cases. The state benefits from good representation for defendants. It would be good for defense attorneys to be able to specialize. They do better work if they handle only criminal cases and this benefits the attorneys, the clients and the system. In Baker County the district attorney's office files most misdemeanors in the county justice court, excluding domestic violence and DUI cases. He tries to use the courts efficiently. Diversion eligible cases and non-chronic offender cases are offered early disposition treatment in the justice court. Ideally, however, there would be two courts of record in the county. His office has one fewer deputy than usual and as a result they currently have a backlog of cases. In Baker County, all cases are filed, even "bad check" cases, which are not prosecuted in some jurisdictions.

Judge Burdette Pratt testified that the attorneys in Malheur County and in the other eastern Oregon counties do good work under the circumstances. Attorneys must travel significant distances and, in Malheur County, there is the added challenge of handling a significant number of cases arising within the

Snake River Correctional Institution. It takes time for attorneys to get into the prison to see their clients, especially if the client is in administrative segregation. Often the witnesses are also incarcerated. Prison cases go to trial more often than other cases. Attorneys have to handle too many cases in order to make it feasible for them to take public defense cases. Attorneys are constantly scrambling from one case to another without being able to spend the time they would like, and need, to on these cases. The best solution is to increase compensation.

Dennis Byer testified that, although he has been an investigator with the Coughlin, Leuenberger & Moon firm in Baker City for ten years, he only recently investigated some public defense cases. He has found the OPDS staff to be helpful in answering his questions. He charges \$90 per hour for private cases and is paid \$28 per hour on public defense cases. Most investigators charge between \$65 and \$75 per hour in private cases.

Mark Rader, a shareholder in the Rader, Stoddard and Perez firm, testified that his firm is the primary public defense contractor in Malheur County where he has practiced since 1988. The firm has two associates who were hired directly out of law school. Both of them live in Idaho as do two of the shareholders in the firm. For each of them it is an hour's drive each way between home and the office. He worries that his associates will decide to practice in Idaho where the counties pay a higher hourly rate than PDSC does. Unlike the situation in Grant and Harney Counties, the caseload in Malheur County does not fluctuate dramatically. He suggested that the Commission consider assisting public defense providers in two ways: with the cost of health care coverage for employees and with educational loan repayment assistance for attorneys. Mr. Rader said that cases arising in the prison are significantly more time consuming than other cases. The Malheur County District Attorney prosecutes all prison felonies in the circuit court. The prison handles only misdemeanor matters internally. The additional time it takes to represent imprisoned clients may affect the relationship with the client and result in more bar complaints and post conviction relief petitions. Responding to these allegations in turn consumes even more of the attorney's time. In order to meet with imprisoned clients it generally takes an hour to get from his office into the area where the interview occurs. It takes approximately an hour to get out of the prison and back to the office once the interview has occurred. Witnesses are often inmates as well so it requires a similar amount of time to meet with them if they are in the same institution. Very often, however witness inmates are moved to prisons in other parts of the state. Prisoners also receive a lot of advice from other prisoners which is contrary to the advice from their attorneys. More of the attorney's time is required to counter the advice received from others. Currently, Rader Stoddard and Perez is receiving a higher rate for prison cases but a much higher rate is needed.

Paul Lipscomb said that in Marion County the most serious prison cases are prosecuted in circuit court but most cases are handled within the institution. Marion County attorneys also report that prison cases require more time.

Krishelle Hampton, a member of the Baker County Consortium, testified that she opened her own law practice in Baker City immediately after graduating from law school. Another local attorney, Bob Whitnah, provided office space for her without charge and he and the other lawyers in town were willing to mentor her. She would like to be able to afford better legal research tools and insurance for her staff. She spends more than 50% of her time on public defense cases but receives less than 30% of her income from those cases. In juvenile cases she attends team meetings with her clients and in DUll cases she appears at DMV hearings on her client's behalf. She loves doing public defense work but may not be able to afford it in the future. If PDSC could help with employee benefits it might be more feasible. Last month her income from public defense cases was \$1,903. Insurance coverage for her employee would have cost her \$700. She knows other young attorneys who would be interested in practicing in eastern Oregon if the conditions were right. She does not believe that PDSC should have a policy against paying twice in conflict cases. It is an inappropriate incentive for lawyers to remain on cases in which they have an ethical obligation to withdraw. Mr. Cronin agreed with Ms. Hampton on this issue and said that the attorney who withdraws should at least get paid some compensation. Ken Bardizian, another member of the Baker County Consortium, said that in Baker County conflicts are not often identified early in the case because discovery is not provided until after an indictment has issued. The attorney can't wait until then to begin work on the case. In addition, in some cases the district attorney doesn't identify some witnesses until just before the trial date. Both Mr. Whitnah and Mr. Bardizian indicated that they had not been free to bargain for the contract terms they wanted because there were attorneys from another county who would have used the opportunity to contract for Baker County cases. Mr. Bardizian contracted with PDSC to handle Measure 11 cases on an hourly basis because he can bill for the actual number of hours each case required.

Bob Whitnah said he grew up in Baker City. He started practice at District Attorney Matt Shirtcliff's office in 2001. After four and a half years in that office he opened his own practice and began handling public defense cases. He likes doing these cases but the compensation is a significant issue. If better legal research tools were available to the defense they could be more efficient. In the district attorney's office he had approximately 150 open cases at a time. For the defense the caseload has to be a lot smaller because they don't have the same advantages and tools that the state has. The search and seizure manual prepared by Department of Justice attorneys is well organized and thorough. Defense publications are prepared by volunteers and are not as thorough as the state's material. OPDS Appellate Division attorneys provide information in response to questions forwarded to them. Mr. Whitnah would like the Commission to assist attorneys in accessing better legal research tools and in

finding a way to make health insurance affordable. If compensation is not increased he may not be able to afford to do public defense cases any longer.

Commissioner Potter said that the Oregon Criminal Defense Lawyers Association had explored the possibility of insurance pooling for members in the past and at that time found that it was not feasible but that it might be appropriate to look into it again in the future.

Chris Zuercher, an associate of Coughlin, Leuenberger and Moon was a deputy district attorney in the county before going into private practice. He likes doing public defense work and finds that he spends a higher percentage of his time on these cases than on his private cases. Mr. Moon has always had a commitment to criminal defense which he sees as a kind of community service. Now would be the best time to start bringing in new lawyers to replace the older attorneys as they leave practice over the next several years.

