

**Members**

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



**Ex-Officio Member**

Chief Justice Paul J. De Muniz

**Executive Director**

Ingrid Swenson

**PUBLIC DEFENSE SERVICES COMMISSION**

**PUBLIC DEFENSE SERVICES COMMISSION MEETING**

Thursday, March 4, 2010  
10:00 a.m. – 3:00 p.m.  
Room 357  
Oregon State Capitol  
Salem

**AGENDA**

- |                                                                                                                          |                                                                              |
|--------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------|
| 1. <b>Action Item:</b> Approval of the Minutes of PDSC's January 28, 2010 Meeting ( <i>Attachment 1</i> )                | Barnes Ellis                                                                 |
| 2. Boards of Directors for Public Defense Contractors ( <i>Attachment 2 and Materials from 1/28 Meeting</i> ) – est 1 hr | Commission Discussion                                                        |
| 3. Right to Counsel in Juvenile Delinquency Cases ( <i>Attachments 3 and 4</i> ) – est 1.5 hr                            | George Yeannakis <sup>1</sup><br>Jordan Bates <sup>2</sup><br>Ingrid Swenson |
| LUNCH – est 30 mins.                                                                                                     |                                                                              |
| 4. Eligibility Standards for Court Appointed Counsel <sup>3</sup> – est 45 min                                           | Kathryn Aylward                                                              |
| 5. OPDS Financial Monitoring Systems And Safeguards - est 15 min                                                         | Kathryn Aylward                                                              |
| 6. OPDS Monthly Report ( <i>Attachment 5</i> ) – est 30 min                                                              | OPDS Staff                                                                   |
| 7. <b>Executive Session*:</b><br>Executive Director Evaluation – est 30 mins                                             | Barnes Ellis                                                                 |

1 Special Counsel to Team Child, Seattle Washington

2 Attorney at Law, St. Andrews Legal Clinic; 2009 University of Oregon School of Law graduate

3 Please see Attachment 5 to the January 28, 2010 PDSC meeting agenda

## Notes

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

***\*The Executive Session will be held at approximately 2:30 p.m. pursuant to ORS 192.660(2)(i).***

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

***Next meeting: The next meeting of the commission is scheduled for April 22, 2010 from 10 am to 3 pm at the offices of the Oregon State Bar in Tigard, Oregon.***

# Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION  
OFFICIAL MINUTES

Thursday, January 28, 2010  
10:00 a.m. – 3:00 p.m.  
Clackamas County Circuit Court  
Holman Building  
821 Main Street  
Oregon City, Oregon 97045

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Chip Lazenby  
Peter Ozanne  
John Potter  
Janet Stevens (by phone)  
Hon. Elizabeth Welch

STAFF PRESENT: Ingrid Swenson  
Kathryn Aylward  
Peter Gartlan  
Paul Levy

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**Agenda Item No. 1 Approval of the Minutes of PDSC's December 10, 2009 Meeting**

**MOTION:** Shaun McCrea moved to approve the minutes as amended; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

**Agenda Item No. 2 Update on Developments in Clackamas County, Commission Approval of Service Delivery Plan**

Chair Ellis noted the appointment of Rebecca Duncan to the Court of Appeals, recognizing her talents and abilities.

Ron Gray introduced the board chair of the Clackamas Indigent Defense Consortium, Brad Jonasson, and reported on what had occurred since PDSC's previous discussion on Clackamas County. He said they had completed a judicial survey on the quality of representation provided by all of the consortium attorneys. Board members met with each attorney and discussed the information received from the survey about the attorney's performance. When the board believed that attorneys needed to improve the quality of their representation,

work plans were made with follow up reports to be provided. In some cases if there is no progress attorneys may be terminated from consortium membership. CIDC has also decided to add an outside board member, Judge Raymond Bagley, who has retired as a senior judge. Another CIDC member was recently appointed to the bench and the consortium is considering filling that vacancy as well as the one created by a previous judicial appointment. There are currently two apprentice lawyers receiving training. One of the current board members has volunteered to accompany Ron Gray to board meetings and other events in order to learn more about his administrative duties and potentially be available to succeed him as the administrator.

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

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

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

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

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

Marty Cohen said there had been some structural changes in the Clackamas County juvenile court. Judge Darling is no longer hearing dependency cases and Judge Van Dyk is handling them. Attorneys have to appear in different courtrooms now, which takes up more of their time. A meeting has been scheduled with all the stakeholders in juvenile dependency cases for the first week in February to discuss court scheduling and other issues, including setting trial dates that do not conflict with the juvenile court schedule. The juvenile consortium has been recruiting outside board members. It would like to include a member with a medical or education background but has been unsuccessful to date. The consortium has only ten members and does not want to expand its board too much. The juvenile delinquency caseload continues to fall but the number of dependencies has been increasing. The consortium needs to add attorneys to reduce workload since some members are taking fewer cases leaving the others with heavier caseloads, but hasn't been able to keep new attorneys because of the low level of pay. He said that the consortium is experimenting with having two lawyers represent only children in an effort to improve the quality of representation. An online evaluation system has been

created for the consortium as a whole but an evaluation process for individual attorneys has not yet been finalized.

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

Judge Steven Maurer said that the court is very satisfied with the work of CIDC. The lawyers in the group are capable, competent and committed. Since PDSC's last visit to the area there has been discussion about the composition of the board and other issues. CIDC took those matters to heart and Ron Gray spoke to Judge Maurer at length about them. Judge Maurer suggested the addition of a senior judge to the board. CIDC surveyed all the judges on the level of competence of CIDC attorneys. This survey represents a more formal process than used in the past to monitor quality. Commission Potter inquired about how the court assesses quality. Judge Maurer said that the judges observe a very high level of professionalism in the relationship between the defense and the prosecution and has an insight into the quality of defense representation not only during trials but during plea discussions in which the court must either approve a plea agreement or not. Sometimes the court is unable to approve resolutions that appear too favorable to the defense. Early preparation, investigation and negotiation benefits the client because the state's offer is more generous at this stage. Attorneys are also effective at the disposition stage, bringing new information and recommendations to the court and advancing the client's position in a way that does not ask the court to accept unreasonable options. CIDC is also doing a good job of bringing in lawyers and mentoring them. They have brought in new lawyers in the past who are maturing and developing well. Judge Maurer said he thinks that when vacancies do occur, it will not be difficult to fill those positions. The group has significant drawing power.

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

### **Agenda Item No. 3**

#### **Boards of Directors for Public Defense Contractors**

Lane Borg said that there is a blueprint for the role of boards of directors in the IRS 990 form. He said that the Metropolitan Public Defender (MPD) Board has expanded since he became the executive director. The current board is comprised of seven independent members, four of whom are selected by outside appointing sources. It is an active board whose principal responsibility is to select and supervise the executive director. It has not been difficult for MPD to find board members. Lane Borg would like the board to include more recent

alumni of the office. Board members need to have a meaningful experience. MPD had a retreat for its board and discussed the mission of the office. Non lawyer members raised basic questions about how the organization measures success, what diversity means, whether employees are being treated well, what the message of the organization should be. Lawyer members think more practically and strategically about achieving MPD's mission.

Commissioner Potter inquired of Lane Borg and others in the audience why a consortium or private law firm might not want a board.

Lane Borg said that it is harder to justify the need for a board in a small organization since it is not clear what purpose would be served by the board. For these organizations, the commission's concerns could be addressed by requiring a periodic audit.

Commissioner Ozanne said that an advisory board might be suitable for a law firm. Acquainting the members of such a board with the work of the public defense firm could create a knowledgeable ally in the local community. Lane Borg said it would be similar to the role played by rotary clubs in the past.

Paul Lipscomb said the Marion County Association of Defenders (MCAD) board currently has nine members, three of whom are appointed by outside entities. In the eighteen months that he has been involved with MCAD he has found a board with outside members to be a very effective model. MCAD has approximately 50 members and has just completed an evaluation process in which every member was evaluated on a number of criteria. The judges devoted a significant amount of time responding to the survey. As a result of the evaluation two former members were not continued under the current contract and three received short contracts. Those members will be reevaluated before a decision is made about giving them a further contract. The board has been very supportive of Judge Lipscomb's efforts to improve the quality of the organization and to respond to the Commission's concerns. Olcott Thompson said that he has been a member of the board for many years. He urged the Commission to require consortia, except for the very small ones like the Polk County consortium, to have boards. Both Paul Lipscomb and Olcott Thompson said that the administrator of a consortium should not serve on the board.

Commissioner Ozanne asked how well a board would function if it was mandated and not really welcomed by the contractor. Chair Ellis said the Commission could make it an expectation in the next contract cycle giving contractors eighteen months to prepare. Commissioner Lazenby said he is leaning toward requiring boards at least for the larger organizations. Commissioner Welch inquired whether the Commission would also be defining the functions that boards would be required to perform.

Judge Darling said that one circumstance under which it might be impossible to assemble a board would be in a rural county like Malheur or Lake. She inquired whether an existing board could volunteer to serve as advisory board another provider. She also suggested the Plan B judges might be made available to serve boards to fulfill their Plan B requirements.

Tom Sermak introduced the chair of his board of directors, Terry Wade. The Public Defender of Marion County (PDMC) has a board of seven members, with a majority required to be attorneys. The non-lawyer members had been an important resource. Three members are appointed by outside sources. The other four members are elected by the board. PDMC currently employs seven

lawyers but the board is not too large for the organization. Ms. Wade said that the board reviews the director's performance every month based on benchmarks they have established. Neither the director nor any of the other employees of the office serve on the board. Ms. Wade said that her own area of practice is in non-profits and tax. Serving on the board has been a very positive experience for her. She has learned about a different area of practice than her own and she has been able to see first hand how a non-profit organization, like some of her clients, operates on a day to day basis.

Jim Hennings said boards as needed by public defense offices to provide the management review and quality monitoring that the Commission cannot do on a local basis. PDSC would guarantee quality by having a local entity hire and fire management and oversee quality. The Commission would be delegating its authority and responsibility on quality issues to the board. The Commission also needs to tell boards what is expected of them and what the best practices for boards are. Boards are the sword and shield for the organization and should play a role in the improvement of the local criminal justice system. The board requirement should not apply to individual lawyers and law firms and small organizations. In consortia, attorney members should be allowed to serve on the board. Boards should include five to seven members and PDSC should contract with the board. The Commission should not be too prescriptive about how the board conducts its business but could nudge them in the right direction in the contract renewal process. Jim Hennings talked about the MPD board and the use of outside appointing sources. He also noted that judges were not included as an appointing source since independence from the judiciary was recommended by the ABA. Retired judges, however, were eligible and did serve on the board.

Mark McKechnie described the board at the Juvenile Rights Project (JRP). That board is comprised of all outside members. It is a large board of fourteen since members' responsibilities include fundraising for JRP's privately supported programs. The board hires and supervises the executive director so it would be awkward for the board to include employees of JRP who are supervised by the executive director. Lawyers from the organization do serve as resources to the board, however.

Commissioners discussed the Clackamas County service delivery plan and the issue of whether or not the Commission should require providers to have boards. Chair Ellis said his inclination in Clackamas County was to require that the board include outside members. CIDC is a large, sole provider of criminal representation in the county that believes they are doing good work. But in time a new administrator will be needed. It is not very different from a public company, which has at least 40% outside directors. Groups of a certain size, say 10 or 15 or more should be required to have boards with 20% or more outside members. Commissioner Ozanne agreed but said the juvenile consortium is in the same situation. At first PDSC encourage boards but there are now a lot of success stories and the Commission should develop a general policy. The difficult question is regarding the size of the organizations that will be required to have boards. The policy should be a statewide policy.

Commissioners discussed when the new rule would take effect and generally agreed that, if required, it would be included as part of the RFP in the next contract cycle. With respect to the number of attorneys in an organization that would trigger the board requirement, it was suggested that 15 would be too high since that would include only three or four consortia. With respect to private law firms, Commissioner Ozanne said that at some point the Commission might

want to reconsider whether it should contract with private firms since it is hard to get inside their structure but that advisory committees should probably not be required at this time. Paul Levy reported that in response to encouragement by the Commission to do so, the Lane Juvenile Lawyers Association incorporated their consortium as a non profit with outside members, whom the group found difficult to recruit. It involved a substantial amount of time and effort and it would have been helpful if the Commission had provided information and assistance with the actual process of creating a board. Paul Levy also expressed concern that if PDSC is too prescriptive about the structure of its contract offices it might jeopardize their status as independent contractors. Commissioner Ozanne said that another thing that the Commission needs to consider is a requirement for an evaluation procedure as a condition of contracting. It appears from the testimony on Clackamas County that there may be someone practicing who should not be. Commissioner Welch said that when the issue is considered in light of the fact that PDSC contracts with the entity rather than the executive director the questions about allowing executive directors and lawyers to sit on the board are very important and need to be examined more closely. Commissioner Ozanne said he agreed that nothing should be imposed until the next round of contracting. PDSC should discuss these issues further and send any proposals out for comment. Olcott Thompson said that OPDS's annual management conference should include sessions for board members, preferably on the Saturday of the conference. Commissioner Potter recommended that Paul Levy prepare a draft of a Commission proposal and circulate it among contractors for comment. Commissioner Welch said that Paul Levy's draft should identify the issues and the options rather than a plan of action. With respect to the size of the organization that would be subject to the board requirement Tom Sermak suggested that it should be the size of the contract, rather than the number of participating attorneys, that should be considered. Kathryn Aylward supported that approach so that consortia would not decline to add new members simply to avoid the board requirement. Commissioner Ellis said that at this time consortia members should not be prohibited from service on the board but that a significant percentage, 20% had been suggested, would be a good starting place. Ingrid Swenson said that OPDS could also provide more information to Commissioners about which contractors would be covered by any particular proposal.

## **Agenda Item No. 9**

### **Contract Approval**

Kathryn Aylward described three proposed contracts being presented for PDSC approval, a contract with the Lane County Defense Consortium (LCDC), a contract with Jeffrey Ellis to manage the Capital Resource Center, and a contract with Bronson James to handle death sentence post conviction relief appeals. She reported that LCDC start accepting cases on February 1. Assistance was provided to them in setting up a case assignment and reporting system. The organization intends to have a board of directors with outside members. Their contract does not include civil commitment cases or murder cases. Attorneys in these cases will continue to be assigned from lists provided to the court. Mr. Ellis' office will be in Portland and the paralegal who assisted Matt Rubenstein will continue to work for the resource center. Information about the rate of compensation to be paid to Mr. Ellis, Mr. Bronson, and other death penalty lawyers was discussed.

**MOTION:** Shaun McCrea moved to approve the contracts; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

**Agenda Item No. 7**

**OPDS Monthly Report**

Peter Gartlan reported that after Rebecca Duncan and Bronson James' departures, Josh Crowther and Ernie Lannet were promoted to the two vacant chief deputy positions. Ryan O'Connor and Mary Reese were then promoted from their Deputy II positions to the senior deputy positions previously held by Josh Crowther and Ernie Lannet. Peter Gartlan said he is gratified by the quality of attorneys the division has been able to promote. For current Deputy I vacancies there have been more than 100 applicants. Chair Ellis said that allowing some of the lawyers to argue cases in the United States Supreme Court and Rebecca Duncan's selection for the Court of Appeals have been good for morale.

Ingrid Swenson described some of the issues before the 2010 legislature and Kathryn Aylward updated the Commission on developments related to the proposed move of the OPDS office.

The public portion of the meeting was completed and the Commission met in executive session. Minutes of the executive session at the December 10, 2009 meeting were approved.

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

Meeting adjourned.

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, January 28, 2010  
10:00 a.m. – 3:00 p.m.  
Clackamas County Circuit Court  
Holman Building  
821 Main Street  
Oregon City, Oregon 97045

MEMBERS PRESENT: Barnes Ellis  
Shaun McCrea  
Chip Lazenby  
Peter Ozanne  
John Potter  
Janet Stevens (by phone)  
Hon. Elizabeth Welch

STAFF PRESENT: Ingrid Swenson  
Kathryn Aylward  
Peter Gartlan  
Paul Levy

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**Agenda Item No. 1 Approval of the Minutes of PDSC's December 10, 2009 Meeting**

0:00 Chair Ellis Any additions or corrections? I note a correction on page three, "RPF" should be "RFP." Any others? If not, I would entertain a motion to approve.  
**MOTION:** Shaun McCrea moved to approve the minutes; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**

**Agenda Item No. 2 Update on Developments in Clackamas County, Commission Approval of Service Delivery Plan**

0:26 Chair Ellis Item No. 2 is an update in Clackamas County, where we are meeting. Before we get to that, I do want to make a statement on the record of how pleased and proud we all are at the appointment of Becky Duncan to be a Court of Appeals judge. I think it is a wonderful recognition of her talents and abilities. I think I am right; she is the first judge on an appellate court that came out of an indigent defense background. I know Chief Justice De Muniz did practice in that area, but I think she is the first one. I am very optimistic that she will be a great success in that court. I wanted to acknowledge that. On Clackamas County, Ron, we don't have a formal table, but just from where you are seated would you like to start by updating us on where you all are? You will recall we have had, I think, four meetings relating to Clackamas. We had one in March of '09. Then we had one in April of '09, but you did not attend. I don't think anyone from CIDC was there. Then there was one in June of '09 that you did attend. Then one in August of '09. I hope you got all the same materials that we did so we are starting on the same page. Do you want to start by talking to us about what has happened since?

2:44 R. Gray Am I speaking loud enough so that you can hear me?

3:06 I. Swenson Janet, could you hear that?

3:12 J. Stevens No. Can I ask you to speak a little louder, Ron.

3:35 R. Gray Is this loud enough? Can you hear me?

3:38 J. Stevens I can hear that.

3:41 R. Gray Just so that everyone knows, the miscreant on my right is Brad Jonasson. He is the president of CIDC and a board member. He is my resource person, and probably considering my personality, he is the level headed guy of the two. He is the one that I talk to on a daily basis or email on a regular basis before I put my foot in my mouth, so if he kicks me you will understand why.

4:09 B. Jonasson I am not the reason that you put your foot in your mouth, though.

4:17 R. Gray No. Since the last meeting probably the biggest thing we did was our attorney evaluation process, all of the major steps, although there are still some steps that are in progress. We did a complete judicial survey about all of our lawyers. We did a client survey and those that have done client surveys know that you are lucky to get a response from clients at all. We did get some. Then our board is made up of nine board members. After we brought all of that material - and Brad was a big part of collating it all and helping me set it up - what we did was we took the board and took two board members and because we have 28 practicing lawyers, each set of two was assigned seven lawyers to meet with and evaluate within a set time period. They took the evaluations, plus our own observations and our own discussions about what we see the lawyers doing. We met with each lawyer and went through the positives, the negatives, the criticisms, and areas that needed improvement with the lawyers were addressed. We have several situations that are pending now, some of minor degrees, and some a little more intense, where suggestions were made on areas that needed to be improved. We approached them from a positive place. Can we get these things worked out? What we did, and the board members agreed, I stayed out of those meetings just because of my administrative job. Then the board members, where improvements were needed, set up plans with the attorneys and will do follow ups with the attorneys on, "What can we do to help you out? Here are things we know about improving," and then the lawyers will be reporting back to those board members on their progress. As an example, we have one lawyer who is a tremendous trial lawyer but a terrible organizer. That lawyer is actually working with the two board members on organizational skills within the office so that things are better prepared, deadlines are better met, and the lawyer is actually hiring someone to help with the organization process in that attorney's office. The lawyers are taking those things to heart. If, when we do the reassessment of the lawyers, there is no progress or rebellion against the suggestions, even though we have now signed new contracts we have the right, of course, to take whatever action is necessary including termination if progress is not made. All the lawyers understand that but we needed to get all those contracts signed to start the new contract period and all the certifications in. The lion's share of that work is done, but we still have work in progress with lawyers to try to get them improved and to make sure that the end result of the product they give to their clients is the best that it can be. The evaluation process, we have learned, is an ongoing thing. There was a lot of work done in that regard and a lot of time used. That is the first time we have taken on such a large project except to troubleshoot individual criticisms in the past. We rotated out two members at the end of the year like we do every year. We have rotated in one new board member from the ranks. We have asked, and with his agreement, we are going to add retired judge Ray Bagley as a member of our board of directors. He is no longer doing work as a senior judge. He is retired and has agreed to come in and offer his expertise and his services to the board of directors. He snowbirds a little in Arizona at the beginning of the year, so we are going to be networking with him by email and phone should we have a meeting whenever he is south. We are working on getting that set up. As some of you may know, one of our

lawyers just became a circuit court judge, Kathy Weber, and hopefully with some positive vibes from what happened in the election we are going to be talking about reviewing applicants and determining what we do with her vacancy and the vacancy that was left by Judge Steele, which was not filled because at that time our caseload was going down. Lately our caseload has gone back up. There is some impetus now to fill these vacancies. Remarkably we almost hit our projections right on the nose for the last contract period because of the upswing in the fall. I think we were closer to our projections than we have ever been in 20 years. This month we are ahead of projections already. We are probably going to have to serious look at adding one or two lawyers and that is the next step we are going to be taking.