Summary of PDSC Discussion at September 11, 2008 Meeting

The Commission's discussion at its September meeting focused on four potential strategies for supporting its eastern Oregon providers: (1) promoting the increased use of technology as a means of improving communication and facilitating participation in court hearings, (2) exploring opportunities for insurance pooling among public defense contractors, (3) creating a resource center for defense attorneys that would offer materials and support services similar to those provided to district attorneys by the Department of Justice, and (4) increasing recruitment efforts and providing financial incentives to attorneys willing to practice in the area.

Chief Justice Paul De Muniz offered to convene a meeting of interested groups, including the courts, the Department of Corrections, local sheriff's offices, defense providers, district attorneys and others to explore improvements to and expansion of the use of video equipment for court appearances and communication with incarcerated clients.⁹

John Potter reported that OCDLA had previously explored the possibility of insurance pooling for its members. He had not been able to locate the research previously done but was willing to discuss the issue again with his board of directors.

Rebecca Duncan described the services that are provided by the Department of Justice to district attorney offices throughout the state and noted that OPDS's Appellate Division responds to telephone and email inquiries and makes

⁹ After a copy of the final draft report was provided to Christine Phillips, the Child Welfare Program Manager for Grant and Harney Counties, she suggested exploration of another potential technological improvement – a paperless discovery system in child welfare cases.

presentations at numerous seminars but is not funded to provide the same level of services as the Department of Justice. Commission members discussed some of the resources that are available to defense attorneys, including the OCDLA list serve, its Criminal Law Reporter and other publications, and Willamette University's advance sheets.

With respect to recruiting additional attorneys to practice in eastern Oregon, Commissioners discussed a number of possible approaches, including increasing recruitment efforts at the law schools. Commissioner Stevens noted that there are additional challenges involved in recruiting attorneys to practice in less populated areas of the state and that some kind of special incentive might be needed. Jack Morris commented that there also have to be retention incentives to prevent lawyers from coming to the area for training and then leaving after they have become experienced. Bert Putney concurred and said that in southern Oregon he has experienced similar losses. Proposed incentives included a scholarship fund for law students who would commit to spending a specified number of years in one of these areas, increased rates of compensation (particularly in prison counties where providers have to spend significant amounts of time getting into and out of prison facilities to visit clients and interview witnesses), a specified minimum level of compensation to cover overhead regardless of fluctuations in the caseload, a single rate for all case types, continued flexibility in carrying over caseload shortages and overages, and providing a guaranteed income for a period of years in order to persuade experienced attorneys from the more populated areas of the state to relocate their practices to less populated areas.

Of the three judicial districts discussed by the Commission, it appeared that Judicial District 24 was experiencing the most severe attorney shortage of the three and probably needed an additional attorney in the immediate future to cover the existing caseload. The service delivery systems in Baker and Malheur Counties appeared to be appropriate for these counties.

A Service Delivery Plan for Judicial District 24

1. Structural and funding issues. The current service delivery system consists of two contract providers, with individual attorneys from other counties handling overflow and conflict cases as needed. While an additional independent provider might be an ideal solution, the current caseload in the district would not support a third provider. The consensus in the community is that there is, however, a need for at least one more attorney to assist one of the existing contractors and potentially be in a position to take over the contract upon the retirement of the current contractor.

There are two major obstacles to having either existing contractor add an associate at this time. Current case rates do not provide sufficient income to

allow either contractor to do so and even if they did, it has been difficult to find attorneys willing to practice in the area.

At its September 2003 retreat and at the September 11, 2008 meeting, Commissioners identified a number of possible strategies for attracting, supporting and retaining new attorneys in lower population areas of the state, including eastern Oregon. The possible strategies identified at the September 2008 meeting included increased use of video technology, insurance pooling, access to legal research tools and attorney recruitment and retention.

One of the challenges faced by many providers in less populated areas of the state is the fluctuating caseload¹⁰. To permit these providers to continue to operate and to allow them to hire additional attorneys, OPDS may need to “share the risk” that the caseload will not fully support necessary operations. Some contractors, such as those in Judicial District 24, already receive the same rate for all cases in a particular county regardless of seriousness. Even this approach, however has not put either Judicial District 24 provider in a position to hire an associate because of the limited caseload. While some have urged OPDS to consider the use of “output” contracts that would guarantee a monthly payment regardless of how many cases were assigned, the office has opposed use of these contracts. Rather than an output contract, PDSC could approve payment of a fixed monthly amount to cover overhead and a per case rate that would be less than average case rates statewide but would vary with the actual number of cases assigned.

When it establishes its priorities for 2009 -11, PDSC may want to direct additional resources to providers in this district if it determines that the need here outweighs the needs in other areas that have already been or will be brought to the Commission’s attention. PDSC urges its contractors in Judicial District 24 to consider all available options and, as part of its contract proposal in 2009, to present OPDS with a business plan that would ensure that an appropriate number of providers are available to meet the needs of public defense clients in the district.

2. Quality of representation issues. The quality of representation issues that were identified in the report, especially in regard to juvenile cases, may well be a reflection of the lack of sufficient resources, and to this extent, might be partially addressed by Policy Option Package 100 in PDSC’s 2009-11 budget proposal.¹¹

¹⁰ John Lamborn reported that the number of misdemeanors being filed in the Grant County Justice Court is increasing. This means that the number of misdemeanors filed in state court will be declining and that lawyers will have to be spending more of their time in the justice court, limiting their availability in Circuit Court matters even further.

¹¹ This package seeks \$17 million in additional funding to permit PDSC to reduce juvenile dependency caseloads by 30% statewide.

The extent of the concerns raised, however, suggest the need for an in depth inquiry. OPDS has referred these concerns to the Quality Assurance Task Force for its recommendation about the best means of assessing and correcting any significant deficits in representation. That group will meet on December 4, 2008.

Attachment 5

**OPDS's Draft Report to the Public Defense Services
Commission on Service Delivery in Malheur County
(November 20, 2008)**

Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. From 2004 through 2007, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Coos, Curry, Jackson, Josephine, Lane, Lincoln, Linn, Marion, Morrow, Multnomah, Klamath, Umatilla, Union, Wallowa, Washington, Yamhill, Hood River, Wasco, Wheeler, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of the public defense system in Malheur County, a summary of the testimony received at PDSC's public meeting in Baker City on August 14, 2008, a summary of PDSC's discussion at its September 11, 2008 meeting, and a proposed service delivery plan.

PDSC's service delivery planning process

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

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

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

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

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

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

Background and context to the service delivery planning process

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

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

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

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. Since 2004 site teams of volunteer public defense managers and lawyers have visited contractors in Benton, Clackamas, Columbia, Deschutes, Douglas, Jackson, Lane, Lincoln, Linn, Multnomah, Umatilla and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. Although a report has not yet been prepared, a site team recently visited contractors in Crook and Jefferson Counties.

In accordance with its Strategic Plan, PDSC has also developed a systematic process to address complaints about the behavior and performance of public defense contractors and individual attorneys.

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

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

The Commission is also concerned about the “graying” of the public defense bar in Oregon and the potential shortage of new attorneys to replace retiring attorneys in the years ahead. More and more lawyers are spending their entire

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

organizations, including paralegals, investigators, automated office systems and formal personnel, recruitment and management processes.

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

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

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

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

³ Id.

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

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

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

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

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

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

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

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

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

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

OPDS's Preliminary Investigation in Malheur County

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

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

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

This report is intended to set forth the information received in those interviews and in testimony provided to the Commission about the public defense system in Malheur County, and to recommend a plan for the continued delivery of services in the county.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in Malheur County's justice system could turn out to be the single most important factor contributing to the quality of the final version of OPDS's report to the Commission and its Service Delivery Plan for Malheur County.

OPDS's Findings in Malheur County

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

The Circuit Court

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

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

District Attorneys Office

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

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

PDSC contractors

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

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

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

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

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

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

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

⁵ The contract also includes post conviction and habeas corpus cases in Umatilla County.

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

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

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

Criminal cases

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

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

Juvenile cases

Delinquencies:

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

Linda Cummings is the Director of the juvenile department. There is also an assistant director who oversees the court process, five probation officers and one diversion specialist. The assistant director and the deputy district attorney assigned to the juvenile department share an office and jointly review new

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

referrals. As of July 1, 2008, the court, rather than the juvenile department, assumed responsibility for docketing juvenile matters and contacting counsel.

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

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

Dependencies:

Attorneys are present at shelter hearings in Malheur County. A pretrial conference is set for 30 days after the shelter hearing. An "admit/deny" hearing is set a couple of days later. Contested hearings are generally scheduled within a couple of months after the admit/deny hearing.

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

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

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

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

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

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

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

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

Comments regarding the quality of representation
in criminal cases

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

Comments regarding representation in juvenile cases

Delinquency cases:

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

Dependency cases:

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

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

Responses to OPDS's 2007 statewide quality survey

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

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

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

The structure

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

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

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

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

Need for Additional Attorneys

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

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

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

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

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

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

Compensation in prison cases

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

Expanded use of video and audio communication

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

Summary of Testimony at August 14, 2008 Meeting of the Public Defense Services Commission in Baker City, Oregon

At its August 14, 2008 meeting in Baker City the Commission received testimony relating to the delivery of public defense services in Grant and Harney Counties (Judicial District 24), Baker County and Malheur County. Although each judicial district is unique, many of the public defense providers serve more than one county and the comments of the witnesses tended to relate to practice in the entire region rather than in individual districts.

Chair Ellis opened the meeting by noting that the needs of each geographic region of the state are different and that the Commission welcomed comments and recommendations that would assist it in identifying a service delivery plan that met the needs of the local justice systems.

Circuit Court Judge William Cramer (Judicial District 24) provided written testimony. He said that the circumstances faced by public defense providers in Eastern Oregon are unique. Currently he believes that although public defense attorneys are overworked and stretched thin, indigent clients are receiving adequate representation in Grant and Harney Counties. Having only one primary contractor and one conflict contractor in each county creates scheduling issues for the court. Also the court is unable to use the pro temp time to which it is entitled because there are not enough attorneys to appear in two courtrooms at the same time. Both counties would be better served if there were more local attorneys available to handle conflicts and to take over when the current providers retire, in approximately five years. There is no current pool from which to draw additional attorneys. He recommended that PDSC work with current contractors to allow them to hire associate attorneys who would be able to take cases now and be in a position to replace retiring attorneys in the future. He agreed that there would be a benefit to having an additional local office to handle conflict cases. Attorneys now have to travel a hundred miles or more to cover conflicts in the district. The court has been trying to get attorneys appointed for both parents and children at shelter hearings. That would be possible in more cases if there were more local attorneys. Attorneys are willing to come to Eastern Oregon to practice. The district attorney's office has been able to attract them because it provides better compensation than the defense does. In order to attract attorneys to defense practice in eastern Oregon adequate compensation would be necessary. If a law firm could count on a reliable income over an extended period of time it would be in a better position to hire one or more associates. Payment to contractors based solely on caseload causes a significant fluctuation in income from month to month. Of the possible approaches identified by the Commission in 2003, subsidizing firms that are willing to bring in additional attorneys appears to be the best.

Commissioner Welch inquired whether technological solutions are being evaluated. Judge Cramer noted that video appearances are sometimes possible. They can be used effectively only when the attorney and client have been able to meet and confer before the hearing.

Gary Kiyuna, a member and the administrator of the Baker County Consortium, said video equipment could be installed in a law office for the cost of approximately \$3,000 that would allow the attorney to appear in court or confer with clients in prison by means of an in-office video system. The circumstances in some cases require that the attorney be in the same location as the client.

He said there are four members of the consortium, all of whom are sole practitioners. Many new attorneys have significant educational loans but are ineligible, as consortium members, to benefit from many of the existing loan repayment, loan forgiveness provisions.