10:04 J. Potter

What do you attribute that to?

10:09 R. Gray

I thought the upswing in the fall was partly due to House Bill 3508. I keep getting told by our district attorney that the crime rate is down. You never know what is going to come through the door as far as warrants being served on old cases or how that happens. Also, when they say something about the crime rate being down that may not count for multiple count cases on one person. Sometimes we will get cases where you have a person who has committed multiple crimes on numerous days. That is one defendant and one indictment. To the DA that is one case, but we are dealing with multiple charges, multiple days, and multiple counts. That kind of fills up our quota a little bit faster when that happens. Lately we have had some serious cases come in with some of the homicides that have occurred. It is the most unpredictable animal that there is. We just never know what is going to happen. We have added somebody who is a retired judge to our board to get some sage wisdom and outside perspective from a party who has no economic interest in CIDC, but certainly who speaks his mind and everybody respects. We have transitioned from somebody who is going to the bench. We lost somebody to the bench with Judge Steele. We are going to be looking at filling those gaps. Our apprenticeship program is still up and running. We have two apprentice lawyers now. We just ended one contract on an attorney named Jared Justice and we are now going to have a young attorney named Andrew Elliott step in as a new apprentice lawyer. We are pretty much constantly providing a training ground for young lawyers where we have two apprentices at any given time. Carol Race is our other apprentice lawyer. I am trying to think if there is anything new aside from any of that. We just went through a process of assisting the new Lane County consortium and helping them get up and started. We sent them copies of all of our bylaws and attorney contracts and administrative contracts to help them get an idea of how to get their consortium up and running. They actually asked Janine to go down and meet with them about the day to day kind of assignment of cases and how we rotate the case assignments and everything. We have communicated back and forth by email with questions to help get them a jump start.

13:18 I. Swenson

Any changes in the succession plan?

13:18 R. Gray

Oh, succession plan, yeah. I am glad you asked that. What I did was I went to the board right before the attorney evaluation process and said, "I would like to find out if somebody is interested in following me around like a puppy to some meetings and learning what it is like to be an administrator" - kind of training somebody for future purposes - and one of our attorneys volunteered to do that, so I am going to kind of drag him along to committee meetings so he can find out what that is all about. He has been on the board a couple of times so he knows about the processes. It is a way of getting someone's feet wet in the whole process of what it is like to be an administrator so if I ever run out of gas we have somebody who can step in. He is about as ornery as I am. I think you have to have a little of that with you if you are going to try and shepherd 28 lawyers. When you mentioned succession - talking about attorney applications, we have a few applications and resumes on file for CIDC, several of them are from relatively young attorneys - the board is cognizant of the fact that we do need to train young lawyers. I am sure whenever we are talking about filling gaps we are going to be looking at that kind of a process. The way we

structure it is we have a committee of three lawyers that checks on the resumes, talks to the references that are mentioned, gets as much information for the board as possible so that when we say we need to fill a position or two that committee comes into the board meetings and says, "Here is all the information we found out." They don't prioritize. We don't ask them to rank. We just ask for the information and then educate the board on what you know. The only thing that I think we have ever asked as far as potential ranking is understanding what qualifications there are in order to take certain levels of cases. Is this new applicant somebody who needs to be trained and walked up through the process, or it is somebody who could step right in now and take a felony? We need to know that, but other than that they don't rank them. We have had that process in place for years and it is of great assistance to the board so that we don't have to take the applicant in front of an intensive interview with the board of directors. We let the committee do all the talking and research and come to us. Then if we have questions we send them out to find answers to those questions. They have done a really good job for us.

- 16:20 I. Swenson Mr. Chair, could you check with Commissioner Stevens and see if she is still there?
- 16:23 Chair Ellis Are you there, Janet?
- 16:27 J. Stevens Yes I am.
- 16:27 Chair Ellis Are you hearing?
- 16:31 J. Stevens More or less. Sometimes more, sometimes less.
- 16:36 Chair Ellis Okay. Comments or questions for Ron?
- 16:43 J. Stevens From me, no.
- 16:43 Chair Ellis I wanted to ask you about one of the issues in the four prior meetings that we have dialogued with CIDC. We have expressed very strong interest in you having a truly public member on your board. I know Judge Bagley, good person; I am not saying anything there, but I think one of the concerns that we have had is CIDC seems to be a little bit of a closed society. I am not sure Judge Bagley really reflects all that we were hoping to see in terms of public participation. Let me just spell that out a little. We as a Commission are very aware the money that we spend is public money. We have worked hard, in many of the districts that we deal with, to try to be sure that the providers think of themselves as at least a quasi-public agency. The reason is when you get to things like attorney evaluations and whether somebody should really be allowed to continue to practice with public money, we think that a board that has a truly independent member or two is more likely to be thinking of the public interest and not just, "There but for the grace of God go I." The same thing on your ultimate successor. You have been a great tribute. You have done a lot of good work and nobody is saying anything else, but it has been our perception that in the selection of an administrator the criteria or the judgment might be different, might be a little more sensitive to the public issues than a selection where the selectors themselves, their livelihood, is going to be affected by who the administrator is. Many of the best providers we have don't have self-perpetuating boards. They don't pick themselves. I think yours is a self-perpetuating board, at least the last I knew it was. Where are you in responding to those concerns because we have expressed them in, I think, four prior sessions together?
- 19:55 R. Gray It has been discussed at several board meetings and it was the board of director's decision that I should contact some people in the community to try and see if we could get an outside perspective on the board, and actually Judge Bagley was one of those people that it was suggested that I talk to. He was the first to respond back and agree. It doesn't mean that that is the end of it all; it just means that that is a step. Secondly, I will tell you, quite frankly, that one of the big questions that the board of directors has is, if the end goal is to provide adequate legal representation for clients

that is above reproach, the question that comes up all the time is, "What does a banker on a board of directors have to do with the quality of the lawyers' performance for the individual client?" I can't answer that. I guess my position is that if it is mandated, if there is some written rule that we have to do that, we will do it. The other question that I get from the board of directors all the time is basically, "If we are doing something wrong, why is it that we are being asked to help other people with their consortia?" I can't answer those questions. I can tell you that there is not unanimous agreement on the board as to how to approach this issue. Obviously, boards of directors have their fights about lots of things, but ultimately the board has to make decisions. The decision of the board of directors was to accept Judge Bagley as a member. That doesn't mean that that is the end of the discussion because it is a discussion that we have a regular basis, but that is just where we are at this moment in time. But I get asked the question, aside from a policy, "What is the benefit to our lawyers and our clients of changing the makeup of the board?" I can't honestly tell them that I know that it makes a difference in the delivery of the product because I don't know. It is an open question. It is not something that is a closed door as far as discussion goes. I understand the impetus. I understand the examples. I understand, for example, in Deschutes County where it happened fortuitously because of the BRAC where the person on the board was able to help them out of a big financial issue because it was an outside person in the banking industry. I will tell you that originally, and consistently throughout the years, one of the positions of the board was to not be a closed shop in the sense of making sure that all of the lawyers had a chance to be on the board so that they would be able to participate in the management of it and understand what it takes to run the organization. We have constantly rotated in people and asked for people to volunteer to be on the board so that the lawyers could be involved of the policing of their own performance. We think that there is a lot of benefit to that. Except for telling you that it is a subject that is discussed a lot and it is not a closed door, there isn't any immediate vote before the board, or plan before the board, to bring in somebody other than Judge Bagley at the moment. That is all that I can tell you.

23:31 Chair Ellis

Commissioner Ozanne.

23:28 P. Ozanne

Ron, the answer I would have for a banker or a business person is that it ensures quality business practice that most lawyers, certainly criminal defense lawyers in my experience having been one, is not a particular area of expertise. It can be. We have found in places where even a business lawyer, as opposed to a criminal defense lawyer, is on the board, the business practices improve, or at least there is someone to consult with about business practice. Now maybe you have that on your board, but then as Barnes said ...

24:02 R. Gray

We recently did and then he retired.

24:10 P. Ozanne

Maybe you have to find another one. Maybe some of your board or participants in the consortium have that expertise, but again, to Barnes point, the really disinterested expertise would be useful. We have found that useful in other places. I don't understand why there is opposition on your board to that approach. It is not as if we are asking or suggesting, or I am suggesting if it is just me, the majority or anything like that.

24:46 R. Gray

I don't think there is any opposition. When I think about being president for 20 some years, I am thinking about what business did the board have in the last 20 years where a public member would have been helpful? To be honest with you I can't think of any.

25:08 P. Ozanne

It is likely to happen as we lose state money, and we are thrown into crisis, and we have to face another BRAC or something.

25:21 C. Lazenby

There is also the possibility that I think you ought to consider that we have had discussions with you over the last year about succession planning and around the

difficulties, it seems, of getting younger lawyers into the system, that perhaps people who are benefiting from the system aren't going to think about, but somebody who is thinking about the enterprise, who isn't participating in it, might actually anticipate that ahead of time and allow the organization to grow so that it isn't so insulated. There is a variety of benefits of having outside eyes and ears working in an organization to anticipate things. Those that are benefiting and participating in it might not actually contemplate beyond just seeing how it works. It might benefit the whole product over a longer period of time. That is part of the notion of having somebody who isn't a participant in the consortium looking at the enterprise and making suggestions on what it needs to look like in 10 years or five years.

26:27 Chair Ellis

Ron, I am sure you talk with your counterparts around the state. First of all, this is the only large population county where we have a single provider - leave Judge Bagley over here for a minute - that is governed solely by members of the consortium. The input we get from other areas of the state, and your counterparts, is having public participation on the board is a great way to keep CIDC from just becoming so set in its ways that it doesn't evolve and it doesn't have a sense by the public that this isn't just a business. This is something that (inaudible) to a public service. We have urged this a lot. Within our group we have talked about should we go the cajole model, which is what we have been doing, or should we go more prescriptively and condition the next contract on it? I don't want to go there. I just want to see it happen.

27:44 R. Gray

I understand that. You may find that it is something that you have to mandate because - I don't want to get into confidences at board meetings, but I can tell you that there have been some brutal board meetings on issues and this is one of them that has been argued vehemently. There are people on the board that firmly believe that things should happen a different way. There are people on the board that think things should happen the old way. That is the nature of a board meeting. You don't always agree. I guess my position is if all we are talking about is some outside perception of what is happening I can't live my life worried about perception. If we are talking about an established procedure then we will just follow established procedure. I can assure you that there are a lot of times that I, or Brad and I, will go into a board meeting and tell them that these are things that we suggest that we could do and change. Then we have these heated arguments and debates about it. We don't always reach the end result that I think is appropriate.

28:52 Chair Ellis

If I were in the situation that CIDC is in where I only had one paying source - I'll use the word "client" because we are the ones that contract with you - and that source had repeatedly expressed a strong desire to see some diversification on your board, I think I would be inclined to respond to that. It just seems to me ...

29:20 R. Gray

That point has been made.

29:24 Chair Ellis

This is the fifth occasion where we have brought it up. We are trying hard to ...

29:30 R. Gray

Believe me I understand exactly what you are saying. That point has been made and it has been argued. If somebody says to me, "Is that a rule that we have to play by or is it up to us how to make sure how we deliver the product?" my honest answer is that, "They would like to see this change but it is not a mandate." You may just find yourself in a position where you have to dictate that if you want it. I can't make people vote a certain way. I can only persuade them.

30:03 Chair Ellis

That may be where it goes.

30:03 R. Gray

It may very well be. We were conscientious enough to know that we needed an outside perspective, so the board member who retired was in civil practice only, state and business law, and provided that insight on our board for years. He left. He was stepping back from doing some of those duties. I went into the board meeting and said we need someone and I want someone who is not a contracting lawyer on this

board. We debated the issue, and it was kind of like this is as far outside as the board was going to let me go, so I went outside and recruited and that is where we are. I am not ignoring your comments. I never have. If I can't persuade the board that that is what they need to do, then you may just as managers have to tell them, "That is what is going to be a required part of your organization." If it is, it is. We are certainly not going to breach a contract.

31:11 Chair Ellis

Brad, do you want to comment?

31:12 B. Jonasson

Well, bringing on Judge Bagley was big stuff for us. We haven't had somebody like that. We haven't met with him yet but we are due to at the next board meeting. I see your comments being discussed again and we will see what Judge Bagley has to say about it. We may not need a mandate, formal mandate. I echo what Ron says. We even have debates about it and there are supporters for outside - Janet Stevens knows, we were on the Board of Governors together. She was a public member when I was a bar member. We value that kind of input and I know what that can mean for an organization. I understand your position and the attributes that you are mentioning come with a public member. As I say, much of what we talk about is the business that we really handle routinely on a day to day basis. Whether a public member would help with that or not, I think most of us think probably not, but there might be broader political and future organizational direction that the public member could help us with, maybe some budgetary matters that might come up that haven't yet. Whether it is purely speculative, or whether that is realistic or not, I don't know.

32:51 Chair Ellis

I believe in June you told us you were going through a bylaw revision process. What happened to that?

33:02 R. Gray

That is something that I have to deliver to the board of directors with suggestions. With all of the attorney evaluation process that was kind of on the back burner for a little bit. The attorney evaluation process was pretty intense and was labor intensive. That became a priority because we tried to get that done before the end of the year. That is still in the works. We have to adapt our bylaws because our bylaws were originally written 22 years ago. They are caveman stuff. We do have to update them. Quite frankly there are some suggestions that I am going to make for the organization that probably will have to be heatedly debated because one of the principles things that is at issue, just like you are talking about, is do we need to modify the board structure, with attorneys retiring and going to the bench, and people that we have used as resources throughout the years, because of their continuity and their expertise and the original philosophy of CIDC. Do we need to change our bylaws to accommodate the passage of time? It is a really viable issue. That is a task that I have to do.

34:19 Chair Ellis

I don't want to get into particular cases, so I am not asking that, but at one of our meetings at least Commissioner Ozanne understood you to have acknowledged that least one of those practicing with you probably should not be continuing to practice.

34:41 R. Gray

That is one of the attorneys who is under scrutiny right now, severe scrutiny.

34:45 Chair Ellis

I guess where I am interested - and I really don't want the particulars, I want the process - one of the dangers of a self-contained consortium is it becomes self-protecting. It becomes very hard to tell any one member that this isn't working and we are going to part company, because everybody has a part of them that doesn't want to do that because they could be subject to that. What is your group's decision making process if you have an under performing lawyer?

35:30 R. Gray

Well, we have a series of steps unless there is an emergency that arises. With this attorney evaluation process we are in a slightly different process, or course. We have two board members who are working with the lawyers and they are going to report to the board. If there is not satisfactory progress being made then that contract will be terminated on the spot if the board decides to do that. That authority is there

and it is built into the contract. There is no doubt that the attorneys know that that is there. The normal process is if something is brought to my attention, and there was one just recently that was brought to my attention, is that I immediately contact the lawyer and tell them that here is the complaint and I need an explanation and a solution. If I don't get a response that I think is appropriate then I drag Brad in and we both meet with the lawyer. There is this progressive series of steps that are involved. If we are not satisfied then we bring the board as a whole in. Many years ago we had a problem with a lawyer that I met with who didn't respond appropriately. Brad and I went to his office shortly thereafter. There was no way that the attorney could rectify the problems. Before the board took action, and he knew it was coming, he just withdrew from CIDC. Generally if I get any information I immediately share it with Brad and I tell him I am going to go work on it. I ask him if he wants to be involved or not? If it is something that we think can easily be addressed, and we can make the lawyer cure the problem, then I take it on. If it is something that we think is serious that needs attention, it is kind of better if both of us come from that perspective so they don't think it is just me. They identify it with me if it is only me they talk to. I will also tell you, just so you know that I am one of the most vehement quality control people on the board. Brad can tell you there have been board meetings where I will sit there and rant if I see something wrong with a lawyer. It needs to be fixed and it needs to be fixed immediately. Sometimes that has resulted in an agreement that another board member will go take the attorney to task because they don't want it to be personal for me. I am probably one of the most adamant quality control people you could have.

38:11 Chair Ellis

I do want to commend your group for this review process. I think that sounds very helpful. One question I had about it, you said you stayed out of it. I couldn't tell whether that was just time constraints or you felt that there was some kind of conflict?

38:24 R. Gray

I think the board made a conscious decision, and it was my suggestion, that it not be driven by my personality. The board needed to be actively involved in the evaluations and just mathematically we had eight board members and we could do it in four teams. Then I could step out and could collate the information as the administrator and take an outside perspective.

38:50 Chair Ellis

You are participating in the follow up but not in the intake.

38:53 R. Gray

I didn't do any of the individual interviews, because, quite frankly, I was feeding information to the board about my observations of the attorneys over the years anyway. At the meeting I basically said there are a few lawyers that I have problems with, and here are the problems, and I think that these need to be addressed as well. I was hopeful that the two person board team would then take that into account when they talk to them and then my personality would be out of it. The lawyers know my intensity and I don't want them to consider that it is me all the time that is doing this. I want them to know that it is the board that has the authority and it is the board who is making those decisions. I purposely did not involve myself in the individual interviews.

39:40 Chair Ellis

Any other questions or comments for Ron?

39:40 J. Potter

I understood both of you to say that you haven't had issues that you couldn't handle within the board that have come up. Have there been any times where you may have had to hire somebody from the outside, a CPA, to help you on any tax issues. A personnel lawyer to help you on personnel issues?

40:00 R. Gray

Well, we don't have personnel. Everybody is an independent contractor.

40:10 J. Potter

Have you had a lawyer look at that?

40:10 R. Gray

We don't have employees.

- 40:17 J. Potter The standards on independent contractors can be quite confusing and a lot of people have been caught up in that.
- 40:22 R. Gray You remember the unpleasantness a few years ago on the backs of our lawyers. We spent a lot of money to hire outside lawyers because of a federal issue that was raised on us a few years ago, which died, thankfully, a happy death. It cost our lawyers a lot of money to have an outside lawyer hired to review years of work by CIDC, I mean box loads of work, and then basically go and tell them there isn't a problem here. There is no violation of federal law, but that was by an outside complaint that cost our lawyers in excess of \$20,000 in legal fees.
- 41:03 B. Jonassen It was an outside complaint because we suspended the lawyer who we think then complained.
- 41:09 Chair Ellis This is the FTC deal?
- 41:13 R. Gray Yes, and we appreciated all of your support because it made a big difference. We never did get an official ruling; it just died. With the passage of time we were finally told by the lawyers that, "If it has been this long you don't have a problem." We just closed the file and we have never heard anything since. We have not hesitated to seek that assistance if we need it even at the expense of our lawyers having to pony up the money. The other thing is that we, at the suggestion of some attorneys, went a year ago and talked to a CPA firm that specialized in audits and asked them to review all of our processes to see if we were adequately handling our financial issues and reporting to our lawyers. Then we created an annual report form to submit to our lawyers so that they would be able to track not only the case flow – all of our books are open books. Lawyers can go look at them at any time, but they weren't satisfied with the fact that they could go do that. They wanted some kind of structured annual report that they could review. We consulted with an accounting firm. Brad, and I, and Janine met with them. We spent some money for them to review our processes and talk about whether we really we needed to do a corporate audit or whether what we were doing was appropriate given the nature of our organization. Then we created some reporting formats that we hadn't used before, so we have done that as well. We are not anti-seeking advice if we need it. We certainly know that it is a business and we have a responsibility.
- 43:00 J. Potter You can probably gather where I am going with this and you have heard Peter and the chair prod you more and more to get some outside members. If I were in your shoes and on the board, I would want to have an outside person and I would be lobbying to get a CPA kind of trained person to sit on the board.
- 43:19 R. Gray We do have a CPA that does everything for us. I don't know whether he would be willing to do that because he is kind of like hired by us.
- 43:30 J. Potter It would be a conflict.
- 43:33 R. Gray We don't do our own taxes and our own books. That is done outside and independently.
- 43:38 J. Potter As it should be. To have a CPA type person on your board would just be to give you advice to keep you out of trouble, potentially, or give you advice that may help with business practices that individual lawyers might benefit from too.
- 43:59 R. Gray I am treading on thin ice, but I will just assure you that this has also been discussed and it has been advocated, but I can't tell you what happens in a board meeting because I would be breaching confidence. I do appreciate the comments and we will relay all of this to our board. I don't have any problem doing that. You may have gathered that my approach is that I believe we do need the independence, but I am just one vote.

44:32 Chair Ellis Other comments or questions? Thanks, Ron. You hear some push back from us and that is not intended to say that we don't recognize the good things. There are quite a lot of good things.

44:53 R. Gray Everybody knows that I am kind of feisty, but I don't ever shy away from criticism. I can't do it in this world. It would be stupid.

45:03 Chair Ellis Brad, nice to see you. At many of our meetings we do have people in your position come, even when theirs is not the principle subject, because we try very hard to have good communication not just with administrators but also with the major participants.