Gordon Mallon testified that his firm had lost a shareholder because of inadequate income. Both he and the other remaining shareholder expect to retire in approximately six to seven years which would leave one public defense provider in Judicial District 24. It would be difficult to start a new law office in the area in view of the limited caseload and there are not a sufficient number of conflict cases to warrant an additional office. His recommendation to the Commission would be that it provide sufficient compensation to existing offices to permit them to hire an additional person or persons. In the most recent contract negotiations he proposed that PDSC pay a flat amount for public defense cases, regardless of the number of cases. Payment according to the number of cases per month makes the income vary significantly from month to month. The costs of operating an office are fixed costs and cannot be adjusted in accordance with a fluctuating caseload. A number of eastern Oregon providers have reported that case-based funding has not worked well for them either. His firm's proposal was not accepted because the Commission had not approved a flat rate system. The Mallon and Lamborn firm is not currently seeking to add any attorneys. It had sought to do so for approximately eight months but could not attract an associate with the salary it could offer.

Dan Cronin testified that he is currently a sole practitioner who handles public defense cases principally in Baker County. He has practiced law in the area for twenty-seven years. Over that period of time he has seen an erosion of the services provided to public defense clients. There should be at least three providers in each county. It would be financially impossible for him to hire another attorney in his office. Attorneys have to handle civil cases in order to be able to hire associates. That means that they cannot specialize in criminal law. Despite his deep commitment to public defense he plans to take fewer and fewer public defense cases in the future.

Matt Shirtcliff, the Baker County District Attorney, said that public defense attorneys in the area do good work. The court, the district attorney's office and the public defense attorneys all work hard and they all get along with each other. They meet together to resolve any issues relating to the operation of the criminal and juvenile court systems. His office is able to recruit new lawyers who spend a couple of years there before moving on. He would prefer to keep them longer but he and other district attorneys offices are not able to pay a high enough salary. His office has a strong relationship with the Department of Justice. He can get help on research issues and on some types of cases. The state benefits from good representation for defendants. It would be good for defense attorneys to be able to specialize. They do better work if they handle only criminal cases and this benefits the attorneys, the clients and the system. In Baker County the district attorney's office files most misdemeanors in the county justice court, excluding domestic violence and DUII cases. He tries to use the courts efficiently. Diversion eligible cases and non-chronic offender cases are offered early disposition treatment in the justice court. Ideally, however, there would be two courts of record in the county. His office has one fewer deputy than usual

and as a result they currently have a backlog of cases. In Baker County, all cases are filed, even “bad check” cases, which are not prosecuted in some jurisdictions.

Judge Burdette Pratt testified that the attorneys in Malheur County and in the other eastern Oregon counties do good work under the circumstances. Attorneys must travel significant distances and, in Malheur County, there is the added challenge of handling a significant number of cases arising within the Snake River Correctional Institution. It takes time for attorneys to get into the prison to see their clients, especially if the client is in administrative segregation. Often the witnesses are also incarcerated. Prison cases go to trial more often than other cases. Attorneys have to handle too many cases in order to make it feasible for them to take public defense cases. Attorneys are constantly scrambling from one case to another without being able to spend the time they would like, and need, to on these cases. The best solution is to increase compensation.

Dennis Byer testified that, although he has been an investigator with the Coughlin, Leuenberger & Moon firm in Baker City for ten years, he only recently investigated some public defense cases. He has found the OPDS staff to be helpful in answering his questions. He charges \$90 per hour for private cases and is paid \$28 per hour on public defense cases. Most investigators charge between \$65 and \$75 per hour in private cases.

Mark Rader, a shareholder in the Rader, Stoddard and Perez firm, testified that his firm is the primary public defense contractor in Malheur County where he has practiced since 1988. The firm has two associates who were hired directly out of law school. Both of them live in Idaho as do two of the shareholders in the firm. For each of them it is an hour’s drive each way between home and the office. He worries that his associates will decide to practice in Idaho where the counties pay a higher hourly rate than PDSC does. Unlike the situation in Grant and Harney Counties, the caseload in Malheur County does not fluctuate dramatically. He suggested that the Commission consider assisting public defense providers in two ways: with the cost of health care coverage for employees and with educational loan repayment assistance for attorneys. Mr. Rader said that cases arising in the prison are significantly more time consuming than other cases. The Malheur County District Attorney prosecutes all prison felonies in the circuit court. The prison handles only misdemeanor matters internally. The additional time it takes to represent imprisoned clients may affect the relationship with the client and result in more bar complaints and post conviction relief petitions. Responding to these allegations in turn consumes even more of the attorney’s time. In order to meet with imprisoned clients it generally takes an hour to get from his office into the area where the interview occurs. It takes approximately an hour to get out of the prison and back to the office once the interview has occurred. Witnesses are often inmates as well so it requires a similar amount of time to meet with them if they are in the same institution. Very often, however

witness inmates are moved to prisons in other parts of the state. Prisoners also receive a lot of advice from other prisoners which is contrary to the advice from their attorneys. More of the attorney's time is required to counter the advice received from others. Currently, Rader Stoddard and Perez is receiving a higher rate for prison cases but a much higher rate is needed.

Paul Lipscomb said that in Marion County the most serious prison cases are prosecuted in circuit court but most cases are handled within the institution. Marion County attorneys also report to him that prison cases require more time.

Krishelle Hampton, a member of the Baker County Consortium, testified that she opened her own law practice in Baker City immediately after graduating from law school. Another local attorney, Bob Whitnah, provided office space for her without charge and he and the other lawyers in town were willing to mentor her. She would like to be able to afford better legal research tools and insurance for her staff. She spends more than 50% of her time on public defense cases but receives less than 30% of her income from those cases. In juvenile cases she attends team meetings with her clients and in DUI cases she appears at DMV hearings on her client's behalf. She loves doing public defense work but may not be able to afford it in the future. If PDSC could help with employee benefits it might be more feasible. Last month her income from public defense cases was \$1,903. Insurance coverage for her employee would have cost her \$700. She knows other young attorneys who would be interested in practicing in eastern Oregon if the conditions were right. She does not believe that PDSC should have a policy against paying twice in conflict cases. It is an inappropriate incentive for lawyers to remain on cases in which they have an ethical obligation to withdraw. Mr. Cronin agreed with Ms. Hampton on this issue and said that the attorney who withdraws should at least get paid some compensation. Ken Bardizian, another member of the Baker County Consortium, said that in Baker County conflicts are not often identified early in the case because discovery is not provided until after an indictment has issued. The attorney can't wait until then to begin work on the case. In addition, in some cases the district attorney doesn't identify some witnesses until just before the trial date. Both Mr. Whitnah and Mr. Bardizian indicated that they had not been free to bargain for the contract terms they wanted because there were attorneys from another county who would have used the opportunity to contract for Baker County cases. Mr. Bardizian contracted with PDSC to handle Measure 11 cases on an hourly basis because he can bill for the actual number of hours each case required.