45:24 B. Jonasson I take that as an invitation.

45:36 Chair Ellis Thanks. Marty, do you want to share with us what is going with your group?

45:50 M. Cohen Sure. Ms. Canady was here but had court at 11:30 and had to leave. She was going to help me out on some issues that have been going on in the dependency part of our contract. I have some notes here and can hopefully address that. I'm not sure how much you are aware, just in terms of the last six months there has been a lot going on here in Clackamas County as far as the juvenile court is concerned, structurally. Judge Darling had been hearing all of the juvenile cases and as of three or so months ago she is no longer hearing any dependency cases. Judge Van Dyk is now doing the dependency cases. Judge Darling is hearing the delinquency cases plus a few of the older dependency cases. We have gone through a lot of changes. We have to go to different courtrooms now rather than one courtroom. One day of week some of the hearings are being held at the courthouse. Other hearings are at the juvenile department and we are able to work with Judge Van Dyke and his staff in terms of organizing how all of this is going to look and how we are going to be dealing with the dependency cases. That has taken up quite a bit of our time over the last three or four months in working with the court and dealing with these changes. There is actually a meeting next Thursday, that Judge Van Dyk is going to be chairing, with all the stakeholders in terms of the dependency cases, to try and finalize what that part of the juvenile court system is going to be looking like here in Clackamas County for at least the foreseeable future. Ms. Canady is going to be attending that hearing. Delinquency hearings are now on Mondays and alternate Wednesdays after three o'clock. Dependency hearings are all day on Thursdays and the other alternate Wednesday so that we are not, hopefully, conflicting with any delinquency work. The major issue that comes up is setting trials and having trials not conflicting with the regular juvenile court days, and being able to get that worked out with the court staff in terms of organizing everybody's schedules and being able to deal with them. There have been ongoing discussions with Judge Van Dyk, and DHS and the CASAS in terms of how all of us are going to work with this. There have been discussions as to another issue that had been brought up previously with you in terms of covering dependency preliminary hearing. We are working on that and working towards a quicker resolution of cases in general. Getting information out to all of the parties so that we can handle that. That is something that, I believe, will be discussed next Thursday at the meeting. There have been regular meetings with DHS on dependency cases and how we are going to continue to improve those. I think some of the other issues that we had brought up in our prior meeting, and I sat listening to your discussions with Mr. Gray in terms of the boards and succession. We felt that it was important for us to perhaps have somebody with a medical background and education background to help us with our board. We have made contacts with a few people to help us with that. We have not been successful in being able to get those people on our board. We felt that people with those areas of expertise would be helpful for us. In listening to the comments in terms of people in the banking industry or CPAs, I would also agree that that might be helpful. We have 10 attorneys so I am not sure if we expand our board too much we are going to have as many people on the board as we have attorneys working in our group. I am

not sure in terms of the balance how that might work. We will continue to look for more outside people that would be willing to work with us. It is not that we have that many board meetings. Perhaps we just talked to the wrong people in terms of getting them in. I don't believe that it would be that much of a time commitment for them.

- 51:14 S. McCrea Was that the reason that was given, the time commitment?
- 51:15 M. Cohen I had not contacted them. I know Ms. Canady had talked to a couple of people. Mr. Clancy, Mike Clancy, had talked to some. That was what I recall. I am not sure if there was anything else that was their rationale in terms of getting on the board.
- 51:40 J. Potter Maybe not exciting.
- 51:46 S. McCrea You will have to offer better snacks.
- 51:47 Hon. Elizabeth Welch I would think that you would have better luck in getting outsiders than the adult system people would. There are people out there who really care about kids' issues.
- 52:00 M. Cohen We will continue to strive to do that. We are also down in numbers. They continue to fall after our last meeting, but over the last – well, during the time of this transition in terms of judges, our cases have begun to increase in terms of the dependency cases. I don't have a real good understanding as to why that is necessarily. Our numbers there have been increasing. We have also lost an attorney. Karen Brisbin is not taking cases right now. She was appointed Justice of the Peace here in Clackamas County. That just started last month, perhaps this month. She is taking a leave of absence, more or less to kind of evaluate how much time she has in terms of doing that job and continuing to work with us. We have another attorney who is no longer taking dependency cases. They are still doing delinquency cases and currently we have about three or four resumes that we are reviewing right now in terms of adding new people to our group. These would be younger attorneys, younger than those of us who have been doing this for the last 15, 20 plus years, to add to our group. Now that we have had some attorneys leave or cut back, there is a need to increase our attorneys and decrease the workload per attorney. Our delinquency caseload is still fairly low right now. That has not picked up. We are still trying to work with the various groups. We have a meeting that is probably going to be taking place in March with the CASAs. I think historically there has been some conflict or difficulties in understanding roles between the attorneys and the CASAs. We are trying to set up a meet and greet type thing with them in March - very informal - and just sit down and talk and try and bring down some of the barriers that may exist between us and that organization.
- 54:55 Chair Ellis Questions for Marty?
- 54:54 J. Potter It is not so much a question, Marty, it is a statement from you maybe. You have been doing this a long time.
- 54:59 M. Cohen Yes.
- 54:59 J. Potter And notwithstanding the pressure that you might be feeling from this Commission or anybody else, if you could make the decision to change the service delivery or improve it, or do anything at all, what would you do?
- 55:15 M. Cohen Service delivery in terms of the services we are providing?
- 55:16 J. Potter Sure and the way you are going about doing it. You have a board, but if you could just restructure the whole thing would you change anything?

55:29 M. Cohen I believe that we need to add more people to our board. I think the one thing that we haven't done that Ron had talked about is having people who are our member attorneys be a part of the board. That is something that I have wanted to do. I think that it is important to do that so that they know what I do and on a more direct basis they know what the board does. I think that would get into the succession thing that has been talked about so that we have that knowledge base there. The other thing, and I know that we are getting more money to deal with dependency cases, but I think there is still – we had an attorney who said, "I just can't make enough money doing this," and left. She had been with us for about six months. Being able to pay people more money to do everything that is expected to deal with a dependency case, for the most part, that would be something that I would be like to be able to do.

56:48 J. Potter So a little bit more member involvement and some more money?

56:53 M. Cohen Yes.

56:58 Chair Ellis Other comments or questions?

57:00 I. Swenson Question. I know Gay had asked for copies of evaluation forms from other providers. I think you were looking at creating a new process for evaluating lawyers. Is that happening? My other question had to do with the child specialists.

57:21 M. Cohen We do have a trial that we set up, and I think it started a couple of months ago, where two attorneys are going to be appointed to represent children. We are going to look at that over the next six months and see how that works. The other attorneys that are taking dependency cases would only be taking adults or the parents. We have set up an evaluation system for the organization as a whole. We were actually looking at that a couple of weeks ago. That is ready to go and that could be sent out. It is one of those online type of evaluations that could be done, but that was for the organization and not necessarily per attorney. With all of these other things with the court, I haven't had an opportunity to finalize the other evaluation process. I know that that needs to be done.

58:32 Chair Ellis Good. Thanks.

58:33 M. Cohen You're welcome.

**Agenda Item No. 3** **Boards of Directors for Public Defense Contractors**

58:38 Chair Ellis Item No.3 is a discussion on boards of directors. I am not quite sure who is here that wants to share their thoughts on this.

58:52 P. Ozanne Can I interrupt, Mr. Chair? The last item was listed as an action item. Was there some anticipation of some action?

58:59 Chair Ellis My thought is I really wanted to have the discussion that we are about to have and then return to Clackamas.

59:13 P. Ozanne Sure. Of course.

59:18 I. Swenson Mr. Chair, we did invite a number of our contractors, or their board representatives, to be here to talk with you today about how things are going and what they would recommend in terms of their experience. We have Paul Lipscomb. We have Lane Borg and Keith Rogers. I am expecting a member of the Public Defender's board in Marion County. I don't see that person yet.

1:00:00 P. Levy Ingrid, I have some comments to share from Karen Stenard who could not be here.

1:00:04 I. Swenson What I handed out this morning, and I am sorry it got to you so late, is a document you may have seen before. It is a list of best practices, which is evolving. I provided

it to you because it does include a fairly comprehensive discussion of boards and recommendations for good board practices with an explanation of why those practices are recommended.

1:00:32 Chair Ellis

Lane, do you want to come up here?

1:00:49 L. Borg

Thank you. For the record, Lane Borg, executive director of Metropolitan Public Defenders. Paul Levy did ask me to think about and prepare some comments on this as well as the next topic, performance reviews. As some of the board members may be aware, I got an opportunity to speak on this topic at the management conference and do some further thinking about it. I do think that there is a blueprint already in place through the IRS 990 form to give us some guidance on what the role of a board really is. What is the board supposed to be doing? The theory behind that, just to revisit that briefly, is that through practices very similar to some of the best practices listed in the draft document that Ingrid gave you, is that through things like transparency and accountability and processes that are in place, policies that are set by the board, that there will be better management, that there will be more responsibility and the public will be served by the non-profits, as most of these are, that are spending the public's money. I would have to say in our situation, and we have had an expansion of the board since my coming on board, we kind of embrace the independent model in a super way. We have seven board members all of which met the definition of an independent board member under the IRS 990 definition. That means none of them are employees of the organization or receive money from the organization or even do indigent defense work directly. Of the seven, two of them are non-lawyers. We have two others that are attorneys but not practicing. We have a law professor and a new board member who is consulting on diversity issues and advising higher education institutions. I think that the board has been relatively active in terms of setting policies, giving advice and direction, but as has been discussed, and I am certainly not the only person in this room that has been an example, the biggest and most important thing that a board does for Metro is me. The fact that I am here through a succession and the board, for a lot of different reasons, felt that it was important to – and this is not in anyway to comment on any other candidates for that position - get some outside influence into the organization. Even though I had worked at Metro it had been 20 years since I had been there. That was a little bit atypical for non-profits which tend to be somewhat conservative and sort of grow within and hire from within, but I think that that was a reflection of an independent board, a board action and decision, and it occurs to me that it is important. I don't think you could get the same result, if it is judged that it is a good result that I am in this position, if you just sort hired people or got a committee together, or threw a group of people together, a blue ribbon panel together to hire somebody when that succession issue comes up because you need to have people that are committed and know the organization. There were a couple of board members that are gone now from the board, but stayed and were committed to seeing that process through. I am on the board of the Oregon State University Research Foundation and we are going through that now with an executive director transition. Having seen that lesson that was my advice to the executive committee, "You had better lock in a group that says, 'We are here until we get through this,' so you have people with institutional memory, commitment and an understanding of what is important to the organization so that they can do the best job possible in picking them." I think in the bigger sense that the most important thing that a board does in a public defender organization is pick, supervise, and oversee the executive director who they then rely on to run the organization.

1:05:31 Chair Ellis

This is probably a hard question for you because you come from a PD background. Do you see differences on this subject between the PD structure and the consortium structure?

1:05:47 L. Borg

Only in what that executive director ends up doing down the line. As Ron Gray was just talking about, he doesn't do the type of personnel evaluations. The evaluations we are doing have to do as much with being an employee of my organization as they

do with the quality of representation. You as an organization are signing a contract and given a whole bunch of money with oversight but not day to day direction. I think Ron Gray's function in this county, Clackamas County, is not that dissimilar to my function at Metropolitan Public Defender. I am administering a lot of money with a lot of responsibility for coverage. Here it is a sole provider. In that regard maybe the argument could be made you want more assurances from a board that there is oversight, that there is somebody there to make sure that there is a good steward of the money that is being spent that way. While the day to day operations are different, what your guys' biggest concern is, "Are we giving contracts to people who are responsible and are going to do good work and a good job?" I don't know that it is that much different between a consortium and a PD.

- 1:07:14 Chair Ellis Implicit, I think, in some of the comments we got from two previous – at least Ron and his colleague is it is really hard to find someone. What has been your experience in terms of finding people who are not providers? They may be lawyers, but they are not providers. They may be business people or academic people, or whatever. How hard has it been to find people?
- 1:07:40 L. Borg Well, not hard for us. I think that that is due to Jim Hennings and to the organization and its reputation within the community. We are more in a position of having to politely decline people who have expressed interest in being on the board. I am, quite frankly, more concerned with how we have had a very interesting increase in our board of the members that are on there. My concern is if we have more openings I need to get some alumni. We have only got two board members that worked at the organization in the past. Both of them worked at the organization more than 25 years ago. That hasn't been a problem for us. I think, though, in listening to Marty he has a small organization, but one that should have, as Commissioner Welch suggested, some real sex appeal to getting people in because people are concerned about kids. I think what you do is you have to offer them a meaningful experience. We are not offering them money so you have to get somebody excited about it. We have talked about the new board members that we brought in and we did a retreat recently, a half-day retreat that included senior staff at the office as well as a lot of the new board members. It was really talking about what is the mission of office? What is their involvement? People want to give of their time but they want it to be a meaningful experience. I think what you have to do is figure out why you want them on there and what they are going to do for you in the short run. In the long run what they are going to do for you is know your organization. When you have a succession they will be the ones that can provide an insight into that. I think you do have to figure out something for them to do. We have a new board member who actually works for Multnomah County, David Austin, and wants to talk to us about his background in messaging and communication.
- 1:09:50 Chair Ellis I know something of what your structure used to be and it may still be somewhat similar. Do you still have outside appointing sources for at least some of the board members?
- 1:09:57 L. Borg Yes. Four of the board members are outside appointing sources. It is Washington County, Multnomah County, the Chief Justice, and the State Bar. Those are the four outside authorities.
- 1:10:14 Chair Ellis Then those four pick the other three?
- 1:10:12 L. Borg Correct.
- 1:10:17 Chair Ellis So it is a blended self-perpetuation.
- 1:10:20 L. Borg Correct. With some flexibility on the board appointed.

- 1:10:29 Chair Ellis      On the board members, how would you describe the role non-lawyers are playing on the board versus lawyers, either alumni or practitioners in other fields? Describe that.
- 1:10:46 L. Borg      I will give you examples from our retreat that we did recently that was very poignant especially with having some of our chiefs, having some of our middle level management people there. The non-lawyers were asking the questions, the very basic questions, that we need to be examining internally that I don't know would have occurred to the practitioners who would be thinking more strategically or clinically about it. For instance, we have a legislator on our board who just put it very directly, "What are your measures for success? How do you define success? Is it not guilty? Is it acquittals, dismissals, days in jail? What is your measure of success?" That took some people back a little bit and got us to think about what it is. Another non-lawyer board member – I should say non-practicing - is a fairly new board member who is able to talk to us in a very pragmatic fashion about what does diversity mean in 2009? What does that mean? What is our role in that? How do we measure that? Are we really doing enough outreach, or the right kind of outreach, so that we are addressing those goals, which doesn't just mean recruiting. It means providing professional development. It means retention of minority applicants that will provide long-term, meaningful, professional development. What defense lawyers are good at is pushing me and quizzing me about if I make some new proposal on say death penalty or something like that, "Do you really have the right structure in place?" Frankly, on the non-lawyers, a lot of that is lost a little bit on them. It is that outside stuff. That bigger thing. "Are you treating your employees right? Are you developing right? Are you messaging right? What is the story you are telling? Why aren't you talking about that? That sounds interesting. Why aren't you talking to the public about that?"
- 1:13:02 Chair Ellis      Any questions?
- 1:13:08 J. Potter      We have kicked this around for years, and if the surveys are to be believed that we have just done, we have a lot more people that now have boards of directors. We are honing the concept. There are new ideas. This Commission is committed to the idea of having boards. We think it is a positive thing. I am interested in hearing from you and everybody else that might make the argument for not having a board - putting on different hats. You have a public defender hat, but put on a consortium hat or put a private law firm hat. Why would you not want to have a board? I ask that in part to help us bring those along that may not have boards. They may have good reasons for not having boards. If there are good reasons we need to know about them. If there are good reasons that we can work around we should know about that too. Why would you not want to have a board?
- 1:14:10 L. Borg      That is a hard one for me to answer because although I started in public defense work, I did have 13 years in private practice and a significant part of my private practice was advising small businesses.
- 1:14:21 J. Potter      Focus on that. You were in private practice and now you have a contract from us. You have got four or five lawyers in your firm.
- 1:14:30 L. Borg      I think the concept of a board, or a robust independent board, is harder to justify when you get to like Marty Cohen's situation. Ten is probably okay, but if you had five lawyers in your consortium or three lawyers, I think what happens is either you have a board that has no purpose, no meaning, and you dilute what the value of that is. You get examples then of boards that aren't doing what they are supposed to be doing in oversight, guidance, and policy setting, that type of thing. I think the smaller you are the harder it is to justify. I think that there is a legitimate issue although I would still argue that consortiums – and I respect Ron Gray's comments that, "We are independent contractors," sort of thing - I have looked at their agreements and I have looked at the organization and I think from a business lawyer's point of view, they have a whole lot more of a business organization entity

to them that I think they hope doesn't get examined too directly. But take somebody like Jack Morris up in the gorge. I don't know what the purpose of his organization having a board would be because it is a private law firm. Now maybe the Commission's concerns can be addressed by saying, "We need some kind of specific audit done," maybe not annually, but bi-annually, every three years - somebody that goes in and asks, "Are you doing what you are supposed to be doing that meets the 990?" the public version of Sarbanes Oxley, in that somebody is checking to make sure that there is some substance behind there. I think in those private organizations it becomes harder to say that just because we are giving you a contract you should have a board doing that.

1:16:36 C. Lazenby

The accountability becomes a difficult problem for us. When Peter was the executive director we started the process of trying to build metrics into the system with an eye, in part, not completely, but in part to being able to go back to the legislature and saying, "We have been good stewards of your money and we have spent them well. Here are our metrics." It does get to be difficult. What are your metrics? Is it not guilty? Is it number of cases that you have done? That becomes more difficult, and since some members of the Commission have expressed an interest in delving more deeply into the criteria for contract levels and contract negotiations, then that accountability is going to become even more important for us to have and be able to look at it and compare apples to apples whether it is Ron Gray or Jack Morris or Metro. The three of you are completely different critters. Even though you are part of the same system and funded with the same dollars, it is impossible for us to compare you in any objective way that we can actually say that we are getting quality on all points and we are planning for the future and building a strong foundation for the system. It is perplexing.

1:18:00 Chair Ellis

Other questions for Lane?

1:18:00 P. Ozanne

I will just toss it out. Lane, you pointed something out that I think we struggled with and I think our board references are to consortia and non-profit public defenders. You say it is pretty awkward to have a board in a private firm. For all of you who are going to react to this I appreciate your comments. You might want to do something with a private law firm even though they are private since at some point the revenue they depend on whether that is all they do or somewhere close to that, is from this work. When I was the executive director I shied away from being that intrusive to say, "You have to have a board," but I wonder whether an advisory committee - and your point is well taken about keeping people engaged who have something to offer and not feel like they are window dressing - but an advisory committee both for the operation but also - we haven't talked about it here today, but also that role when we need what I will call business development, but we often call it lobbying - when we need community support for what we do. It would seem to me that an advisory committee, and let's pick on Jack Morris, I would say that it might be beneficial, arguably, and maybe not, but beneficial in the community of Hood River and The Dalles for some private, unaligned people to understand the defense. We have had that. I think of Geoff Gilfoy who has been a consultant. He has been a great spokesperson. He said, "I didn't even understand your business and now I do." He has really helped us in many ways. I wonder if there is any potential value in that or is it just too cumbersome and intrusive.

1:19:53 L. Borg

I think in a perfect world that might be advisable. I don't know that I would set that out to say that you are required to have it but it might be a suggestion. Here is an idea of having an advisory board or somebody you connect with because what that is going to do, it occurs to me, is kind of substitute for what used to happen say 25, 30, 40 years ago in rural communities is that you would be a member of the rotary or organizations that would get to know you. Through those informal conversations you would be educating people so that when there is an issue there is somebody to call on. I have to tell you that has been an education for me on that board I mentioned at OSU. It is made up a few professionals like me, but mostly retired professors in the Ag department and then farmers from all over the state. That has

been a wonderful tool for the College of Agriculture when the legislature starts looking at something that they can immediately call on four or five farmers from every single region in the state to call a legislator and say, "You know, basic research is important at land grant schools and you should be doing that." Well the same thing can be happening but it is going to be more authoritative if the person has actually met with you. Maybe it is trying to substitute for that old rotary type of contact in a smaller community, but I think it can be effective.

1:21:29 Chair Ellis

Thanks. Olcott and Paul do you guys want to share because I think your situation much more directly parallels the Clackamas one we are looking at. I am very interested in your observations.

1:21:58 P. Lipscomb

I am really glad that Olcott is here today because I only have 18 months direct involvement with MCAD down in Marion County. He can give you some more of the history. What I can tell you is that in 2006 amended articles of incorporation were adopted by the board. That took an 11 member board of individuals, who were all working in the consortium, and cut it down to nine members. Of those nine members, three are appointed by outside entities, one by the Marion County Bar Association, one by Willamette University - we have law professor on our board - and one by the circuit court. That has been the case since 2006. I have only been with MCAD for 18 months. My experience with MCAD has always involved three outside members. I find it very effective. It would be hard for me to imagine why we wouldn't want to do it. These are the people that I report to. These are the people that evaluate me. I am human. I am pretty self-motivated, but I am human and when we are a week away from the next board meeting I am paying better attention, making sure that what I told the board would get done does get done. I just think that is pretty normal and natural. We have almost 50 members in MCAD now. We have also recently gone through an evaluation process. We did it more externally than internally. We involved the circuit court and received almost a universal response from the judges. It was a very time consuming process where each of our members had to be evaluated on quite a number of different criteria. I was very pleased and gladdened by the amount of time and effort that the judges put into that. It was very helpful to me as executive director to exercise the authority given to me by my board, which was to do the hard work of the quality control, and we did that. There are two former members who did not get, will not get, contracts in this contracting period. We have three members who got short contracts, temporary contracts that expire on May 1. At that time they will be reevaluated again and there will be a determination made as to whether they get a further contract with MCAD or not. My board has been very supportive of me and my efforts. They hired me to improve the quality of the organization and to respond to some of the concerns of your group. They have been diligent about making sure that that is my principal order of business.

1:25:35 Chair Ellis

Olcott?

1:25:35 O. Thompson

Thank you. It seems to me as if I have been a member of the board since the beginning of time, although I know I haven't. The board actually had nine members originally and it had nine members for years and years. About two years after I joined, the composition changed. The then executive director Steve Gorham and a couple of board members, myself included, started to - and it was a response to stuff that came out of your Commission and the public defense seminars - think, "Hey, outside members probably would be pretty good." What I heard as an underlying theme of Ron Gray's comments was he couldn't get his members to let him get outside members on his board. Ultimately what pushed us over the hump was you folks. We took what you said to us, and what you kept saying at the public defense management conferences, and told our members we got to do it. The board went up to 11 members, then 10, and then nine just so we didn't kick anybody off. As far as our board is concerned the members elect six of our nine member board. They can elect anybody they want to. Traditionally they have always elected members of MCAD, but they could elect anybody they want to. The three appointing entities can

appoint anybody they want to except prosecutors. We have urged them not to appoint MCAD members. In fact, one of our outside members was technically a member of MCAD when he got appointed. He was not doing any work for us but he was still a member. Just some comments about boards on the whole. I'm not a PD person but I assume that all the PD offices have boards. I hope they do. I would urge you to require consortia to have them on the whole. A year and a half from now you are going to have contracts again. Consortia should have boards, period.

- 1:28:03 Chair Ellis      When you say have boards, implicit in that, I think, non-member participants and hopefully outside appointing sources.
- 1:28:13 O. Thompson      Well, my comment about boards, are based in part based on my experience with MCAD and another organization where I was not a member of the board, but the other organization for a long time had a self-perpetuating board. That organization stagnated. Naturally a board appoints a person they like and that is human nature. A certain percentage should be outside members from the consortia, period. You want that outside thing. Okay, fine, a banker probably can't do a real good job of evaluating me as an attorney and my effectiveness in the courtroom as an attorney making the legal arguments, but they can evaluate me and my effectiveness as a business person. The word out of the judges is I am in the courtroom yelling and screaming all the time. They may not know how legally sound my arguments are, but they can say that is not appropriate. They can do those evaluations. One thing, and Lane touched on it, is real small consortia. Because of where Marion County is Polk County is right there. There is the overflow contract that is a consortia but it has only four members. What do you do about a board for that?
- 1:29:42 Chair Ellis      I can easily see, and I don't know where the line gets drawn whether it is 10 or what it is, but what we are talking about is an issue that pertains to larger groups. The very small...
- 1:30:02 O. Thompson      I agree with you. It makes sense to me for this Commission to require consortia, and it is a policy issue where that line is drawn, to have boards, not self-perpetuating but with outside members. Absolutely, I think that is the logical step. I don't know what you do about law firms. I think advisory boards make sense.
- 1:30:30 Chair Ellis      Any other questions or comments for them?
- 1:30:35 J. Potter      The chair mentioned that you are somewhat similar to Clackamas County. You have a larger consortium by almost twice, you have 50 or so people in your consortium and they have 28 or so. Paul, you are not a member of the board but in Clackamas County the administrator is a member of the board. Is there an argument to be made one way or the other that the administrator should be on the board?
- 1:31:00 P. Lipscomb      In my view I don't think the administrator should be on the board. I think it is a healthy for the board to have an employee who doesn't have a voice in the policy decisions that are made. My board will listen to me but I don't vote at meetings and it doesn't always go my way. I think that is really good.
- 1:31:25 O. Thompson      I agree with Paul. I don't think an actual employee should be a member of the board. It is a conflict.
- 1:31:34 P. Ozanne      A question to both of you. I wonder now about your suggestion, Olcott, about an across the board requirement. If we didn't take that route, and I don't remember if we actually mandated that MCAD have a board with outside members ...
- 1:31:56 Chair Ellis      We cajoled.
- 1:31:57 O. Thompson      You made the very strong suggestion and that was what enabled the folks who were already working on it to convince the membership to change the bylaws and articles of incorporation.

1:32:16 Chair Ellis I remember the meeting.

1:32:16 O. Thompson I am thankful that you did.

1:32:18 P. Ozanne I don't know if we do cajoled squared or what we do next, but I kind of wonder how do you think it would work if we said, "You have to have a board." People would be brought in and not welcomed. How would that work? Who would want that job?

1:33:01 Chair Ellis We can dialogue as well as take input. What would be wrong with us adopting a policy for consortia, above whatever number we are going to talk about, to essentially adopt our best practice and say, "Our expectation is in the next contracting cycle and if it isn't there we are going to have a real problem with that contract." That gives them 18 months to go through whatever anguish they might go through. I can see us doing that and it is not limited to just CDIC. They happen to be most visible in the room here today. I think they may be the only one of their size that hasn't made this kind of progress.

1:34:01 P. Ozanne I didn't know whether there would be that kind of consensus on the Commission.

1:34:06 Chair Ellis Well, we are going to find out.

1:34:07 O. Thompson I would do what the chair suggests and make it applicable to everybody. Why single somebody out? To the extent that MCAD already has a board that "qualifies" under the best practices, we are happy. Our experience with the board was that Willamette appointed a professor. She came to one board meeting and said, "No way!" Two things happened. One, we cleaned up our act a whole lot better than we had cleaned it up at that point. It was a very dysfunctional board at that point. We cleaned it up and they appointed someone else who has turned out to be a great board member. I think she would have been a great board member too. Let everybody know it is coming. There were members on our board who did not want outside members. They were happy after a couple of board meetings that we had outside members. It is amazing. If you get good outside members - and we got good outside members who knew how boards were supposed to work, who knew what their function was in general - they turned everybody around immediately.

1:35:35 C. Lazenby I think we do need to be mindful though of what Lane was pointing out about the scale. If you get down where you have three providers, or two, or one provider, but I am leaning towards a rule that says we need to require this.

1:35:50 Hon. Elizabeth Welch I think this has been a wonderful discussion and very helpful from you folks on the other side of the table, but there is a second issue and that is does the board do anything? Without getting specific about it I think there is some reason to believe that there are some boards in this system now that probably don't do anything. They don't meet. In other words, I don't think you can just say they have to have a board and they should have outside members and all the good stuff people mentioned. To the extent that there was resistance, and I am speaking for myself, I find the resistance absolutely befuddling. I don't understand but we have run into a fair amount of, "Everything is just fine."

1:36:50 S. McCrea Just go away now.

1:36:50 C. Lazenby Leave that satchel of money and just go away. Just because we say there needs to be a board of directors that doesn't mean that they are going to change their attitude. They will go ahead and have the board of directors and they will still have the same issues. One other thing, I can't imagine a better person to run a large consortium or a PD than a former circuit court judge. It is so important that people get represented and whatever the stripe of a judge, and we all kind of end up with pretty much the

same stripes, it is so vital. It is intriguing to me to think about what Paul must do everyday. I would like to hear about it sometime.

- 1:37:56 Chair Ellis That was all praise.
- 1:37:55 P. Lipscomb I took it as such. When we met with the board last year at about this time for our review, our Marion County review, I gave you an annual report and I told you that I would be submitting a second annual report this year. You will get one from us next month before your March meeting.
- 1:38:25 J. Potter Olcott, is there anything else to add to the list of the arguments why you shouldn't have a board? My list now shows size may be a factor. Private lawyers, maybe not but maybe there is a business advisory board. Then this new idea that boards don't do anything anyway so why have a board? I am looking for the reasons why you might not want to have a board.
- 1:38:51 O. Thompson Because then you have more oversight. As a provider down in the trenches, I don't want anybody telling me what to do.
- 1:39:00 Chair Ellis You lose control.
- 1:39:02 O. Thompson It is an argument. I don't agree with it.
- 1:39:09 P. Lipscomb Some of the thorny issues that we have struggled with, and are still struggling with: is there any way for the consortium to limit the number of cases that an attorney handles when an attorney is working as an indigent provider in more than one county? So not all their cases are coming through us and what does it take to remain a member of MCAD? We have many members who as they mature in the practice and do less and less indigent defense are still emotionally attached to MCAD and simply don't want to fade away. Transitioning lawyers to an inactive status is something that is provided for in the bylaws but still resisted by the members who are heading in that direction. It seems like a couple of times a year the issue comes up as to how do we redefine, or should we redefine, what membership status is. The outside members are very good on those kinds of issues.
- 1:40:20 P. Ozanne Paul, your interest in knowing about the caseloads a lawyer handles outside the county, is that primarily a concern about workloads and taking on too much?
- 1:40:30 P. Lipscomb There are one or two lawyers in our group that have too much business to adequately attend to each case.
- 1:40:38 P. Ozanne It is a parallel issue of those who are practicing in other fields. Is that an issue that you think needs addressing? How busy they are with something else while they are taking cases at MCAD?
- 1:40:54 P. Lipscomb I think that would be a concern also, but I would encourage all of my members to take cases outside the indigent defense arena and not just in criminal law. There are some people that really want to specialize in criminal law. I think it is healthy. I am a generalist so maybe that is a prejudice of mine. I think it is really healthy to get your toe in the water in other fields of law as well. You will be the better for it and you will understand your clients better for it.
- 1:41:28 Chair Ellis Thank you. I want a sense of the pleasure of the Commission. The vice chair is about to kick me in the knee. Why don't we hear from Judge Darling and then what I would propose we do, unless there is additional input on boards generally, is go back and address Clackamas and how we want to deal with them.
- 1:42:03 I. Swenson Mr. Chair, just one thought on that. That is Judge Maurer may have comments that would be of interest to you before you make that decision. I'm not sure but he will

not get here until sometime during the noon hour. He is the last person scheduled to address this.

1:42:25 Chair Ellis

We will certainly hold up action until then.

1:42:26 P. Ozanne

Speaking of judges, I think we have a second career path for Judge Welch - consortium director.

1:42:43 Chair Ellis

Judge Darling, nice to see you again.

1:42:45 J. Darling

Thank you. Finishing up on this last conversation, which was fascinating to me, can I add to your list of reasons to not have a board? My area is too small to find board members. Think about Malheur and Lake. They have only got four people so how are they going to get a board? The other idea I was thinking about as I was listening to this is why couldn't an existing board serve outside itself? Like if this MCAD board is in good shape why couldn't it be the advisory board for somebody else's consortia that is too small to have its own? Lastly, I don't know if this one would ever work, but Plan B has now become overrun with available judges and that is not going to change. I think the time will come when we cannot keep all our Plan B judges busy. It is a fear I have as more and more judges retire. When the Plan B was new it was different. Now that it has been around long enough, I have been in discussions with the Chief myself and together with my circuit judges association about other ways that judges could satisfy Plan B time. One of my suggestions was participating in the legislative process and being there to advise different committees. There is a lot of discussion about that. I got to thinking about the value that Paul must bring to his board, why couldn't retired judges get Plan B credit time for assisting in the oversight of consortia if they wished to? It would cost you nothing because it is paid for already. I think there are some really cool things you could do there. It would just require a conversation with the Chief.

1:44:26 Chair Ellis

We had that issue eight or nine years ago with Judge Van Hoomissen. He thought somehow he couldn't serve, but I think that the rationale was you expected to have cases ...

1:44:46 P. Lipscomb

There has been a change since then. The change is that you folks are not part of the judicial department.

1:45:05 Chair Ellis

I am frankly groping for what the problem was. He was asked and he turned it down.

1:45:14 P. Lipscomb

He wanted to accept.

1:45:15 J. Darling

All things change. My purpose in coming today was not to add onto that discussion but to really just respond to some of the issues that came up last year regarding the juvenile contract here, the ID, which I think might be well served to have a board. I immediately started thinking about who it would be. What has happened since last year is many of the concerns I brought to you last year the group has really been responsive to. I sent Ingrid a letter indicating that there had been much movement towards ramping up practice, dedicating resources differently, taking a different approach. We lost some numbers in our group. The group is now too small, I think, to do the job and they are going to have to be recruiting some more. I think they are down to six or seven. On a dependency case when you have three at any one time you are in trouble. We need a conflict list, someone to qualify and determine who the conflict list is. I don't know if there is any work going on there. That would be helpful. Practice I think is on the rise. Again, we still face that the vast majority of the practitioners in the juvenile contract have been doing it for pushing 30 years. They do not have 30 years left to give. I find them struggling to find replacements. They mentored two young lawyers in the last year both of whom started dependency work and said, "I don't think so" and left. They had dedicated the resources and the mentoring only to have nothing to show for it but they did do it. Mike Clancy is

leading the mentoring effort. He is an excellent choice for that, but they need some other formalized mentoring program to find replacements. More of the lawyers are interested in delinquency than dependency. Dependency is often where the time spent is huge. My last point, before I would answer any questions is, I think over the next two years you would be well served to look at the payment structure and compare how ID gets paid for what they do particularly in the dependency world versus how other contractors are getting paid. There is almost a self-fulfilling prophecy that still lives within the payment structure. "I am not paid enough to do a good job. If I could be paid more I would work better." What is now being asked of these lawyers in the dependency arena is so much different than what was asked of them four, five, or six years ago. There has been no reconsideration of the payment structure. We just seem to keep recreating what is there. The other thing that has happened is one of our dependency lawyers is now in a lawsuit and as a result has quit. It is not often you get malpractice claims in the dependency world, but there is one now. I think it is pivotal and somebody has got to pay attention to what a lawyer's responsibility in the dependency world is. This will be interesting. I would ask you to look at that. I don't know if the group has asked you to but I think it would help if there was a different way of having a lawyer believe they were, in fact, better compensated for what they were doing, if you could structure how that money was used, not necessarily more money, but how to use it. Cases are down. Court appearances are down. Dependency case appearances are up, but delinquency cases are down. If you have any questions, that is all I have.

1:48:43 C. Lazenby

What do you think the reasons are they are down? Is it shrinking resources in the law enforcement community?

1:48:52 J. Darling

No. Actually in our county ...

1:48:56 C. Lazenby

People just behaving better?

1:48:54 J. Darling

No. In this county there has always been a view towards prevention and family involvement. They do far more up front in hopes of changing behavior before cases go. There is much more family involvement, many fewer removals even in the delinquency world. I think as a result our recidivism rates in this county are the lowest in the state. There are some long lasting changes that are occurring in family structures that are keeping those kids from coming back into our system, not necessarily as a result of what the lawyers are doing, but they are a part of it because they cooperated in helpful resolutions as opposed to just standing on their god given legal rights. There comes a point where legal rights and helping children collide and I have watched the lawyers struggle with what to do with it. Judges do too. If you can help a kid where is the line? The line should still be in the same place but it kind of gets swayed sometimes. There is a lot of collaboration here. If a kid did a bad thing we say, "Okay, you did a bad thing so now this is what are we going to do." More resources are how we are now going to prevent future bad behavior. I think it works. We don't have a lot commitments. We don't have a lot of residential placements. We could use more foster care. Other than that I don't know what the reason is. Maybe because we all live out on acreage and nobody can find us. There are not a lot of apartments. Most people in our county are living in individual homes separated by more than an arm's length. Sometimes you don't see and hear the problems that people living on top of each other see.

1:50:48 P. Ozanne

Judge, I wondered if you could elaborate on the idea of compensating people more fairly and also with no more money. I was wondering if you had some thoughts. In your mind is the current system not compensating people for things that they are doing and aren't getting compensated for, or is it a matter of maybe weighting cases based on their severity in the dependency area? What is your thinking about how we might respond to your concerns?

1:51:16 J. Darling

I think it is all of those. Permanency hearings are pivotal hearings now in the dependency world from a lawyer's point of view. If this issue is do we now give up

on the possibility of my client's ability to parent and move to an adoption plan, there should be a lot of work put into that. It is a pivotal point in a case. There should be a lot of preparation and effort. Sometimes those hearings last more than 40 minutes, sometimes a half a day. Some lawyers can parlay them into more than that but sometimes the issues demand it. I have had a 20 minutes permanency hearing and I have had a one day permanency hearing. It just kind of depends on the preparation of everybody and what has gone into getting that case where it. I am not so sure those hearings have been properly recognized for their importance. Lawyers are almost punished for getting a TPR case to a relinquishment as opposed to taking a TPR to trial in the compensation schedule. The case is more than just going to trial. It is all that other stuff and whether it is just wrong on the lawyer's part, or whether it is reality or both, whatever is going on in this particular group's payment structure leads them to believe that they are not being paid to do things that I think they either are or should be paid to do. That, I think, is where the inquiry has to be. Ask those lawyers what is it you perceive you are not being paid for? What is it you perceive should be paid for? It is more perception than reality, I think, and possibly reality. Why is the compensation structure the way it is today, when it is exactly the way it was eight years ago and dependency practice has changed dramatically? That is what I would look at. I can say I haven't compared those contracts and studied them, but I have them and the categories, other than adding a few things that they now get paid for, like six or seven years ago they weren't paid for CRB and now they are. They weren't paid for some of the conferences and now they are, so other than adding what you get paid for the basic structure of the contract is unchanged. I don't think that is reflective of practice.

1:53:34 Chair Ellis

Anything else? Thanks.

1:53:35 J. Darling

Thank you for letting me come.

1:53:40 Chair Ellis

Do you want a recess?

1:53:41 S. McCrea

Yes.

1:53:44 Chair Ellis

Let's keep it short.

(Recess)

2:04:00 Chair Ellis

Judge Maurer, if you want to come up and take the stand. Thanks for joining us. I know you have other things going on today, but we would be very interested in your observations of how things have progressed since last we were together, which I think was last April.

2:04:26 J. Maurer

Okay. My prepared remarks are very brief. I have none. We will go right to my observations. Like most things we do here in Clackamas County Circuit Court, we tend to think that in indigent defense we do better than everywhere else. We, as a court, are very satisfied with the indigent defense contract group and their efforts that we see day to day in court. I think we have the benefit of a vast reservoir of experience in the group, a remarkable and longstanding commitment to providing indigent defense services amongst that group. I think there is a very collegial relationship that fosters good mentoring opportunities within that group. On balance, I think we, as a combination of partners, really provide a very high level and very capable, competent, and committed level of indigent defense services to people who have been charged with crimes in our county. Certainly as a court we are very proud to see people in dire straits being charged with these serious crimes that we are able to provide them service. Since you were here last, after the meetings I know there were some questions about the composition of the board and some of the other ways in which perhaps looking to other models things may be borrowed that might even enhance the provision of service in our county. Those are things that I think the leadership of that group, Ron Gray, Brad Jonasson, took to heart. Ron Gray came and we talked at some length about some of the recommendations being made. We

talked about getting some non-members on the board of directors. I suggested several of our retired judges who bring a vast amount of experience and who are still very committed to our court. I think Judge Bagley has agreed to be a member of that board. I think that would be an additional resource for the group as a whole to manage and maintain the high quality and to keep an eye towards maintaining that level of service and looking at opportunities to continue to bring in quality, younger lawyers and maintain these high standards on a long-term basis. The group did a survey of all of the judges on the level of competence of the attorneys involved, asking for comments as well. There has been a longstanding relationship of sufficient closeness between the bench and these folks that have been involved in the process for a long period of time providing indigent defense services. Those of us on the bench have been very comfortable talking with Ron, and one of the senior members of that group, to let them know if we are seeing a problem with one of the lawyers or some issue that is being handled a particular way that causes us any concerns, so informally that kind of resolution of any questions about the kind of service being provided by any of the membership, or the handling of any issues generally that raises any concerns has always been something that would be readily raised with the leadership. I think that their relationship within the group is such that they have informally been able to handle those issues in a manner that has been satisfactory to everybody, certainly to the court. With this survey and the solicitation of some more formal comments, I think they have begun to create a more formal process of addressing those within their organization. My understanding is that some of the senior people have been involved, and continue to be involved, in monitoring for quality assurance and periodically just check with me, if there have been concerns raised to make sure that there isn't some ongoing problem that needs to be addressed more vigorously by them. On behalf of the judges I think we are very, very satisfied. We are really quite proud of the job that this particular group of lawyers does on a court appointed basis. We are very gratified.