Bob Whitnah said he grew up in Baker City. He started practice at District Attorney Matt Shirtcliff's office in 2001. After four and a half years in that office he opened his own practice and began handling public defense cases. He likes doing these cases but the compensation is a significant issue. If better legal research tools were available to the defense they could be more efficient. In the district attorney's office he had approximately 150 open cases at a time. For the defense the caseload has to be a lot smaller because they don't have the same

advantages and tools that the state has. The search and seizure manual prepared by Department of Justice attorneys is well organized and thorough. Defense publications are prepared by volunteers and are not as thorough as the state's material. OPDS Appellate Division attorneys provide information in response to questions forwarded to them. Mr. Whitnah would like the Commission to assist attorneys in accessing better legal research tools and in finding a way to make health insurance affordable. If compensation is not increased he may not be able to afford to do public defense cases any longer.

Commissioner Potter said that the Oregon Criminal Defense Lawyers Association had explored the possibility of insurance pooling for members in the past and at that time found that it was not feasible but that it might be appropriate to look into it again in the future.

Chris Zuercher, an associate of Coughlin, Leuenberger and Moon was a deputy district attorney in the county before going into private practice. He likes doing public defense work and finds that he spends a higher percentage of his time on these cases than on his private cases. Mr. Moon has always had a commitment to criminal defense which he sees as a kind of community service. Now would be the best time to start bringing in new lawyers to replace the older attorneys as they leave practice over the next several years.

Summary of PDSC Discussion at September 11, 2008 Meeting

The Commission's discussion at its September meeting focused on four potential strategies for supporting its eastern Oregon providers: (1) promoting the increased use of technology as a means of improving communication and facilitating participation in court hearings, (2) exploring opportunities for insurance pooling among public defense contractors, (3) creating a resource center for defense attorneys that would offer materials and support services similar to those provided to district attorneys by the Department of Justice, and (4) increasing recruitment efforts and providing financial incentives to attorneys willing to practice in the area.

Chief Justice Paul De Muniz offered to convene a meeting of interested groups, including the courts, the Department of Corrections, local sheriff's offices, defense providers, district attorneys and others to explore improvements to and expansion of the use of video equipment for court appearances and communication with incarcerated clients.

John Potter reported that OCDLA had previously explored the possibility of insurance pooling for its members. He had not been able to locate the research previously done but was willing to discuss the issue again with his board of directors.

Rebecca Duncan described the services that are provided by the Department of Justice to district attorney offices throughout the state and noted that OPDS's Appellate Division responds to telephone and email inquiries and makes presentations at numerous seminars but is not funded to provide the same level of services as the Department of Justice. Commission members discussed some of the resources that are available to defense attorneys, including the OCDLA list serve, its Criminal Law Reporter and other publications, and Willamette University's advance sheets.

With respect to recruiting additional attorneys to practice in eastern Oregon, Commissioners discussed a number of possible approaches, including increasing recruitment efforts at the law schools. Commissioner Stevens noted that there are additional challenges involved in recruiting attorneys to practice in less populated areas of the state and that some kind of special incentive might be needed. Jack Morris commented that there also have to be retention incentives to prevent lawyers from coming to the area for training and then leaving after they have become experienced. Bert Putney concurred and said that in southern Oregon he has experienced similar losses. Proposed incentives included a scholarship fund for law students who would commit to spending a specified number of years in one of these areas, increased rates of compensation (particularly in prison counties where providers have to spend significant amounts of time getting into and out of prison facilities to visit clients and interview witnesses), a specified minimum level of compensation to cover overhead regardless of fluctuations in the caseload, a single rate for all case types, continued flexibility in carrying over caseload shortages and overages, and providing a guaranteed income for a period of years in order to persuade experienced attorneys from the more populated areas of the state to relocate their practices to less populated areas.

Of the three judicial districts discussed by the Commission, it appeared that Judicial District 24 was experiencing the most severe attorney shortage of the three and probably needed an additional attorney in the immediate future to cover the existing caseload. The service delivery systems in Baker and Malheur Counties appeared to be appropriate for these counties.

A Service Delivery Plan for Malheur County

The principle provider in Malheur County is Rader, Stoddard, Perez. Other contractors include David Carlson and Coughlin Leuenberger & Moon. In addition, a Baker County contractor, Gary Kiyuna, handles Malheur County cases on an hourly basis. The Rader firm has two associates, in addition to the three shareholders, who accept public defense cases. This combination of providers appears to be an appropriate one for the county.

Although there is no public defender office in Malheur County to provide training to new attorneys, most of the attorneys in Malheur County are well-trained

veteran defenders. The newer attorneys in the county are employed by law firms that appear to be providing them with the training and supervision they need.

In this county, as in a number of counties including all of those in eastern Oregon, there is a need for additional attorneys, particularly in juvenile dependency cases where there are often multiple parties to the proceeding. Currently coverage for conflict and overflow cases has to be provided by attorneys from other counties. But their availability is limited and they often have to appear by telephone. Recruitment of new attorneys is difficult for offices in most of the lower population areas of the state but in addition, Malheur County is on the Idaho border and attorneys in Idaho are paid significantly more for similar work.

At its September 2003 retreat and at the September 11, 2008 meeting, Commissioners identified a number of possible strategies for attracting, supporting and retaining attorneys in lower population areas of the state, including Eastern Oregon. The strategies identified at the September 2008 meeting were: increased use of video technology (including technology that would permit attorneys to video conference with their clients and with witnesses who are confined in correctional facilities), insurance pooling, access to legal research tools, attorney recruitment and retention efforts.

While the overall quality of representation in Malheur County was rated as “good to very good” in the 2007 survey, heavy caseloads were reported to be a factor in the areas of representation where problems were noted – lack of timely contact with incarcerated clients and minimal use of investigation and motion practice in juvenile delinquency cases. As witnesses noted, a major proportion of the felony cases in Malheur County are prison cases and defending these cases takes a disproportionate amount of time for a number of reasons. Increased use of video conferencing might reduce the number of times attorneys have to actually travel to the institution to interview clients. If, even with the use of time saving approaches, current case rates do not provide adequate compensation for the amount of time required for the average case, contractors are encouraged to provide additional information about the factors that affect the cost of doing business in Malheur County to OPDS when they submit their contract proposals for 2010-11 contracts. They are also encouraged to assist PDSC in establishing its funding priorities for the next biennium by informing the Commission of the extent of their needs and recommendations for funding approaches that would address those needs.

Attachment 6

Excerpt from Jackson County Service Delivery Plan (Nov. 20, 2008)

A Service Delivery Plan for Jackson County

PDSC is grateful for the cooperation and hospitality extended to its staff and its members during its visit to Jackson County and the initial investigations made in preparation for that visit. PDSC expresses its sincere appreciation to all the members of the Jackson County criminal and juvenile justice communities for their assistance in informing the commission and helping to guide the creation of a service delivery plan for the County.

In light of all the information provided, PDSC approves the following service delivery plan for Jackson County.

A public defender office supplemented by a consortium to handle criminal cases and a consortium to handle juvenile cases appears to be the appropriate service delivery model for this jurisdiction. The public defender office is performing many of the essential functions of a public defense system in the county. It is training new attorneys, providing on-going education to criminal and juvenile attorneys in the area, participating in policy making bodies in the criminal and juvenile justice systems and taking on new functions as needed, such as providing representation in juvenile cases.

The criminal consortium is reported to be providing superior representation despite its lack of a well developed administrative structure.

The juvenile consortium is generally credited with providing very good representation at some stages of the proceedings and is addressing concerns regarding representation between the time of jurisdiction and the final proceedings in the case.

With respect to the appropriate expectations for attorneys handling juvenile dependency matters, whether particular recommended courses of action are denominated as "social work" or "legal work," the Commission endorses the standards set forth in the Oregon State Bar's Principles and Standards for Counsel in Criminal, Delinquency, and Civil Commitment Cases. These standards recognize that values that may have originated in other disciplines, such as active client outreach, knowledge of available treatment and support services, familiarity with a client's personal circumstances, are also essential to zealous legal representation on behalf of clients in dependency matters.

The performance standards, while not mandatory in every case, are “intended to be followed in most instances.”¹

PDSC recognizes that excessive caseloads challenge even the ability of well-qualified and highly motivated attorneys to meet the needs of their clients. While caseloads in both criminal and juvenile cases in Oregon appear to exceed national standards by approximately 30% the impact is reportedly greater in juvenile cases. PDSC has proposed Policy Option Package 100 in its 2009-11 budget request that would provide an additional \$17 million to reduce juvenile caseloads. Should the agency receive any amount of funding for this purpose, OPDS would outline for the Commission at its priority setting meetings in the summer and fall of 2009 possible approaches to the allocation of the funds that would achieve the goals of reducing caseloads and improving representation.

The Executive Director will form an advisory group of juvenile contractors to (1) plan for the agency’s presentation regarding Policy Option Package 100 to the Public Safety Subcommittee of the Joint Ways and Means Committee, (2) make recommendations for the use of any funds appropriated, and (3) regardless of whether additional funds are available, make recommendations to the Commission and OPDS regarding other courses of action that could be taken to improve the quality of representation in these cases.

During the course of contract negotiations, OPDS will explore with all prospective contractors the number of attorneys and the percentage of such attorneys’ time that will be devoted to work under the contract and how the contractor intends to meet the needs of its public defense clients when the proposed caseload exceeds the caseload standards included in the request for proposals.

¹ Forward to the original version of the standards, at page 2. The document may be found at http://www.osbar.org/surveys_research/idth/foreword.html. PDSC views the Principles and Standards as the Oregon standards referred to in its statutory mandate to “Establish and maintain a public defense system that ensures the provision of public defense services ... consistent with ... Oregon ... standards of justice.” ORS 151.219.

Attachment 7

The Consecutive Sentence Saga

By Rebecca Duncan

On October 14, 2008, the United States Supreme Court heard oral argument in *Oregon v. Ice*, the most recent in a line of cases following *Apprendi v. New Jersey*, 530 US 466 (2000), and concerning the scope of the Sixth Amendment's jury trial guarantee. As Oregon practitioners are well aware, the issue in *Ice* is whether a defendant has a Sixth Amendment right to have the facts necessary to impose consecutive sentences under Oregon law found by a jury, as opposed to a judge.

The Sixth Amendment issue arose in *Ice* because Oregon's consecutive sentencing law, ORS 137.123, requires that certain facts be found before a court can impose a consecutive sentence for an offense. Under ORS 137.123, the default sentence is a concurrent sentence. When sentencing a defendant for multiple offenses, a judge can impose a consecutive sentence only if the offense for which the consecutive sentence is contemplated: (1) was not part of the same criminal episode as the other offense, or (2) was part of the same criminal episode as the other offense, but either (a) was not merely incidental to the other offense, or (b) caused or created a risk of causing a greater or qualitatively different harm to the victim, or caused or created a risk of causing a harm to a different victim. ORS 137.123 reflects the legislature's intent that, if one offense is "part and parcel" of another offense, a defendant should receive a concurrent sentence.

By its terms, ORS 137.123 authorizes a judge to make the factual findings necessary to impose a consecutive sentence. And, in Mr. Ice's case, that is what happened. A jury convicted Mr. Ice of six offenses and then, at sentencing and over trial counsel's objection, the trial court found the additional facts necessary to impose consecutive sentences for three of the six offenses. While the judicial fact finding was authorized by the statute, the issue litigated at the trial court level and through the United States Supreme Court was whether it was constitutional; specifically, whether it violated the defendant's Sixth Amendment right, as identified in *Apprendi* and its progeny, to have a jury find all the facts that set the maximum punishment for an offense.

Oregon's consecutive sentencing law differs

from that in most jurisdictions in that it limits a judge's discretion to impose consecutive sentences. Most other jurisdictions follow the common-law approach and afford judges complete discretion with respect to the imposition of consecutive sentences; judges can impose concurrent or consecutive sentences as they see fit, additional fact findings are not required.