2:10:39 Chair Ellis

Any comments or questions for Judge Maurer?

2:10:41 J. Potter

Clearly when a judge comes and talks to us and if the judge says, "We are not at all happy with the defense services or the providers," it causes us alarm. We are always happy to hear a judge say that they are happy with the services. Can you be more specific about the kinds of things you are happy with or what you might improve? It is tough for us, at times, to measure quality. To measure what is good you can look at trial rates. You can look at client satisfaction. Another test sometimes is to put yourself in a client's shoes. You are now, with your knowledge and background, you are a client and you are going to hire a lawyer within the consortium. Would there be anybody you wouldn't hire? Can you tell us how you come to the satisfaction level that you have achieved?

2:11:39 J. Maurer

I think the point you make about courts being completely assured of your gauge of quality is always tricky. You don't see trials everyday and you don't know the precise nature of the case. You can have a sense that it has been pretty effectively negotiated just looking at the charges. Then you get some flavor of that from the discussion at the time of plea or sentencing. I guess in broad strokes the thing that I think I see is - again maybe we are very lucky here in Clackamas County in this respect as well - but when you watch the dynamic between the DA's office and the indigent defense bar, there is almost universally - there are always some exceptions, certain cases that create exceptions - but there is almost always a sense of mutual respect for the job that the other is doing and an understanding about the role. In watching these cases - and obviously the bulk of these cases are negotiated, so that is a big, big piece of the process - I think that what I see and what you gather from looking at the requests for investigators and costs, you can see that in my view there has been a real concerted effort and an understanding that really is your first and best shot, and negotiating this in a manner that is going to be most favorable to your client and going to kind of staunch the bleeding here for your client. I see that the bulk of these lawyers have enough experience and understanding that really the best performance their client can expect from them is really at that early stage. We have

a process that has been incorporated into our docketing system, case manager process, which tries to concentrate those efforts at the front end of the case. We think that benefits everyone not the least of which is the defendant. The attorneys have been a part of that and understand the importance of that. I think they have incorporated that early preparation, early investigation, and targeted that case manager date as the date, which it is designed to do. I see a level of maturity that I think is also passed on, simply within the organizational culture there, that really targets that front end resolution of the case in way that is advantageous to the defense. The DA's office, as part of this process, has made a big commitment to make plea offers that are more generous than might be anticipated if they can resolve it early enough. There is a real incentive for the defendant to take advantage of that. It is a false lure if effectively you are giving up too much in terms of triable cases. Part of my gauge is seeing a concerted effort to really spend the time necessary, at an early stage, and really identify whether or not it makes any sense at all to be looking toward a trial of the case and to then resolve it, and most of time very, very beneficially to the client. Many times, although the court has as part of this process reserved the right to simply say that, "I am not going to accept that and I am going to allow the defendant to withdraw his plea," I just cannot, in good conscience, impose a sentence that would appear to be so lenient. When I find myself thinking that I think this defense lawyer did a pretty darn good job on this. I don't know all the nuances of the case but I think, at least, to the extent anecdotally that that provides some information that would certainly be something that I see. On the trial side we have some folks that have tried a lot of cases. They are not afraid to go to trial. I think that also speaks to their ability to negotiate these cases effectively at an early stage. When we do get these trials some of them are folks that I tried cases against when I was in the DA's office, more years ago than I care to remember and they were good lawyers then. I think the largest measure probably just comes from watching that plea resolution process, negotiation process, but then supported also by the trial process and punctuated there as well with the sentencing proceedings. We see probation violation matters where I find myself not infrequently thinking, "That is a pretty good point." I hadn't really thought about that in terms of disposition, perhaps, of a particular sentence or maybe an issue related to continuing or revoking the probation. I think with that maturity there also comes an understanding and recognition that again, I think because of the longevity of some of these lawyers that they understand the judges as well. I think they can be more effective when they really understand the range they are working with. Under certain circumstances it is only going to move so far in these various directions in terms of considering options. You get lawyers that aren't asking for something that doesn't have a chance of getting off the starting block, but instead, in terms of advocacy, maybe farther than the judges wants to go but gets the judge kind of looking at that and saying that, "I understand what you are saying but I can't go that far." In that process you have moved the goal line, in favor of your client, by quite a little bit. Those are the kinds of things I see. As I say, it is a function, perhaps, of knowing so many of these lawyers for a long time and having confidence in what they are doing, also, in seeing the newer lawyers that are being brought in and incorporating those same kinds of approaches into their presentations. I know the discussion has been what happens when a number of these lawyers leave? They are kind of in the twilight of .. I hate to ...

2:19:40 Chair Ellis

Be careful.

2:19:40 J. Maurer

to age them and myself, but kind of at the twilight of their careers. What do we do with new lawyers coming in? I have been, and continue to be, of the view that they are doing a good job of mentoring and bringing in lawyers and getting them into a position to really effectively use the combined talent and experience that exists institutionally there within that group.

2:20:19 C. Lazenby

That was going to my question because we have expressed concern on the Commission about sort of the graying of the bar here and wondering if there was enough being done to bring along younger lawyers to fill that void. We get a sense

here that there seems to be lot more experienced lawyers carrying the bulk of the cases, especially out of the consortia, and there doesn't seem to be a younger crop coming up either with the proper training or the sufficient numbers to replace them as we go along. From a service provision standpoint are we going to be looking up in five years, after a series of retirements and not really have younger quality lawyers that can fill that void?

2:21:01 J. Maurer

I think on that point that was something that was expressed to us last time. I talked to Ron about that and made my observations last time about that. I think that a number of these lawyers have expressed an interest in continuing for a significant period of time. Now some like Brad Jonasson are going to be retiring here very shortly. That will be an opportunity, rather than challenge, to bring in another person. This is for economic reasons and the model they have selected is a defined group. You have a certain number and that is not to say they can't begin to expand to meet some of the time issues you are talking about, to take advantage and fill the gap created by retiring more senior members of the group, but I think that the younger group, although, of course, we have lost one because she went on the bench, but I think to some extent that gives you a measure of the quality of the people that are coming in on the young end of this group. I think there is a group of younger lawyers that to my mind has matured and is developing well. I think that that has been a product of the work of some of the leadership of the group. It is always a little bit difficult to know in terms of the demographics of exactly what new lawyers will be coming into the area and what the composition or motivation of those lawyers will be. Certainly though I think, at least in my view, that as the opportunity presents itself and the more senior members of the group begin alerting their colleagues that they are contemplating retirement, we have a small enough bar in the metropolitan area, let alone the state, that certainly Clackamas County is seen as a good place to practice. I think if an opportunity were known to exist within the indigent defense group here, I think with the stability of that group and the reputation that that group has amongst the judges, I mean I think there are a number of things that certainly in terms of recruitment opportunities or sales points would be available. Now I don't know again if there has been a particular impetus to do a lot of that because so many of the senior members have continued to be very, very active, and anticipate to continue to be active at least until the mid-range here of years. I understand and see that there is, of course, the potential that the well could dry up. I don't see that being very realistic. I think there is a significant drawing power for that group in this county. I think the group has also demonstrated their commitment to understanding the importance of maintaining high standards. I think they are committed as senior members of that group, to leaving it in as good a shape as when they came to it. Understanding the concerns I believe that those concerns are shared and dealt with by the leadership of our contractor.

2:25:30 Chair Ellis

Thanks judge. Appreciate it.

2:25:33 J. Maurer

Thanks for all of your work. We appreciate you being here and what you have done for all of us interested in this very important process.

2:25:46 Chair Ellis

Tom, we have the two from Marion County PD. Terry Wade and Tom Sermak. Welcome and thanks for taking the time to come.

2:26:03 C. Lazenby

I apologize. I have a pot boiling over in real life that I need to go tend to. I am going to take off. Don't take it personally.

2:26:17 Chair Ellis

Tom, maybe you should introduce Terry and let her share some thoughts with us.

2:26:22 T. Sermak

Chair Ellis, we have sort of come into the middle of the discussion that you have been having about boards. Ms. Wade is the newly elected chair of my board. She is the third chairman that we have had. I am not certain where you are. We could just respond to questions, or I can describe to you how our board is set up. Whatever you would prefer.

2:26:42 Chair Ellis Why don't you just briefly describe how your board is set up and then we might have some questions.

2:26:44 T. Sermak We have a seven member board. The requirement is that the majority of them be attorneys. We have had non-attorney members from the beginning. As a matter of fact, the first chairman was a retired lawyer. The second chairman was a banker and Ms. Wade is an attorney has never practiced criminal law.

2:27:15 Chair Ellis What field do you practice in?

2:27:15 T. Wade Non-profits and tax.

2:27:19 Chair Ellis That has some elements, okay. The number 990 means something to you?

2:27:25 T. Wade Very definitely.

2:27:27 T. Sermak The non-members I find to be quite beneficial.

2:27:47 Chair Ellis Non-lawyer board members.

2:27:46 T. Sermak Yes. Non-lawyer board members. Thank you. One of them is an executive director of a large non-profit in Marion County. She has been an invaluable resource for me in terms of the administrative side of it. We have a very active board. We meet monthly. Every month I am required to explain all of the money that I spend and we also look at all of the cases that come in. They look at basically revenue earned and how the money is being disseminated.

2:28:23 Chair Ellis Who appointed your board?

2:28:24 T. Sermak One member is appointed by the Chief Justice. One member is appointed by the president of the Oregon State Bar and one member is appointed by the Marion County Board of Commissioners. The other four members are elected by the board.

2:28:46 Chair Ellis Are they staggered terms?

2:28:46 T. Sermak Yes. They are now three year terms but they are staggered. The initial board staggered their terms.

2:28:55 P. Ozanne Tom, one of the discussions was determining the need for a board based on the size of the entity that is involved. How many attorneys do you have now?

2:29:13 T. Sermak Interestingly, we have seven attorneys and seven board members. I have seven working for me now.

2:29:19 P. Ozanne The concern was when they are small the board is just not going to have enough to do. It sounds to me like that is not your problem, or maybe it has to do with the fact that you are a new organization, but talk a little about that. Do you feel you are too small to have a board?

2:29:31 T. Sermak Oh, not at all. We had at least a five or seven member board when I only had four lawyers. We met on a regular basis. I don't think the board has ever felt that they were wasting their time or that it wasn't valuable input that they were able to give to us. I don't think that that has anything to do with it. I think what determines the size of the board is the mix of the group and the efficiency with which they can work. I find that a seven member board is almost ideal. You get a broader range of opinion and input into things. It doesn't depend on the size of my office so much. That has just never been a factor. I have never felt that I was top heavy because I had a seven member board.

2:30:25 Chair Ellis Why has there been the turnover you describe?

2:30:27 T. Sermak In what?

2:30:29 Chair Ellis The chair. Many of those others stayed on the board.

2:30:36 T. Sermak John Hemann was the first and he was on board before there was an office. He chaired for awhile. He wanted to step down. Bill Copenhaver is the banker. He has been on since the beginning. He was the chair. He is still on the board and informally they have decided that the outgoing chairman will stay on the board for a year to help with the transition. Bill will be with us for at least another year. I think Ms. Wade is going to do the same thing.

2:31:12 T. Wade The benefit to that is really because there are other responsibilities involved in being the chair and we didn't want to overburden one member with all of those for a long period of time. For instance John Hemann agreed to serve two years as chair, a partial year before we even got formed and then another full year.

2:31:31 Chair Ellis What is your process for evaluating him?

2:31:35 T. Wade The board as a body reviews Tom's performance every month based on his reports to us on the finances, the case count, staffing issues, any other concerns or questions that he has. We monitor him based on those bench marks, but we also review annually his performance and we give him an evaluation in the same way that he gives his staff evaluations. That is really more for development and to make sure that all our bases are covered.

2:32:16 T. Sermak To flesh that out a little bit, every year, usually in April, I am given a self-evaluation form to fill out just as I give to my lawyers on an annual basis. The board then also has an evaluation form that they fill out. Then there is a somewhat stressful sit down session with the chairman, and one or more members of the board, while they do a formal review of my performance.

2:32:45 T. Wade That has been more stressful in the past.

2:32:45 Hon. Elizabeth Welch Are you on the board?

2:32:47 T. Sermak Am I? No, I am not. Going over the bylaws I don't think there is anything that would expressly prevent an employee from being on the board, but we don't have any employees on the board.

2:33:02 Hon. Elizabeth Welch None. So no lawyers from within the organization?

2:33:07 Chair Ellis No providers.

2:33:10 T. Sermak Right.

2:33:11 Chair Ellis Any other comments or questions?

2:33:15 J. Potter How long have you been on the board?

2:33:17 T. Wade I have been on the board for three years.

2:33:25 J. Potter And the board itself elects you for a one or two year term?

2:33:26 T. Wade Three year term. My initial term was two years and I am in the first year of another full three year term.

2:33:35 Chair Ellis Have you enjoyed it?

2:33:36 T. Wade I have. It is a different world than I am used to. There is a learning curve for all of us. I believe that we now have three board members who have practiced in criminal defense. For the rest of it is all new. It is an education for us.

2:33:54 P. Ozanne How did you discover the office or did they discover you? How did you get interested in the board?

2:34:00 T. Wade I got a phone call from Chief Justice asking me if I would serve, and I said yes, then tried to figure out what I could bring to the board that would help.

2:34:10 P. Ozanne I thought of that in the areas where there is some difficulty recruiting - a call from the Chief Justice might help.

2:34:16 T. Wade It is a magic phone call.

2:34:18 Hon. Elizabeth Welch Why is this interesting for you now, now that you know what you got yourself into, right -or what the Chief Justice got you into - from your standpoint as a busy, working person?

2:34:31 T. Wade With my practice dealing with non-profits, I organize them and I keep up with them on an annual basis making sure that they are following all the reporting requirements and that they are following their own mandates, but actually being involved on the board level it just expands that perspective a little bit to see this is not as easy as the once a year meeting would make it seem. Just from an administrative point of view it is an expansion on what I do every day, it is just a different area of the law than I have ever been involved in. It is kind of going back to law school once a month to have Tom lecture us on the cases and what is a Measure 11. Why do we need a special lawyer to handle it? Why can't we recruit from the rank and file? That kind of thing. It is a unique opportunity.

2:35:23 S. McCrea Is your term as chair a year, or is the length of your service on the board?

2:35:27 T. Wade It is at least a year and if I wanted, and the rest of the board approved, I could continue on in that role. It is not a limited term. It is a lot of extra work that I don't know that I would volunteer for for another year.

2:35:45 Chair Ellis Thank you. Jim, you had some thoughts.

2:35:57 J. Hennings I am Jim Hennings. I am a somewhat retired attorney and also consultant.

2:36:02 Chair Ellis I thought you were a carpenter?

2:36:03 J. Hennings I am a carpenter, too, but I am also a consultant on public defense management issues. The board area was, quite frankly, one of two on your agenda that tweaked my interest and I was close enough I could come by. One of the things that I think is important if you are going to start mandating boards, and personally I think you should mandate boards, but if you are going to start mandating boards you have to decide what it is you want as the overall board for indigent defense. Quite frankly one of my biggest disappointments was despite our saying we want boards, and despite having management conferences where we would discuss boards, I don't think this board has really done what I think is necessary. In my mind the board gives indigent defense a very key capability, that is month by month oversight of individual organizations that are providing the services which you can't do. You can't go to every district in the state. You can't send the management review group to every district in the state. There is nobody at the local level that is reviewing the quality of the work that is being done. You get that with a board if it is a properly organized board that has the right and the duty to supervise management including

hiring and firing management. It is really a delegation issue. You are delegating to boards, I think that was what you were trying to do, the responsibility that you would like to be able to do and that is, how do we guarantee quality? You guarantee quality by having somebody hire and fire the management, tell the management you are not doing right and you have to change. That is where you get the quality. That is where you get the day to day supervision. Everybody needs a boss. Ultimately you are every indigent defense attorney's boss, but you need one that is supervising them directly.

2:38:27 P. Ozanne

Jim, would that play out with somebody either from the office, our staff, or someone willing on the Commission to go visit boards like we have the site visit process and the structural review process. Are you thinking about a board visit process?

2:38:44 J. Hennings

Yes. I think if it is a delegation, the proper method of delegation is you make sure the person you are delegating responsibility and authority to knows what is expected. I think that means a major effort, if you are going to start pushing boards, to tell boards exactly what you expect. Some of it is in the best practices. Some of it you should talk to Geoff Guilfoxy about. He was the one who gave me a great deal of good information about what boards do and the structure of boards, but you need to sit down with the boards, not just the president of the boards. You need to sit down with the boards and say we are giving you a great deal of authority and responsibility. Are you going to live up to that? You do it possibly by having reports from the boards to this group. In a sense they are your functionaries. They are not completely because they have some other duties and responsibilities to the organization, but I really think you ought to look at the board structure that you want, and that I think is critical, to be a delegation of your authority and responsibility. The main purpose of the board is to guarantee the local quality. You get all kinds of other things with boards. You get community representation. You get being part of the community. I think it is critical that they be part of the community where the services are being provided. The reason is if the board is part of the community, then the organization is part of the community. I see indigent defense as doing more than just providing quality service on each individual case. That is the bottom line, but we are responsible to see that we have a better criminal justice system, that we take into account all the human resources that are necessary in order to make the community better. That is what you get in addition to paying for the best services if you have a board that is pushing in those directions.

2:40:59 P. Ozanne

So invite the board to come during one of our visits, or during the structural review process, they should be on our calendar.

2:41:06 J. Hennings

And you need to decide what it is you are going to delegate to the boards. You talk about how you nudge people and urge them along. I don't think you can have boards for individual attorneys or maybe law firms. Law firms become a little different. The detriment to those are that you then have to trust your staff to conduct that hiring and firing, decision making process, that a local board would do. I think for a consortium I don't see any problem at all with saying that you are going to have an independent board and that independent board is going to hire and fire ...

2:41:50 Chair Ellis

Would you go so far as to say on a consortium that no consortium member be on the board?

2:42:02 J. Hennings

Let me get to my caveat. How in a consortium do you create the longevity for when there is turnover, because you don't have a lot of management positions? At Metro, and most of the public defenders, there is a mid-management that grows that understands what the external organization problems are beyond just the cases. In a consortium I don't see that happening. If you could replace that knowledge base of understanding the outside world in a consortium, then I would go along and say "fine, no consortium members." At this point that is the strongest argument I see, at least for consortiums, allowing some percentage of the board to be actual practicing members. I think it creates a conflict of interest. It is not pretty, but I don't know

what the alternative is and then you risk losing all the institutional memory that is going to be necessary in order to keep an organization running. Size, I think it has to be small enough that everybody on the board is actually interested and concerned. My favorite is five to seven. I think once you get above seven you start having the one member that never shows up. You can you have it in a smaller group too. You need the board actively involved. I think you can go to three if size really becomes an issue. There are problems about bringing in boards for other organizations because they may end up in a conflict situation.

- 2:43:52 P. Ozanne Jim, what is the size of the organization itself? The numbers of lawyers in the organization? Is there some cutoff point where you wouldn't have a board?
- 2:43:55 J. Hennings I think if you have an organization that is a public organization, you should be able to say they have a board. Maybe you say below a certain number you can go down as low as three. If you are a public organization as opposed to a strictly private organization, I see consortia as being a public organization for this purpose. If you are hiring individual law firms I'm not sure if it makes any difference.
- 2:44:21 P. Ozanne What about if the lion's share of their revenue is from us? Does that make a difference to you?
- 2:44:28 J. Hennings I think at that point you ought to be pushing a consortium rather than a law firm. I think at that point you need the direct supervision on a fairly immediate basis and you need to be able to fire the management. I don't see how you do that with law firms. I think that has to fall on your staff to make those kinds of decisions.
- 2:45:00 J. Potter So in many of these contracts, in consortiums in particular, the contract is being awarded based on the experience of the administrator or the lawyers involved. Now we are talking about a board that might fire that person that may have been the reason why we contracted. How do you ...
- 2:45:13 J. Hennings I am saying your contract should be with the board. I think that is the true party in interest on both public defenders and consortiums. It is the board. They are who you would look to for the continuation if the director should disappear.
- 2:45:35 J. Potter So the contract is with the board but we would still look at who the board has hired as a condition of our contract?
- 2:45:42 J. Hennings Is the board performing their functions? The board needs to be independent, dedicated to the job which is to supervise management and therefore to guarantee the quality. It should be diverse. The board should perform a sword and shield function. I saw this early on with Barnes going to battle to protect us when I didn't have the political clout that could do that.
- 2:46:12 Chair Ellis Of course I did.
- 2:46:13 J. Hennings I remember you negotiating with the county where they wanted us to take a five percent cut in our funding. We walked out with a 10 percent increase and they shook your hand. I never understood that.
- 2:46:32 P. Ozanne Would you require a non-profit corporate organization for all consortia as well?
- 2:46:44 J. Hennings I think it makes good sense. for one, and then right now you get the extra protection of what the IRS is requiring as far as non-profits, which I think is good despite what the private industry is saying.
- 2:47:01 Chair Ellis But you don't get the unit rule for conflicts.

2:47:05 J. Hennings I think you can avoid the unit rule and that is the strongest argument for the consortia avoiding the unit rule. I'm not sure that is going to last forever either. I think one of the things the board may look at is what happens when you lose that.

2:47:21 Chair Ellis Nothing is as simple as I wish it were because I think the logic of the unit rule applies to law firms and PDs because they have a management. I think the logic of the unit rule doesn't apply to consortia, which are combinations of independent practitioners with a coordinator, not a true executive, not a true manager. Then as we start looking at it I think it is a greater leap than I might even agree to, to say where you have a consortium you can't have member participants in the management. I am jumping ahead a little bit. I absolutely think that what we have here, a very closed system, but they are using public dollars and they also, as the exclusive provider, are exercising a franchise that we have given them. I think we have a responsibility to see how it is done. I really think the time has come that they have to open up.

2:48:42 J. Hennings I agree with you but, again, I urge you to think about it as you are delegating some responsibility and authority to a group. Are you going to be willing to really delegate that, really do it the way a delegation has to be done?

2:49:03 Chair Ellis I think it is a good concept.

2:49:04 J. Hennings That is what I thought I could add.

2:49:04 Chair Ellis Alright. Go back and build your deck.

2:49:12 Hon. Elizabeth Welch I am just curious about some of the details that sort of cropped up as we talked about a low percent, if any, of people who are working in the organization and providing services. You guys were never board members, right?

2:49:37 J. Hennings No. We were never board members. I think that would be a direct conflict of interest. How can I evaluate myself?

2:49:45 Hon. Elizabeth Welch I don't know what the statistics are on that in terms of the existing boards. I think you were here when I made a comment about, "You need to have them but made sure they are actually doing something." Would you foresee, assuming that we are going to be prescriptive at this point to some degree about all of this, that we say how many meetings a year there ought to be?

2:50:17 J. Hennings I don't know how prescriptive you can get. I think the nudging approach may be the better one. "When we are reviewing your contract we are going to decide whether or not you are performing the functions that we delegated to you. If you are not, if that is what our staff is telling us, then the organization is not going to exist any longer." They are responsible for making sure the organization is actually providing quality services, is actually being run well, and they can hire and fire whoever the manager is.

2:50:52 Hon. Elizabeth Welch The appointment of members of the board by the County Bar Association, the Chief Justice, that all sounds like a pretty good idea. Any comments about that?

2:51:07 Chair Ellis It goes back to 1972.

2:51:11 J. Hennings That is right. After the organization had started we felt the funding authorities ought to have some sort of say, and at that point they were the counties. We thought that the appointments ought to come from a diverse area so that there wasn't an appointing authority that essentially was in control. We wanted a number of appointing authorities. We felt it was important that the board could not have the

pigeon holes but select anybody they wanted. That was why we came up with the idea of the board itself appointing several members.

2:51:55 P. Ozanne           What about us appointing a member?

2:51:55 J. Hennings        That would be a possibility.

2:51:55 P. Ozanne         We are part of the shareholders.

2:52:07 J. Hennings        The question you have to ask yourself is what are you going to expect of that person?

2:52:13 P. Ozanne         That would be a way to solve the independent, non-lawyer position.

2:52:13 J. Hennings        Are they reporting directly to you? OIn some questions the interest of the organization may be contrary to the position of this group.

2:52:28 Hon. Elizabeth  
Welch                        What about judges appointing? You don't have that.

2:52:36 J. Hennings        We don't have that and that was basically following the ABA recommendations and the national standards. One of the big fights at that time was independence from the judiciary. It continues to be a fight in many areas of this country.

2:52:53 Chair Ellis         Not just a fight but there is a real value to it. You can get a very clubby system that whistles people in and out efficiently.

2:53:07 J. Hennings        Anyway, it is fraught with same danger but we said just because you were a judge you can't be on the board.

2:53:19 Chair Ellis         Some of your best board members were retired judges including one from this county.

2:53:22 J. Hennings        Yes. The experience is great. The question is does it get in the way of the independence as it has nationwide? It is still an ongoing fight.

2:53:42 J. Potter          Jim, the evaluation that OPDS did – it looks like 26 people answered this question. The question was, “Do your board members have directors and officers liability insurance?” Fifty-seven percent said no. Do you think with the added responsibilities you are talking about ...

2:54:00 J. Hennings        I would not serve on a board that did not provide director's liability insurance.

2:54:08 J. Potter          It appears that some boards are boards in name only. It is a club more than a board.

2:54:13 J. Hennings        If you decide to go that way part of the change is to educate boards. “Here are your liabilities. Here are your responsibilities. If you can't stand that heat, then get out of that kitchen.” You can find people. This is an interesting area. It may mean in some instances the Chief Justice making a phone call. Once you get started you are going to continue.

2:54:41 J. Potter          If I understood you correctly you were suggesting that OPDS would contract with the board. The board's name is on there. In that case couldn't you demand liability insurance? Should that also be paid for by OPDS funds?

2:55:00 J. Hennings        It is now. It is part of the business. You are not running a good business if you don't have it.

2:55:20 Chair Ellis         Mark McKechnie from JRP.

- 2:55:31 M. McKechnie Good afternoon. I will try to brief since you have spent quite a bit of time on this topic. I thought one of the more interesting things I could touch on is the evolution of our board at Juvenile Rights Project. I started in 1999 and it was right at that time that JRP was exploring the possibility of moving from an internal board to an external board of directors. It wasn't just our decision that that would be better. It was really driven by foundation funders that we were interested in receiving funds from. They were not likely to grant money to an organization that didn't have that kind of external oversight of the organization. We raise funds to do other kinds of advocacy outside of public defense contracts. Largely out of that necessity, we started transitioning to an external board of directors. The first phase was sort of a hybrid where we kept the internal board members and added an equal number of community members. I think there was a lot of fumbling in the process about how that should work. Certainly, if you have lawyers from the organization who have essentially been the board for many years, and then you add a few other people off the street, they are at quite a disadvantage in terms of the knowledge and the understanding that they have about the organization and they are likely to follow the direction of the internal folks. By about 2002 or 2003, we had fully transitioned to an external board of directors. For most of this time we had roughly seven, eight, nine board members. We currently have 14 board members. Our board is larger, I think, than every other described partly because unlike other contractors there is also a development and fundraising role that our board members play. That wouldn't be the case for most of the contractors.
- 2:57:50 Chair Ellis But you have no provider lawyers on the board?
- 2:57:55 M. McKechnie Correct, and I am also not a member of the board. I am supervised by the board, hired and evaluated by the board.
- 2:58:04 P. Ozanne What do you think about Jim's point that having at least some members, lawyer members, on it really builds institutional capacity? They buy into understanding management. Obviously in your case you are not a lawyer, which is great too. I think that is a good way for management to go. Assuming that in many places it is going to be the lawyers would you have some lawyers on it ideally?
- 2:58:38 M. McKechnie You are talking about lawyers who do the contract work not just people who are lawyers by vocation? Is that what you mean?
- 2:58:45 P. Ozanne Lawyers in your office on the board. You have transitioned to a totally external board, but Jim Hennings was suggesting that by having at least some members on it you build some institutional capacity that you wouldn't have it they were all outside.
- 2:59:04 M. McKechnie From within the organization I think it is very awkward. From where we started with the board members working for the organization, supervised by the director as lawyers and then they as a board were supervising the director, I can't imagine being in that position. I don't think that particular setup is very healthy. I think one way around it, which is a way that a lot of organizations have provided some continuity and institutional knowledge, is to have former lawyers from the organization who have been gone for a period of time serve on the board. I would say that for most of the time that we have had an external board we have had at least one member who previously worked for JRP. That provides some continuity. We usually have at least one of our supervising attorneys attend the board meetings as a resource. They are not a member of the board either, but they are there to answer questions. Another thing that I think has been very important has been to really orient and educate the boards because they are all outside members about the work we do. I spend time with each new board member explaining to them what the OPDS contract is and what the different case types are and how our contract works. We don't get to it at every single meeting and we typically meet 11 times a year. We take off December and we have staff come in and present for 10 or 15 minutes about the work they do and a particular program. It can be one of our privately supported initiatives or programs or different aspects of our defense representation. I think the last one we

did was on our Court of Appeals cases. Two of the attorneys who specifically do that work explained what those cases are like. The issues in juvenile appellate work and a couple of specific cases they that were working on or had recently worked on, how the cases come to us and the volume of the work and the workload. All sorts of things.

- 3:01:35 J. Potter           What percentage of your total budget comes from OPDS contracts?
- 3:01:40 M. McKechnie      It is typically 75 to 80 percent. It varies a little bit from year to year.
- 3:01:46 J. Potter           So it is still the major focus.
- 3:01:47 Chair Ellis         Okay. Any other questions?
- 3:01:50 Hon. Elizabeth  
Welch                        I just want a point of clarification. Jim, when you talked about lawyers from the office being on the board you were talking about consortia?
- 3:02:05 J. Hennings        I was talking about consortia and not public defenders.
- 3:02:07 Hon. Elizabeth  
Welch                        That is what I thought.
- 3:02:10 J. Hennings        In consortia I don't know how you would get the experience.
- 3:02:24 Chair Ellis         I think we are at a point, if we ever going to do it, when we need to go over and get our lunch. Then we will come back and I think we can address in one sitting the Clackamas plan and the board issues.
- 3:02:42 I. Swenson         Mr. Chair, should Commissioner Stevens call back about 2:15 or so?
- 3:02:51 Chair Ellis         2:00. Lunch is already bought and we are just going to go over there and eat it?
- 3:03:08 I. Swenson         I don't know. Sorry.
- 3:03:14 K. Aylward         No. We switched from box delivery to just going over there and ordering and eating. The table is set up.
- (lunch break)

**Agenda Item No. 9           Contract Approval**

- 0:05 Chair Ellis           Kathryn, do you want to describe the three contracts that are listed.
- 0:09 K. Aylward            The first one is the Lane County Defense Consortium. We did as instructed. We have a preliminary agreement in place with them to begin January 1, but they won't start picking up cases until the 1<sup>st</sup> of February. That allowed them to get a payment in January to cover some of their startup cases. Shelley Winn, the analyst in my office, has gone down and helped them a lot with set up. As Ron Gray said, Janine, his former administrator, went down and helped them. I feel comfortable. We have a lot of communication with the judges. We talked about drug court. We talked about mental health court.
- 0:48 Chair Ellis           What have they done by way of a board?
- 0:50 K. Aylward            I don't know. The last I heard was that they had their eye on some people. They intend to have a board.
- 1:07 Chair Ellis           Including outside?

- 1:10 K. Aylward Originally that is what their proposal and follow up letter said. “Yes, we intend to have outside members.” Whether they have actually achieved that, I don’t know. The contract does not include civil commitment cases. The judge who handles those cases has a little short list that he likes to use. The group didn’t bid on them and I think we just leave that alone. At some point down the line if that doesn’t work we can incorporate it into their contract. It also doesn’t include murder. Again, the court will have a short list. We have asked all the attorneys to resubmit their certificates and we will go through that list and with Paul’s assistance make sure that the list is ...
- 1:58 Chair Ellis Are there some murder qualified contractors available?
- 2:03 K. Aylward There are, including some of the people who may be members of the defense consortium. The second contract is for the Capital Resource Center. We talked at the last meeting about Jeffrey Ellis. What he is doing is starting the first three months of the contract at half-time. Then after three months it is going to pick up to full-time. That will give him time to transition.
- 2:31 Chair Ellis Will he be physically officed in Salem with us?
- 2:33 K. Aylward Not in Salem, in Portland. He has been in a lot of contact with Matt Rubenstein and the agreement is that Matt was paying \$2,000 a month to a paralegal who not only maintained the website but the technical membership stuff. We want to keep that going. That is included in Mr. Ellis’ contract, that continuation of the whole resource online.
- 3:00 Chair Ellis This was mentioned last time but I would like to say again. We are not related.
- 3:06 P. Ozanne Kathryn, on that score, I wasn’t in state when this happened and I think it is a great development. Within the conversation of replacing Mr. Rubenstein, it came up that the compensation kind of surprised me about how low it was, in my own mind, for the responsibility. How does it pencil out as an annual for him? What would it be in comparable salary?
- 3:36 K. Aylward I suggested that the hourly rate should be, and I can’t remember if it was \$90 or \$95 or something in that range, and he said, “No, I think it should be \$100.” We ended up settling on \$97. It is \$97 an hour for the hours that he works. In addition, the amount in this contract includes the \$2,000 a month for the paralegal and a small additional amount for the fact that as a resource center person you have to attend more CLEs. We assume with the death penalty attorneys if you are getting \$95 or \$97 an hour that out of that you have to cover your own expenses to go to CLEs and trainings, but this position needs to do it much more and on a bigger scale because they are bringing information back to others. It is not very much. It is \$1,500 or \$1,800, or something.
- 4:33 Chair Ellis Is he admitted to the Oregon Bar?
- 4:35 K. Aylward Not yet.
- 4:40 Chair Ellis So that is a January exam?
- 4:41 K. Aylward If is my understanding that he doesn’t need to take an exam.
- 4:40 Chair Ellis Reciprocal.
- 4:45 P. Ozanne The hourly rate is comparable to other death penalty contractors?
- 4:51 K. Aylward They are all between \$90 and \$97. The third contract is Bronson James to do death sentence post conviction relief appeals. That will start February 1. That is \$90 an hour with no extras in it.

- 5:14 I. Swenson We should just remind the Commission that they suggested last time that we continually post our need for lawyers to do that kind of work. Our own website is being revised at the moment. At any time we expect it to be ready to go. As soon as it is we will be posting that. I don't know if you have had a chance to talk to John Potter about posting it on their website. We will certainly do that.
- 5:39 J. Potter You can either have us do it or post it yourself.
- 5:41 Chair Ellis Any other questions or comments. I would be willing divide the question if anybody wants. Otherwise I would entertain a motion to approve all three.  
**MOTION:** Shaun McCrea moved to approve the contracts; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 6-0.**
- 6:12 Chair Ellis What I would suggest is we talk about both Items 2 and 3 at the same. I think they do tie in, the Clackamas plan and the general subject of boards and directors. I would open the floor for discussion. I would be happy to lead off. I am really impressed how tenacious Clackamas has been. I think we have been clear that this is an area that we really care about. We really think they need to move from their 25 year, everybody locked hands, closed loop thinking to a more open structure. I thought I detected today not only a division within but almost an invitation that if you tell us if we have to we will. My own instinct was, "Okay, that is where I would be inclined to go on Clackamas." They are a very large consortium. They are 27 now which is a little higher than they were a year ago. They are a sole provider in a major county. That has always been a question for me, but I recognize that they feel strongly they are doing a decent job. I think the data we get is the representation quality seems to be okay. I can just see it coming that Ron Gray is not going to be there forever. It is a very close way they approach things. It is not just the selection of Ron's successor, it is the whole way something is structured. In my mind, managing that enterprise is not that different from public companies, all of which have at least 40 percent outside directors. We have had this best practices document, which I think is a good document, out and in circulation for quite awhile. It is the work product of our own quality assurance task force. The way I sort of come down on it is groups of – and I'll pick a number, higher than 10, just so we don't hit borderline cases, fifteen or larger. I just find it hard to accept continuation of this close knit provider dominated, not just dominated, but exclusively provider board. I also think it is not a good practice that the manager, if that is his title, is also on the board. I don't think he can manage himself. I think he ought to be a manager accountable to a board. I think the concept of one in five at least be outside is right. I know they have put Judge Bagley on there. I detected that was probably not going to bring to that board a lot of active, objective thinking, because I think it still the inside club. I would like to proceed in Clackamas with what they have all but invited us to prescribe to them. I am inclined to take them up on that. That is my reaction.
- 10:45 P. Ozanne I agree with everything you have said with the exception of why one office? The juvenile consortium is in the same boat. We have talked to them as many times as we have the adult group. I certainly agree on the merits for Clackamas, but it seemed to me, and maybe things have changed and our staff will tell us, but when I was more involved there was frankly widespread resistance to this. You really had to urge and exhort. Now we are at a place where we have a lot of success stories. We heard them today. Why don't we just develop a general policy? The tough question will be the size. There are some other details, but the size of the organization and when does that trigger a board requirement. After hearing Tom Sermak speak, I am not sure where the line is. Rather than just on pick on Clackamas, I would just as soon develop it as a statewide practice.
- 12:03 Chair Ellis If I didn't indicate that is where I am headed, I didn't articulate it very well. I don't know what level. I am suggesting 15 because that won't catch too many of what I think of as borderline cases. It could be a lower number. I wouldn't make it any

higher. Do we know if there are any other consortia, 15 or more, without outside director involvement? I can't think of any.

12:37 P. Ozanne Does Klamath have anybody?

12:40 I. Swenson There are just 10 there.

12:47 P. Ozanne They have an outside member?

12:47 P. Levy They have an outside member. It happens to be the provider's CPA. I heard three people on this Commission say that is a conflict.

13:13 Hon. Elizabeth Welch I would like to back up just a touch and ask, you two are talking about a statewide what, a rule?

13:38 Chair Ellis I am. I think they have all been told this. They certainly acknowledged we have cajoled them for as long as anybody can remember.

13:47 J. Potter Mr. Chair, what are you thinking in terms of development of a rule. When would it go into effect? Is this something that we are saying we would tell them we are going to do?

13:57 Chair Ellis Next contracting cycle.

14:00 J. Potter You would have to and everybody else would have to. We would develop these rules and they would go into the RFP? We would clarify all the details for the next contracting period?

14:13 Chair Ellis I think the draft is pretty well available to us. Ingrid has a view that we ought to run this by the contractor advisory group before we finalize it. I am not quite sure how to do this. Maybe Paul would prepare a resolution that we would pass at a future meeting. Today we are just talking conceptually. I envision that it would be the policy of this Commission that responses to RFPs by provider organizations, and we are going to have to talk about the law firm issue in a minute, of 15 or more lawyers should, and then I would pick up where we are on the best practices document.

15:17 I. Swenson Among our current contract terms as a requirement of the contract? It would ultimately be listed as a term of the contract?

15:31 Chair Ellis Correct.

15:35 Hon. Elizabeth Welch I have some questions. I am uncomfortable with 15. I think it is too big. I think we heard from some people today that there really is no justification for not making it universal, so I have a problem with that. I am curious if you pick 15, just for discussion purposes, and I am looking at you because I am about to ask you one of those dumb questions. What percentage of the consortia would be excluded with a 15 rule.

15:58 K. Aylward It is not a dumb question. I brought my laptop and couldn't get connected. I can let you know. I agree with you that 15 is too high. There are a lot of consortia that have fewer than 15 and very few have more than 15. My guess would be three or four consortia.

16:21 Chair Ellis And this would be the only one that doesn't already comply. I think we need to discuss the law firm model. There are two in particular that I am thinking of. Jack Morris' firm and I think he has six providers. And Jim Arneson would be another.

16:58 I. Swenson John may have a better count. He includes a good list in his directory.

17:01 J. Potter I am coming up with seven for Morris' firm at the moment.

17:10 I. Swenson I would like to remind the Commission when we were down in Jackson County and we heard about Los Abogados down there which is a criminal consortium. There are four members and there may be more than that now. We heard from all sources that these were the top notch criminal lawyers available for public defense cases in that county. They were pretty adamant that they had no need for and no interest in developing a board. They didn't feel like that was a good use of their resources and their energy. I think they were somewhat persuasive at the time. I wanted to remind you about that. Same with Jack Morris. We have no concerns, at this point that we are aware of, with any thing that he or his law firm has done in the five counties where they are active. Your rules have to apply to good providers and poor providers. I understand that, but I just want to remind you that there is that component. There are people who are managing apparently very well, and for whom it would be some kind of imposition to create something.

18:20 Chair Ellis How large is the Klamath group you are talking about?

18:21 I. Swenson I was talking about Jackson. That is just four.

18:29 P. Ozanne I certainly wouldn't advocate for a board and I am certainly circumspect even about the advisory committee. I don't read the introduction to our report anymore. If it is still in there I suggested, and I guess everybody ratified that the preferred vehicles are consortia, and law firms create problems. If you contract with them you really can't get inside of them if you respect their entity. I would like to send a signal that, okay, the examples that have been cited here are good examples and we wouldn't want to break those up. At least one of the people, maybe both law firms, have been pretty adamant that if they look like a public defender they are out of here. I would certainly like to move in that direction over time and think hard about when there is an opportunity to reconsider the whole thing of contracting with law firms. I am pretty confident given the market place that people will maybe push back. I would certainly like to test the proposition that they would stop providing services somewhere. I don't feel like trying to reorganize a private law firm right now, particularly in the instances that we cite, because they are certainly very good. It is just an example of any structure that we develop there is always going to be exceptions. In the main, I just have trouble with our inability to look inside. You don't have any control over whom they hire. You can't figure out the allocation of the work inside the firm. It is troubling. I am not sure I would want to push the advisory committee on the existing, but I certainly want to think for the future.