The difference between Oregon and most other jurisdictions, then, is that in Oregon, a jury's verdict alone does not authorize the imposition of a consecutive sentence. And that, according to the attorneys for Mr. Ice, is what creates the *Apprendi* problem. In *Apprendi*, the United States Supreme Court ruled that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 US at 490. Subsequently, in *Blakely v. Washington*, 540 US 296 (2004), the Court explained that for *Apprendi* purposes, the "prescribed statutory maximum" is "the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 296. Thus, the argument made on behalf of Mr. Ice was that the "prescribed statutory maximum" under Oregon law is a *concurrent* sentence because that is the maximum sentence a judge may impose "based solely on the facts reflected in the jury verdict."

The Oregon Supreme Court accepted Mr. Ice's argument and held that imposition of the three consecutive sentences violated his Sixth Amendment rights. But, the decision was not unanimous. Justice Kistler filed a dissent, arguing that the purpose of the *Apprendi* rule was to prevent legislatures from shifting fact finding regarding elements of an offense from the jury to the judge. "Far from seeking to require juries to decide beyond a reasonable doubt every fact that affects sentencing, the rule in *Apprendi* serves only

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APPELLATE PERSPECTIVE: *Continued from previous page.*

to provide a nonsubjective means of determining when the legislature's efforts to redefine the elements of a single offense will stay within constitutional bounds." *Oregon v. Ice*, 343 Or 248, 272 (Kistler, J., dissenting).

Justice Kistler's dissent was an invitation to the United States Supreme Court to reexamine the *Apprendi* rule and consider its reach. The Court accepted the invitation, granting the state's petition for certiorari in January 2008.

In the Petitioner's Brief on the Merits, the State of Oregon, represented by Ms. Mary Williams of Oregon's Department of Justice, argued that the *Apprendi* rule did not apply to consecutive sentencing facts. Like Justice Kistler, the state argued that the purpose of the *Apprendi* rule was to prevent legislatures from shifting fact finding regarding elements of an offense from the jury to a judge, and that Oregon's consecutive sentencing law did not do that. To support its argument, the state presented a review of historical sentencing practices to show that, traditionally, judges had authority to impose concurrent or consecutive sentences and juries never made findings like those necessary to impose consecutive sentences under ORS 137.123. Therefore, the state argued, allowing judges to make the findings necessary to impose consecutive sentences did nothing to diminish the jury's traditional fact-finding role.

Thus, the state's primary position was that the *Apprendi* rule—all facts (other than prior conviction) that increase the prescribed statutory maximum for an offense must be found by a jury beyond a reasonable doubt—applies only to "constitutionally protected elements," a term the state did not define, but seemed to equate with facts of the type traditionally found by juries, *i.e.*, facts that determine guilt. According to the state, if a fact was not of the type traditionally found by juries, it could be found by a judge without violating the Sixth Amendment.

As a secondary position, the state argued that even if the *Apprendi* rule applied to facts necessary to impose consecutive sentences, Oregon's consecutive sentencing scheme did not violate the rule because the facts did not increase the statutory maximum for an offense. The state argued that a consecutive sentence is not a greater penalty for an offense than a concurrent sentence because it does not increase the length of a defendant's prison term for an individual offense, although it may increase the length of his total prison term for all of his offenses:

To be sure, a trial court's decision to impose consecutive sentences has a substantial, practical impact on the total amount of time that a defendant will be required to serve for his crimes. But—for purposes of the constitutional rights at issue—the die is cast when the jury convicts the defendant of multiple offenses. . . .

Put differently, . . . [c]onsecutive sentences increase a defendant's aggregate punishment, but they do not increase the statutory maximum for any of the underlying individual offenses. A defendant's consecutive sentences merely reflect that the jury convicted him of committing multiple crimes. Pet BOM at 56–57.

In the Respondent's Brief on the Merits, Mr. Ice, represented by Mr. Ernest Lannet of Oregon's Office of Public Defense Services, Appellate Division, argued first that the state's focus on whether an element was of the type traditionally found by a jury was misdirected. Mr. Lannet argued that the *Apprendi* rule was a bright-line rule, created by the Supreme Court to determine whether a fact had to be found by a jury. In *Apprendi* and its progeny, the Court had rejected arguments—like the state was making in the current case—that whether a fact had to be found by a jury depended on whether the fact was an element or a sentencing factor. It had rejected arguments that whether a fact had to be found by a jury depends on the type or nature of the fact. Instead, the Court had ruled that whether a fact has to be found by a jury depends on the effect of finding the fact: if the effect is to increase the statutory maximum, *i.e.*, raise the ceiling of the defendant's potential punishment, then it has to be found by a jury. According to Mr. Lannet, the inquiry is a functional one: if a finding of fact raises the ceiling of potential punishment, then it must be found by a jury, regardless of whether it is the type of fact traditionally found by a jury. Because, argued Mr. Lannet, the effect of finding consecutive sentencing facts under Oregon law is to raise the ceiling of potential punishment from concurrent to consecutive sentences which have always been recognized as greater penalties, those facts must be found by a jury.

The briefs set the stage for oral argument, the direction of which would depend on whether the justices continued to hold the positions they had taken in the prior *Apprendi* cases. Of the nine justices who will decide the case, six have previously voted in favor of the *Apprendi* rule: Chief Justice Roberts and Justices Stevens, Scalia, Souter, Thomas, and Ginsberg. Three had opposed it: Justices Kennedy, Breyer, and Alito. Breyer has been the strongest opponent of the rule's applications, believing that they undermined laudable legislative efforts to limit judicial discretion and, thereby, achieve more consistent and appropriate sentences. He has also been frustrated with what he has seen as the Court's disregard of the jury's historical role. Why, he wonders, should a defendant have a right to a jury trial on sentencing facts that, historically, were always within the purview of the sentencing judge? Haven't the *Apprendi* majorities disregarded the very history they claim to use to interpret the Constitution?

As petitioner, Ms. Williams argued first. The first question came from Justice Scalia, who questioned the state's attempt to distinguish the current case from the Court's *Apprendi* cases, noting that under Oregon's particular sentencing

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scheme a defendant was entitled to a concurrent sentence unless facts beyond the jury's verdict were found, and asked, "[I]f you take seriously what—what we have said in our prior cases, namely that any fact which has the effect of lengthening the sentence to which the defendant is entitled must be found by a jury—if you take that seriously, I don't see why it doesn't apply here."

Ms. Williams responded that the current case was different from the *Apprendi* cases because judges traditionally made fact findings relating to consecutive sentences.