20:37 J. Stevens Can you speak up a little bit.

20:36 Chair Ellis Yes Janet. That was Peter Ozanne talking.

20:47 P. Levy I will just provide a little input. Karen Stenard, who administers the juvenile consortium in Lane County wanted to be here but couldn't. She was going to talk about boards and evaluations. She couldn't get here and gave me some comments that I can share with you. I think they are worth considering. Hers is an organization that, I think, heard your message that we want boards and want boards with outside members. Their group at the time was not incorporated. It was an informal gathering of lawyers as quite a few consortia are. They formed an advisory committee nonetheless, an advisory board, which did include outside members. I gather that they couldn't really figure out how that advisory body related their group. So wanting to fulfill what they saw as the wishes of the Commission they incorporated as a non-profit and had to have a board. As Karen describes it it was a difficult process, not the decision to do it but just figuring out how. She said she "had been to enough management conferences and seminars where we have been told, 'this is what you need to do,' but I haven't yet been to one where you said, 'here is how you do it.'" She thought that is really needed in this

whole process. "Tell us how to get there and do this." I think what Karen was also saying is that they didn't need it to be required in order to move to a board with outside members. I think we are seeing, and the survey shows this to some extent, that people are getting the message. Maybe they aren't moving fast enough but they are moving in that direction. She said it was difficult to find outside members. Now they have a majority of members on their board, former DHS, former juvenile department, and an employment lawyer. She found them but says it wasn't easy. The most important thing their group did was hire a lawyer to help them incorporate. I am not convinced, but it is not for me to be convinced, that you need to or even want to go to making this a requirement. I will just add this; you have talked at times about your need to maintain the independent contractor status of our contractors. There is a line, and there will be a line at some point that you could cross in telling them how to structure and conduct their business, where they will no longer be considered independent contractors and could arguably be considered employees. There is litigation in Washington where a circuit court in King County did exactly that, said the public defense contractors there are, in fact, and these were private entities, they called them agencies there. The circuit court said you are actually public employees and entitled to 20 years worth of public retirement benefits.

24:19 Chair Ellis

You are kidding.

24:19 P. Levy

No. The judge was in Pierce County but they were King County providers. I am not prepared to counsel you and talk to you today about where that line is, but it is one you would want to approach only if you absolutely have to.

24:47 P. Ozanne

I have to leave here and I am comfortable with the discussion here and the direction. One other thing that seemed to me to come out of the testimony today, in my view, was the need for an evaluation requirement. We can discuss it at another time. We wouldn't develop the evaluation. First of all you would just say there has to be an evaluation as a condition of contracting. I think I would probably delegate to our Quality Review Committee, rather than us personally, who are made up of their peers to look at it, and if it doesn't measure up then we would ask them to seek advice from the Quality Assurance Committee. There would be a requirement of an evaluation. I am not convinced there is an evaluation from what I heard today. We are still in a situation where there is somebody who is apparently a problem, of somebody who is practicing that shouldn't be and someday that will be addressed. It is just not moving fast enough in this example. I think, again, based on my experience, that is true other places. I don't see any problem requiring evaluations but letting the contractors develop it.

26:21 Chair Ellis

You are talking about evaluations of providers not evaluation of the manager?

26:26 P. Ozanne

No. I think that will be taken care of by boards. I am talking about the question of evaluating lawyers' performance. I think that should be taken up on another day.

26:39 Hon. Elizabeth  
Welch

There are so many fundamental issues here that haven't been talked about since we resumed. One of them is I am very taken with Jim's presentation to us on the notion that we should be contracting with these bodies rather than with the manger of a team of lawyers, whatever.

27:06 P. Ozanne

I think we do that.

27:09 Chair Ellis

CIDC is incorporated, isn't it? It is a non-profit corporation.

27:17 Hon. Elizabeth  
Welch

When you look at it that way it really completely changes the discussion in terms of what you would ask. Then the issue is do we allow Lane Borg to be on his own

board? Do we allow inside lawyers to supervise their own boss? These are really important practical questions that I think we need to look more deeply at.

27:47 P. Ozanne

I like Barnes' idea of not imposing anything until the next round of contracting. This is something that will take a lot of our discussion and we will send it out for comment. I think there are just a lot of potential pitfalls. Maybe you make the board responsible for being assured there is an attorney evaluation component rather than the director, which we have usually done.

28:15 O. Thompson

Just something from the MCAD experiences when we decided to get outside directors. Over a two year period of time we had a couple of retreats where we had somebody come in and explain to us non-profit law and how boards were required to function. There is a fair amount of stuff out there which includes stuff from the Oregon Attorney General, which I think makes clear that you can't have employees on a board. You can't have that CPA on a board. I think it would be incredibly useful if, particularly at the Public Defense Management Seminar, if there could be stuff specifically for board members on Saturday. I know I have tried as an MCAD board member to get particularly our outside board members, but even get our inside board members, to those conferences. Particularly for the outside people they would be giving up basically a half a day or a day's worth of employment to get there on Friday. That would be incredibly useful, I think, for all of us consortia boards. I think MCAD is a little further along on some of the stuff that we have been hearing about. Then the board members know what their jobs are and it is really non-profit board law. It is not directly even really connected with the criminal defense function.

29:43 Chair Ellis

To me I would really love to see Clackamas move to a model where at least a significant component, whether it is 20 percent or some other percentage I don't know, where the appointing source is from outside the organization and the director is not a provider. I just know that is better. How do we resolve this? I think it is something....

30:23 J. Stevens

Can I ask a question?

30:24 Chair Ellis

Yes.

30:30 J. Stevens

Are you looking for a board of directors in the traditional sense of the word, or are you looking for an advisory board?

30:40 Chair Ellis

The traditional board is what I am talking about.

30:43 J. Stevens

With all the traditional responsibilities.

30:57 Chair Ellis

Right. I am not sure whether everybody is moving in the same direction here.

30:59 J. Potter

I agree with you, Mr. Chair. I think we are moving in the same direction it is just a timing issue. I don't think that we have to make that decision today. I don't think we can make that decision today. We have a year until the next RFP goes out. With some more honing of the document that Ingrid has provided, and more discussion on an agenda, we will hone each thing. We can go from 15 to 10 or 10 to 5. If there are going to be exceptions we can construct those. What if we ended today with a request, and I think Paul you are the logical person here, request that Paul draft for our consideration a proposal along the lines that we have been discussing that would become a Commission policy of what we expect RFPs of a certain sized provider group to do, have that draft circulated to the provider task force. I do want their input. I think it is probably going to be supportive. The action items on the Clackamas service plan are subject to what we come up with there, which may well involve a requirement that both of the consortia here conform to that new policy if it is adopted. Does that sound like a way to bring this to a point today?

33:00 S. McCrea Yes.

33:00 T. Sermak On the issue of the size of the entity, it seems to me that one of the issues here is the fiduciary responsibility and the responsibility of the Commission and the providers who are spending public money. I am wondering why the Commission isn't looking at the size of the contract rather than the number of employees as the benchmark of where you might possibly need a board.

33:37 Chair Ellis Hopefully there is a correlation. Maybe that is a better dividing line.

33:47 K. Aylward I love that idea because I am sitting here thinking if I am a consortium of nine members, and Salem is urging me to add another member which will kick in the board, I don't want to do that, but I do want more money and if more money coming in triggers the board requirement then okay, I will do that board stuff.

34:09 J. Hennings Barnes, remember there were five board members when MPD started with two attorneys.

34:20 Chair Ellis We supervised the heck out of you.

34:20 J. Hennings I don't think size makes any difference at all. I think structure is the only thing that makes any difference.

34:32 Hon. Elizabeth Welch I have a reservation about Paul's assignment in that I think it requires him to make a lot of decisions about things that we haven't decided.

34:42 Chair Ellis He is only coming back with a draft. We aren't adopting anything today.

34:53 Hon. Elizabeth Welch What about identifying what the issues are and the options are rather than a plan of action.

35:00 P. Levy I do have question. Commissioner Ozanne talked about evaluations. Is that something you would like addressed in this proposal to include an option for directives on that?

35:20 Chair Ellis My personal view is no. I think if you get a good board they will do it. I am sensitive how far do you go on the micromanagement. I think I would not include that.

35:45 L. Borg Again, I have been harping on this for the last six to nine months but it is going to come into effect in the next year and half the revised 990 is going to go all the way down to non-profits that have a half a million dollar budget or more. When you look at that it is going to drive a lot of what your direction to Paul is. The big thing is that board members are going to have to sign a document to turn in. If they are going to be audited they have to sign this to turn in with the 990 that says they are either an independent or disclose what their business with the organization is. I have read the policies that the organization says it has got. You even have to put in there how long you were given to review the 990 as a board member.

36:35 Chair Ellis I thought 990 applied to those seeking 501(c)(3) status. I don't envision many of our contractors.

36:49 L. Borg I will have to go back and look at it. If you look at the types of things you are supposed to review, it is the same type of things I am hearing talked about here.

37:13 Chair Ellis Using Clackamas as an example, I am not at a point that I would prohibit provider members from being on their board. I think that it too radical. I do want a

significant percentage and 20 is what is suggested and it sounds like a good starting point. To be non-provider members and my strong preference would be that their appointing source be other than provider members.

- 37:50 I. Swenson We could also provide you with a little bit more information next time if you are interested. We could tell you how many contractors there are in various categories and who they are if that is useful to you. If you look at our survey you can't connect the provider with all of the responses because of the way it is numbered but we could do that. Just reviewing the one question about eligibility for membership on these boards, only one of our contractors in that list of 28 said non-members are eligible. There are patterns we can tell you about and you might choose either to make big changes in what is already established or not. So just knowing a little bit about what is already in place and maybe a bit more in how it is working for them might help you decide how directive you want to be.
- 38:53 J. Potter Paul develops the model based on what we have heard. Then there is a column next to, an overlay next to it, that says here in the model that you talking about but be aware, currently by the surveys that we have done, this is the reality. Do you want to change the reality to the model or don't you?
- 39:15 J. Hennings I think paying attention to the IRS rules is going to be important. I believe all the consortia are now non-profits. The IRS rules apply to non-profits. That is going to make a huge difference. If anything the IRS is saying they are going to get more stiff on those requirements.
- 38:49 Chair Ellis We should get your board member back from Salem who is a non-profit lawyer.
- 39:57 L. Borg For an organization like us we have attorneys we deal with and I understand that is just what I have to deal with in a larger organization, but for the smaller groups the University of Oregon now has a business clinic in Portland. Lewis & Clark has a small business clinic as well as a non-profit business clinic. This would be a perfect fit for some of these. I think Clackamas is even too large to do that, but if you are talking about a group in Polk County, or one of these other counties, there is no reason they can't go to these law school clinics and be the client for them in terms of working with them and developing forms.
- 40:47 Chair Ellis I think we need a motion on the Clackamas plan. We don't need a motion on this other. It is more a request for Paul to do his thing between now and then.
- 41:05 J. Potter Isn't the motion for the Clackamas plan going to integrate into it, the notion that Paul will do...
- 41:10 Chair Ellis So your thought is defer Clackamas. I think anybody who is listening knows where we are headed. Alright.
- 41:32 Hon. Elizabeth Welch I still think it is fascinating that the district attorney of this county has never come to any meetings.
- 41:39 Chair Ellis I think that is true.
- 41:45 I. Swenson He did speak to us but did not come.
- Agenda Item No. 7 OPDS Monthly Report**
- 42:00 Chair Ellis Why don't we do the OPDS monthly report. I am shy of doing the contracting piece without Peter because that was an issue he was very interested in. Let's do the monthly report.

- 42:11 P. Gartlan Good afternoon. Peter Gartlan of the Appellate Division or what is left of it. Judge Duncan couldn't be here today.
- 42:36 Chair Ellis Just by way of timing she is already serving, isn't she?
- 42:41 P. Gartlan She was sworn in on Tuesday. Bypassing the evaluation because that is a separate item, but given Judge Duncan's departure and Bronson's departure, we are in a process of filling those positions. We have filled in the new chief deputies that you shall meet at the next meeting. They are Josh Crowther and Ernie Lannet. Ernie was the attorney who argued *Oregon v. Ice*. Ernie has been with us for about 10 years. Josh has been with us for about eight years. Then we had to fill some senior deputy positions because both Ernie and Josh were senior deputies. We filled them with Ryan O'Connor and Mary Reese. Mary Reese is a long-standing employee but she had left the office for a few years a couple of years ago. She has probably been with the office at least 12 to 15 years. Ryan is a graduate of Notre Dame and he has been with the office for about five years. Even though we are losing two really, really good people, I am really reassured by the fact that when I look around I see the quality of the people that we have been able to promote I am very encouraged. These people are really good. They are the first and second generation attorneys who have come in after Becky. Becky came in around 1999 or 2000. These are people that Becky and I hired. It is really pleasing to see these people come up and be very competent and talented individuals.
- 44:53 Chair Ellis You know you have done a couple of things along that line that I think have been really good. You have let some of the lawyers argue those really high profile US Supreme Court cases, which I think is just great for morale up and down an organization. I think Becky's appointment will have the same effect. I am hopeful, and I think it is true, that your office begins to look like a really good place to go because there is upward mobility there.
- 45:28 P. Gartlan Essentially we are grooming people for the Court of Appeals. All kidding aside, I agree with that. I think it is reflected in the number and quality of the applicants that we have had over the last several years. This most recent pool for the entry level deputy I positions is well over a 100 applicants. There are just many stellar applicants, very, very talented people. Again, that is reassuring and encouraging. I think people are aware that our office is a good place to come to. It is a place where they will be supported and learn and grow as attorneys. That is pretty much it.
- 46:30 Chair Ellis Anything else?
- 46:30 I. Swenson I owe you an executive director's annual report. It is in draft form but I will get it to you before the next meeting. It just sort of summarizes the developments at OPDS in the last year.
- 46:46 Chair Ellis Anything on this upcoming legislative session we need to worry about?
- 46:52 I. Swenson It looks like their issues will all be substantive issues rather than fiscal ones. We had been asked to submit, like other agencies, an additional reduction plan and that request was canceled as of yesterday. From that perspective it is looking a little better. Kathryn participated in a meeting on House Bill 2287 which is the court fee bill. We learned that revenue under that measure is approximately half of what it was projected to be, so there will be additional concerns about filling our budget deficit as well as the judicial one.
- 47:38 K. Aylward Probably between now and the next commission meeting we will be entering into a lease. We have been in discussions for a long time about moving into a building across from the justice building. It was always a question of whether we would actually fit. The building owner agreed to use their architect to do a layout for us at their expense. I got that yesterday and it looks nice. It looks like we will fit. I have met with them several times and I think we have worked out the price. There is an

issue with the tenant improvements. Their cap is \$500,000 that they will cover. If it is more than that we have to amortize it over the length of the lease. I am not quite sure how I then get some – you guys get some protection if it is \$900,000 or a million and a half. There will need to be some other kind of cap. They have agreed to two and a half months free rent. That covers us during the time overlapping the actual physical moves. For a couple of weeks we can have a foot in each camp. Two months rent free not only covers the cost of the move but allows us to fill any holes there might be in our budget. I have talked to LFO about it and they are excited about the notion that we are going to undertake this much work to be able to save some money.

- 49:03 J. Potter` And a better location.
- 49:04 Chair Ellis It really is right across from the DOJ?
- 49:09 K. Aylward Yeah.
- 49:14 I. Swenson And it has a meeting room that would accommodate the Commission too.
- 49:21 Chair Ellis All we need is parking and we are done.
- 49:21 K. Aylward The building does come with 32 parking spaces rolled into the lease. It has its own lot.
- 49:31 Chair Ellis That sounds terrific. Anything else on OPDS? My thought would be to, unless I am told that some of the things I am skipping are time critical, go to the executive session at this point. I want to thank you all for joining us up to this moment. I don't see any members of the press present, but they are certainly welcome to stay if they so chose.
- (Executive session)
- 1:01:16 Chair Ellis Alright. We are out of executive session. Anything else we ought to consider today?
- 1:01:21 I. Swenson Did you take a look at the minutes?
- 1:01:22 Chair Ellis We did. They were executive session minutes so following strict protocol we approved them while still in executive session. Is there a motion to adjourn?  
**MOTION:** John Potter moved to adjourn the meeting; Shaun McCrea seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**
- Meeting adjourned.



# Attachment 2

# MEMORANDUM

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To: Public Defense Services Commission  
From: Paul Levy, General Counsel, Office of Public Defense Services  
Re: **Public Defense Provider Governing Bodies**  
Date: February 25, 2010

## Introduction

During the course of several recent meetings, the Public Defense Services Commission (PDSC) has considered whether to become more “prescriptive” concerning the structure of entities that contract with PDSC to provide public defense services. In particular, the Commission has discussed whether, and in what circumstances, it might require contractors to be governed by a board of directors that includes independent members who do not provide public defense services under the entity’s contract with PDSC. This memorandum provides the Commission, and interested members of the Oregon public defense community, with additional information regarding this issue and descriptions of several ways in which it might be addressed.

The Commission’s consideration of this matter is framed by its longstanding acknowledgement, stated in each of its many service delivery reviews, that it has “no interest in developing a one-size-fits-all model or template for organizing the delivery of public defense services in the state,” and recognition that the considerable diversity in the structure of local public defense organizations has “emerged out of a unique set of local conditions, resources, policies and practices[.]” However, the Commission has made significant structural changes in some regions when necessary to fulfill its mission to ensure the delivery of quality public defense services in the most cost-efficient manner possible.

Indeed, the Commission’s consideration of the governing bodies of public defense providers arises in the context of ongoing concerns with both the quality of public defense services and the responsible management of public funds. Despite reports and findings that the state’s public defense contractors are generally providing good representation, the Commission continues to receive information about persistent performance problems with some attorneys providing representation under contract. The Commission has been informed that a significant number of contractors have not undertaken meaningful quality assurance measures, including effective training, monitoring and evaluation of attorney performance. For many of these contractors there is no governing body other than the attorneys who provide services under the entity’s contract with PDSC.

## **Boards of Directors**

A board of directors is the statutorily required body charged with duties and responsibilities for the governing of corporations. Oregon law allows a corporation, through its articles of incorporation and bylaws, considerable flexibility in determining the membership and authority of a board of directors, which may consist of only one person. Public defense providers that are not corporations are not required, by law, to have a board of directors. A “board of directors” for such non-corporate entities may have no legally recognized authority to govern its affairs.

Nearly all Oregon public defense providers that are organized as non-profit corporations also qualify as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code. The principal federal “tax return” for these organizations is Form 990, which requires a description of the organization’s governance and management structure. For tax year 2010, the Form 990 will be required for any tax-exempt organization with gross receipts of \$200,000 or more.

The Internal Revenue Service (IRS), through the Form 990, demonstrates a strong preference, but does not require, that organizations have boards of directors that include “independent” voting members. To be considered an “independent” board member, a person must not be compensated as an officer or other employee of the organization, and must not receive other payments exceeding \$10,000 from the organization as an independent contractor or have other specified business transactions with the organization. In addition to questions about board members, the Form 990 also asks whether organizations have established policies and procedures concerning reasonable executive compensation, conflicts of interests of officers and directors, whistleblower claims, and document retention and destruction, among other matters.

Instructions for the Form 990 and related documents from the IRS explain that the policies and procedures it inquires about, including a governing body that mainly consists of independent members, increase the likelihood that organizational decisions will be made in the best interests of the organization and the community it serves, reduce risk of abuse and impermissible private transactions, and assist the organization to succeed in the mission for which it qualifies for tax exemption.

Although the IRS considers the policies and procedures described in the Form 990 to be the hallmarks of a well-governed organization, they are not required as a matter of state law for non-profit organizations. There is no requirement, for instance, that a board of directors include independent members, nor any prohibition on employees serving as board members.

## **Current Structure of Public Defense Providers**

In addition to the survey of contractors regarding board structure and evaluation practices presented at the January 28, 2010 Commission meeting, OPDS contract analysts recently examined that data in light of the size and business structure of contractors. Specifically, the analysts looked at contractors who provide services with five or more attorneys. PDSC contracts for public defense services with 46 entities that fit that description. Of these entities, 28 are consortia, 10 are public defender offices, and eight are law firms.

As seen on the attached spreadsheet, most of the entities described above have a formal legal structure, most also have a board of directors, and a large majority of those entities with boards include, though may not require, independent members. Specifically, each of the public defender offices is structured as a non-profit corporation with a board of directors on which some or all members are considered independent. For consortia, 13 are organized as non-profit corporations, and of those nine have independent members on their board of directors. Of the remaining consortia, 10 have some formal business entity (two are for-profit corporations, eight are limited liability companies), and four of these entities report having a board of directors with at least one independent member. There are five consortia with no formal business structure; one of these reports having a board of directors but no outside member sits on it. Of the law firms, only one reports having a board of directors, but no outside member sits on it. In all, a total of 23 of the 46 contractors described above report having a board of directors with outside members.