Justice Scalia countered, "But you could say the same about sentencing in general, and we held that the Sixth Amendment does impose a limitation on judicial power where at least there is an entitlement by law to a certain lower sentence. And there we said that you can't leave it to the judge to decide whether the facts that trigger that law exist or not."

Ms. Williams replied that the purpose of the *Apprendi* rule was to prevent elements from being shifted from the jury to the judge, to prevent legislatures from "taking what traditionally had been elements of an offense and relabeling them as something else, as sentencing factors, that the jury was no longer finding what traditionally it would have found for each conviction." Her response prompted a question from Justice Kennedy, who wondered whether the consecutive sentencing facts were not, in fact, akin to elements, noting that the statute "does bear on culpability, and culpability sounds like part of the definition of an offense or more serious offense."

Justice Scalia later reiterated his position that the *Apprendi* rule applied. "We said in *Apprendi*, once you try to narrow it [a judge's discretion] by law and say you can't do more than this, once you do that, that fact has to be found by the jury. And that's what's going on here."

After Ms. Williams responded, Justice Breyer—who has strongly dissented in the *Apprendi* cases—spoke up, asking Ms. Williams whether it was right that, "you haven't found a single case ever where it was the jury rather than the judge that made this question of how you put together sentences for two separate crimes...?"

Ms. Williams agreed, and Justice Breyer turned, looking incredulously down the bench to Scalia and commented, "And at the time of the writing of the Constitution, which sometimes some of us feel is relevant, in that instance they did have the judge, not the jury, decide how to create a total sentence where the person had committed two crimes on the same occasion."

Justice Breyer's comment prompted Scalia: "But you could say that same in *Apprendi*. It was a judicial determination how much of a sentence you were going to get from ten years to life. It wasn't up to the jury. It was up to the judge. ... And I don't see any difference here. I mean in both cases it was traditionally done by judges."

Justice Souter asked the next question, agreeing with Scalia that the current case was the same as the *Apprendi*

cases, "Aren't we in exactly the same position here? Because the defendant here can correctly say: I cannot be sentenced to the more onerous—under a more onerous scheme of consecutive sentencing—unless some fact is found which has not been found by the jury in coming to verdicts of guilty in any of these crimes; a further fact must be found to expose me to the heavier penalty."

"And that is exactly the same as the situation in *Apprendi* with one possible exception that is, do you accept, as I thought you did, the proposition that consecutive sentencing is the heavier penalty or is a more onerous sentencing alternative. If you accept that, I don't see how you would escape the analogy with *Apprendi*."

Ms. Williams started to respond that she did not accept that consecutive sentencing is "an enhanced penalty for any of the specific convictions," and Justice Souter cut her off, saying, "Everybody agrees," and then saying, "If you had a choice between two concurrent sentences and two consecutive sentences, you know which one you are going to choose. So we—we know what is the heavier sentence or the heavier sentencing option."

And with that, it became clear that the strong proponents of the *Apprendi* rule believed that, given Oregon's consecutive sentencing scheme, facts necessary to impose a consecutive sentence have to be found by a jury. The argument then turned to the bounds of the rule and whether it would apply to other fact findings. Justice Breyer asked, "[W]hat about restitution, forfeiture, taking a child and having him tried as an adult? What about alternative drug programs? What about diversion? I mean, I can think of five or six where there might be a factual finding necessary to proceed to a situation whether the total amount of punishment is greater than less." And Chief Justice Roberts later asked, "[W]hat if, under the law, the judge upon sentencing is supposed to make a determination of where the defendant should be sent, which facility, based on determination of which one has the most room?"

The Court also questioned what will happen if it held that consecutive sentencing findings under Oregon law have to be made by a jury. Would the facts be tried in the guilt phase and, if so, would that be to the detriment of defendants because they might have to argue they did not commit the charged crimes but if they did, that the crimes were part of the same criminal episode? Would the Oregon legislature repeal the statute to eliminate the jury trial requirement and, thereby, undo the limit on judicial discretion to impose consecutive sentences, which also would be to the detriment of defendants?

What's next? That is the final question after the *Ice* oral argument. The Supreme Court will issue its decision in the next few months. If the Court affirms the Oregon Supreme Court, practices should continue as they have since the Oregon Supreme Court's *Ice* decision: judges will not be able to impose consecutive sentences unless the

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facts necessary to do so are found by a jury or admitted by the defendant, or the defendant waives his or her jury trial right to such findings. It is unlikely that the Oregon legislature will change the law in response to an affirmation because state law, enacted in the wake of *Blakely*, already provides for jury findings of sentencing enhancement facts (a term chosen over "aggravating factors" because it was anticipated that *Apprendi* might be extended to facts other than those necessary to impose upward departures, including consecutive sentencing facts).

The questions for defense attorneys include how to plea or try cases in light of *Ice*. Attorneys should remember that waiving a jury for guilt (by pleading or by having a bench trial) waives a defendant's right to a jury for sentencing. So, if you want to have a jury trial on consecutive sentencing facts, you'll need to have a jury trial on guilt as well. And, conversely, if you are having a jury trial on guilt, but do not want to litigate the consecutive sentencing facts before the jury, you'll have to decide how to stipulate to those facts or waive your jury trial right to them.

As for the next *Apprendi* case, defense attorneys should challenge imposition restitution without jury findings. Although the Oregon Court of Appeals has rejected such challenges, they appear to fall within the *Apprendi* rule. Defense attorneys should also consider challenging the imposition of special conditions of probation based on facts other than those found by a jury (for example, imposition

of a "no alcohol" condition when nothing in the jury's verdict indicates that the defendant was under the influence of alcohol at the time of the offense). When determining whether to make an *Apprendi* challenge, defense attorneys should consider Justice Scalia's statement in the *Ice* oral argument, that "[T]he core question is, 'Is the defendant entitled [...] to get no more than a certain penalty [unless] a particular fact is found?'" If the answer to that question is yes, then the defendant is entitled to have a jury find that fact. ☞



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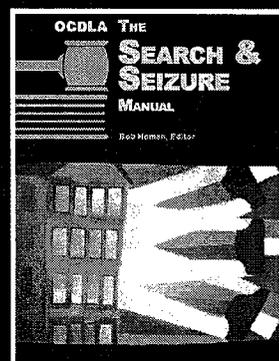
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