For a variety of reasons, the total value of a contract does not equate to the number of attorneys providing services under a contract. But of the 23 biennial contracts valued at \$2 million or more, all but six include contractors with ten or more attorneys. There are three current contractors with ten or more attorneys that have contracts valued at less than \$2 million. Of entities with contracts valued at \$2 million or more, seven (including one law firm) do not currently have a board of directors with independent members.

## **Proposals**

The Commission's discussion of public defense governing bodies with independent members has invited consideration of alternate approaches to accomplishing its goal of responsible management of public defense funds. Listed below are several possible approaches the Commission might take, along with some relevant considerations.

1. The Commission could direct the Office of Public Defense Services (OPDS) to negotiate certain contracts only with entities that are governed by a board of directors that includes independent voting board members. The Commission would direct OPDS to describe, in any Request for Proposals for Public Defense Legal Services Contracts,

the minimum requirements for the governing bodies of contract proposers. In so doing, the Commission may wish to apply any requirements concerning governing bodies to only those entities proposing to contract for services valued at some specified value, such as \$2 million or more. The Commission could specify the percentage of voting board members who must be independent, who qualifies as an independent member, and how independent members are selected. The Commission may consider exempting law firms from any requirements concerning contractor governance.

*Among the considerations relevant to this approach:*

- Is the Commission also prepared to require that contract proposers subject to this requirement be incorporated, since that is the only business entity for which a board of directors is required by law? Does the Commission view an “advisory board,” which may have no actual governance authority, as acceptable for those providers with an entity structure that does not require a board of directors?
- To what extent do current providers who would be subject to this proposal already include independent members on boards of directors? In other words, how much change would adoption of this proposal cause to current practices? The recent survey and other inquiries disclose that many of the current contractors who might be subject to a requirement concerning board structure already include independent members.
- Would some current providers subject to a board governance requirement decline to contract with the Commission were this proposal implemented?
- To what extent can or should the Commission dictate the structure of the independent contractors with whom it does business?

2. The Commission could continue to strongly urge, but not require, that public defense providers of a certain size or description include independent members on any governing body that they may have.

*Among the considerations relevant to this approach:*

- Will more contractors adopt a board structure with independent members without a requirement to do so? A significant number of contractors have formed boards of directors and added independent members to their boards without a requirement to do so, presumably in response to the Commission’s well-known preference for such a practice. The governance by a board of directors with independent members is also a best practice recommended by the OPDS Quality Assurance Task Force, which conducts peer evaluations of

public defense providers. These peer evaluations typically recommend the formation of a board with independent members where they do not already exist.

- Are there other ways in which the Commission and OPDS can assist contractors in adopting boards without requiring them? Provider governance and boards of directors has been the subject of presentations and workshops at three of the recent annual public defense management seminars. The Commission heard at its January 28, 2010 meeting that at least one contractor, who recently incorporated and established a board with independent members, believes more guidance is needed from OPDS to assist providers with the transition to a formal business structure that would include a board with independent members. The Commission has also been informed that small business clinics and other programs at Oregon law schools may be available to assist contractors with establishing a preferred business structure.

3. The Commission could make available to contractors an option, in lieu of meeting a requirement for a board of directors with independent members, which would permit contractors to demonstrate to the Commission, in their responses to a RFP, that the contractor has developed and implemented effective quality assurance mechanisms and appropriate financial safeguards.

*Among the considerations relevant to this approach:*

- To the extent the Commission's interest in provider governance stems from concerns with the quality of provider services, how much confidence does the Commission have that requirements for provider governance will improve or assure quality representation? Is there evidence that the presence of independent board members improves the quality of a provider's legal services? As the data reveals, many providers currently have independent board members. Nonetheless, quality assurance concerns persist with some of these providers.
- Are there other approaches to assure quality representation? Clearly, an effective board of directors, however structured, does not, without more, assure quality representation. But it may be that other approaches, not requiring changes to provider governance, could be effective in improving the quality of provider representation. For instance, the Quality Assurance Task Force is finalizing revisions to its best practices recommendations with a new document that describes in significant detail the responsibilities of public defense providers to establish and implement quality assurance practices. The Commission may wish to consider whether implementation of these best practices

recommendations, in lieu of changes to provider governance, would be an acceptable option.

- Are there reasons other than quality assurance that weigh in favor of requiring independent members on provider boards of directors? Assuring sound financial management is certainly a primary concern behind the emphasis, on the IRS Form 990, for boards with a majority of independent members. The Commission has frequently noted that the presence of independent members on provider boards of directors broadens the base of understanding and support for public defense within local communities. Do concerns about provider fiscal responsibility and community support warrant mandating changes to the structure of some providers?

## **Conclusion**

Oregon is frequently cited as an example of a state that has succeeded in providing quality public defense services through a system that relies largely upon contracts with private entities. Yet the model has many challenges, and principal among them is achieving the recognition among contractors that they have the responsibility, in the first instance, to adopt and enforce effective mechanisms to assure the quality of representation they provide clients. That responsibility should be a touchstone for the governing body or management of any public defense provider. It is widely believed that the participation of members of the public, who receive little or no direct benefit from an entity's business, will assist it in succeeding in its mission to serve the public. The question remains whether, and in what circumstances, that participation should be required.

Contractor	Entity	Board	# of Board Members	Outside Members	Legal Entity	Contract Amount	# of Attys
Metropolitan Public Defender Services, Inc.	PD	Y	7	Y	Corp Non-profit	\$18,412,236	57
Public Defender Services of Lane County	PD	Y	7	Y	Corp Non-profit	\$8,140,680	23
Southern Oregon Public Defender	PD	Y	5	Y	Corp Non-profit	\$7,612,960	23
Multnomah Defenders, Inc.	PD	Y	5	Y	Corp Non-profit	\$7,311,888	23
The Juvenile Advocacy Consortium	Consortium	Y	5	Y	Limited Liability Entity	\$5,937,040	19
Marion County Assoc. of Defenders, Ltd.	Consortium	Y	9	Y	Corp Non-profit	\$5,876,400	38
Clackamas Indigent Defense Corporation	Consortium	Y	9	Y	Corp Non-profit	\$5,315,040	30
Klamath Defender Services, Inc.	Consortium	Y	5	N	Corp Non-profit	\$5,290,680	16
Portland Defense Consortium	Consortium	Y	8	Y	Corp Non-profit	\$4,767,120	19
Lane Juvenile Lawyers Association	Consortium	Y	5	Y	Corp Non-profit	\$4,488,960	17
Juvenile Rights Project, Inc.	PD	Y	14	Y	Corp Non-profit	\$4,427,040	20
Crabtree & Rahmsdorff Defense Services, Inc	PD	Y	4	Y	Corp Non-profit	\$4,276,880	13
Multnomah Juvenile Defense Consortium	Consortium	N		N	Limited Liability Entity	\$3,486,960	16
Linn County Legal Defense Corporation	Consortium	N		N	Corp For-profit	\$3,162,240	9
Yamhill County Defenders, Inc.	Consortium	Y	7	N	Corp Non-profit	\$2,949,975	17
Intermountain Public Defenders, Inc.	PD	Y	5	Y	Corp Non-profit	\$2,866,080	9
Umpqua Valley Public Defender	PD	Y	5	Y	Corp Non-profit	\$2,759,040	10
Oregon Defense Attorney Consortium	Consortium	Y	3	N	Corp Non-profit	\$2,741,952	23
Public Defender of Marion County, Inc.	PD	Y	7	Y	Corp Non-profit	\$2,611,760	9
Lincoln Defense Consortium	Consortium	Y	7	N	No formal entity	\$2,393,160	14
Linn County Juvenile Defense Corporation	Consortium	Y	5	Y	Corp For-profit	\$2,312,160	7
Independent Defenders Inc.	Consortium	Y	4	Y	Corp Non-profit	\$2,154,480	11
Southwestern Oregon Public Defender Service	PD	Y	3	Y	Corp Non-profit	\$2,088,080	6
Morris & Olson, P.C.	Firm	N		N	Corp For-profit	\$2,041,920	7
Jackson Juvenile Consortium	Consortium	N		N	Limited Liability Entity	\$1,983,840	6
Brindle, McCaslin & Lee, PC	Firm	N		N	Corp For-profit	\$1,886,520	10
Lane County Defense Consortium	Consortium	Y	5	Y	Corp Non-profit	\$1,810,320	14
DeKalb & Associates	Firm	N		N	Corp For-profit	\$1,738,480	5
Rader Stoddard & Perez	Firm	N		N	Corp For-profit	\$1,491,000	5
Columbia County Consortium	Consortium	Y	5	Y	Corp Non-profit	\$1,473,680	9
Bend Attorney Group	Consortium	Y	3	Y	Corp Non-profit	\$1,468,800	9
Ridehalgh & Associates, LLC	Firm	N		N	Limited Liability Entity	\$1,460,000	7
Karpstein & Verhulst	Firm	N		N	Corp For-profit	\$1,436,480	5
Blue Mountain Defenders	Consortium	Y	5	Y	Limited Liability Entity	\$1,430,880	6
Josephine County Defense Lawyers	Consortium	Y	3	N	Corp Non-profit	\$1,416,000	9
Benton County Legal Defense Corporation	Consortium	Y	5	Y	Corp Non-profit	\$1,286,640	7
Rose City Defense Consortium	Consortium	Y	3	Y	Limited Liability Entity	\$1,202,840	10
Twenty-Second Circuit Defenders	Consortium	N		N	Limited Liability Entity	\$1,096,680	5
Washington County Indigent Defenders, P.C.	Firm	Y	2	N	Corp For-profit	\$1,080,240	9
Grande Ronde Defenders	Consortium	N		N	Limited Liability Entity	\$963,040	6
James A. Arneson, P.C.	Firm	N		N	Corp For-profit	\$946,320	5
Los Abogados	Consortium	N		N	No formal entity	\$873,840	7
Oregon Appellate Consortium, Ltd.	Consortium	N		N	Limited Liability Entity	\$776,400	5
Coos County Indigent Defense Consortium	Consortium	N		N	No formal entity	\$761,360	5
Madras Consortium	Consortium	N		N	No formal entity	\$677,400	6
Baker County Consortium	Consortium	N		N	No formal entity	\$408,960	5

# Attachment 3

To: Public Defense Services Commission

From: Ingrid Swenson, Executive Director, Office of Public Defense Services

Date: February 24, 2010

Re: Waiver of Counsel in Juvenile Delinquency Cases in Oregon Courts

Under both the United States Constitution<sup>1</sup> and ORS 419C.200 and 419C.245 youth alleged to have engaged in conduct that would be criminal if committed by an adult are entitled to representation by counsel.

In the course of PDSC service delivery reviews<sup>2</sup> and Quality Assurance Task Force site visits it has come to the agency's attention that a significant number of youth who are entitled to representation are waiving the right to counsel in some counties. The Oregon Judicial Department has estimated that in 2008 between 60.3 and 66.7% of youth were appointed attorneys on original delinquency petitions and in probation violation proceedings, leaving between 33.3 and 39.7% who were unrepresented or represented by private counsel.<sup>3</sup>

That number is completely out of proportion to the percentage of adult defendants who waive counsel in criminal cases and raises a concern about whether there are adequate protections in place to ensure that youth who do waive are capable of representing themselves and are making waivers that are truly knowing, intelligent and voluntary.

Included with this outline is a copy of an article prepared by then University of Oregon law student Jordan Bates on waiver of counsel in delinquency proceedings. The paper includes information obtained by Ms. Bates about practices in some of Oregon's counties and an appendix that includes statutes and court rules relating to waiver of counsel in other states. Ms. Bates will present her paper to the Commission at its March 4, 2010 meeting.

In order to obtain more information about the circumstances under which waivers are being accepted in each county in Oregon, law students from the University of Oregon<sup>4</sup> contacted all juvenile departments in the state by phone, email or both. Directors in 33 counties responded. They provided the following information:

#### 1. Formal Accountability Agreements

Under Oregon statute, in addition to any informal diversion programs that county juvenile departments may provide, youth accused of conduct that would be criminal if committed by an

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<sup>1</sup> *In re Gault*, 387 US 541, 561 (1966)

<sup>2</sup> In 2006 PDSC received testimony and other information regarding public defense representation in delinquency cases. Waiver of counsel was not a focus of that discussion. In one of its regional service delivery reviews, PDSC was informed that 50% of youth waived counsel.

<sup>3</sup> This information was provided by the department's Juvenile Law Staff Counsel in response to an inquiry from a law student. Counsel noted that actual data on representation by private counsel is unavailable, but practitioners report that such representation appears to be rare in all counties.

<sup>4</sup> University of Oregon Law School students David Sherbo-Huggins, Rebekah Murphy and Kristin Ware obtained and organized the information from the directors and provided it to OPDS. Mr. Sherbo-Huggins and Ms. Murphy worked under the supervision of Leslie Harris, the Dorothy Kliks Fones Professor of Law at the school.

adult can be considered for participation in a Formal Accountability Agreement (FAA) in lieu of the filing of a delinquency petition. ORS 419C.245 requires that youth being considered for such participation be advised of their right to have the advice of counsel about whether or not to participate.

In a survey of juvenile departments conducted by David Sherbo-Huggins and Rebekah Murphy all counties reported waiver rates for FAAs at 95 to 100%. In addition, a number of counties reported that when youth chose to avail themselves of legal advice at the FAA stage they were advised either that they would have to retain counsel or that, if they wished to assert their right to appointed counsel, a delinquency petition would be filed<sup>5</sup>.

Some of the misunderstanding about the right to appointed counsel for youth being considered for FAAs is due to the lack of awareness on the part of some of PDSC's contractors that they are entitled to payment for this representation. Two counties reported that lawyers formerly provided representation at this stage for free but were not longer willing to do so.

After receiving the survey responses, OPDS contacted individual juvenile departments and informed them of the availability of appointed counsel and encouraged them to make arrangements for the provision of legal advice by the public defense attorneys in their area so that youth who sought the advice of counsel would not be penalized for doing so by the filing of a petition.

2. Delinquency Petition/Probation Violation Proceedings: County-by-County

In the survey conducted by Mr. Sherbo-Huggins and Ms. Murphy data was also obtained regarding waiver of counsel by youth charged by way of a delinquency petition with conduct that would be criminal if committed by an adult and with violation of the terms of probation. This data was added to Appendix Two in Ms. Bates' article on waiver of counsel, "The Awesome Prospect of Incarceration" with her permission and appears below.

**OREGON PRACTICE ON WAIVER OF COUNSEL – BY COUNTY<sup>6</sup>**

<b>County</b>	<b>Waiver Practice</b>
<b>Baker</b>	Youth appear initially with a parent or guardian and are given the opportunity to discuss with them whether they want to waive or not. If the parent or guardian is the victim, the Judge will appoint counsel at the first appearance. <b>No estimate on frequency of waiver. Rare to permit waiver in felony cases. Probation violation proceedings initiated by affidavit. Counsel provided only if requested.</b>
<b>Benton</b>	A majority of youth are represented by attorneys. When a youth waives the right, the judge consults with the youth and parents about the reasons and possible consequences. Judges do not allow waivers on serious cases where placement could be outside the home. <b>Approximately half of the youth in probation violation proceedings are represented. A motion to show cause is used to initiate</b>

<sup>5</sup> In the FAA setting it is the juvenile department staff and/or the youth's parent who discuss the right to counsel and determine whether a youth appears competent to waive representation since the matter does not come before the court.

<sup>6</sup> Material in bold was obtained by Mr. Sherbo-Huggins and Ms. Murphy and added to the original document prepared by Ms. Bates

	<b>violation proceedings.</b>
<b>Clackamas</b>	Court requires counsel at the first appearance (preliminary hearing). Youth's parents then complete financial forms to determine whether youth is eligible for court appointed counsel. Very rare that counsel is waived, estimate is less than 5%. <b>Almost all youth are represented in formal probation violation proceedings as well.</b>
<b>Clatsop</b>	Moving toward a standard practice of having a written waiver of counsel, though not currently the case. Judge advises youth of his/her right to counsel and regularly asks youth if s/he has consulted with his/her parents before making an admission if doing so without counsel. Judge will also ask parents whether they are ok with the child proceeding without counsel. Occasionally the Judge will appoint counsel in a serious case (serious charges, conflict with parents, age) even if the youth desires to waive.
<b>Columbia</b>	Never have a juvenile waive counsel. Court explains the rights to the youth and the parents. Judges will often appoint counsel even if the youth wants to waive if there is a question about the age or mental health status of the youth. The Juvenile Department can also request counsel on behalf of the youth if they have reason to believe it would be in the youth's best interest.
<b>Coos</b>	<b>It is estimated that no more than 5% of youth waive counsel on initial petitions and approximately 50% in probation violation proceedings. In ten years the juvenile department has never advised the court that any youth appeared to be incompetent to waive counsel.</b>
<b>Crook</b>	No information
<b>Curry</b>	<b>Youth are represented in only about 50% of delinquency cases and 10% of probation violation proceedings; admissions to felonies are not permitted without counsel; on probation violations waiver is discouraged if the juvenile department seeking detention or out of home placement. Wavier is not discussed when youth are offered informal sanctions for probation violations.</b>
<b>Deschutes</b>	It is rare if a juvenile does not have an attorney. Almost all of them do. <b>It is estimated that 95% of youth are represented in delinquency cases and youth charged with felony offenses are not permitted to waive. Attorneys are present for initial appearances. 99% of youth charged with probation violations, which are alleged by a motion to revoke probation, are represented.</b>
<b>Douglas</b>	<b>Approximately 99% of youth and 100% of those charged with felonies are represented by counsel. Attorneys are present for initial appearances. Approximately 95% of youth are represented in formal probation violation proceedings which are filed as Notices of Probation Rule Violation.</b>
<b>Gilliam</b>	<b>Approximately 80% of youth waive counsel on delinquency petitions. No waiver permitted on felony cases without the advice of counsel.</b>
<b>Grant</b>	<b>Attorneys are not present for initial detention hearings; court will not accept admissions at this hearing. No</b>

	<b>statistics on waiver at “admit/deny” hearing. Court discourages waiver. A show cause motion is used to initiate probation violation proceedings; no statistics on waiver. If had counsel on original petition, counsel generally reappointed on probation violation.</b>
<b>Harney</b>	In Harney County, by order of the circuit court judge, each juvenile that is petitioned into court for an allegation of delinquency is assigned an attorney at his first appearance. The juvenile is represented at all stages of the jurisdiction process. The only exception is when a juvenile is petitioned for a violation i.e. Curfew, Minor in possession of alcohol or possession of less than 1 oz of marijuana. <b>The same attorney who represented the youth in the initial proceedings is generally reappointed for probation violations which are initiated by petition. Attorneys are present at initial hearings.</b>
<b>Hood River</b>	An attorney is typically retained or appointed on all delinquency cases. If a youth does not want an attorney, they are again made aware of their right to one and are given time, if needed, to speak with a parent or guardian. If the youth and his/her family can convince the court they do not need counsel, the court will not appoint counsel. Counsel may not be waived if the petition is a felony.
<b>Jackson</b>	<b>Approximately 25% of youth waive counsel in delinquency cases, including some felony cases; 75% waive in probation violation proceedings. Attorneys are not present at initial hearings</b>
<b>Jefferson</b>	No information
<b>Josephine</b>	The judge almost insists that every youth be represented by an attorney. Even if the youth signs a waiver, the Court usually persuades the youth that he/she should have representation. <b>Approximately 99% of youth are represented, in both delinquency and probation violation proceedings. Defenders are not present at initial hearings. Violations are pursued as motions.</b>
<b>Klamath</b>	<b>No estimates of waiver rates provided although it is reported to be rare in felony cases; attorneys are present at initial hearings</b>
<b>Lake</b>	<b>Approximately 95% are represented in delinquency proceedings but have been permitted to waive in some felony cases. Youth waive counsel in 95% of probation violations, most of which proceed informally.</b>
<b>Lane</b>	Attorneys appear with youth at their first hearing. An attorney is appointed in all situations. If a parent is able to retain counsel and chooses not to, the judge will appoint counsel for the youth. <b>In probation violation proceedings petitions are not usually filed. The Probation officer contacts the youth’s attorney and a motion is filed and hearing scheduled. Attorneys also advised when informal probation sanctions are imposed.</b>
<b>Lincoln</b>	Very few formal cases where an attorney is not appointed and then in only fairly minor matters. Most of the judges look at it as almost an unwaivable right. <b>Probation matters are filed by affidavit and motion.</b>
<b>Linn</b>	Judge conducts a colloquy on the record with the juvenile,

	<p>being sure to advise him/her of the disadvantages of representation. The waiver must be in writing if the charge is a serious misdemeanor or felony. If a parent is able to afford counsel and chooses not to, the Judge will appoint counsel and enter a judgment against the parent. If the offense is serious, the Judge appoints counsel in almost all situations, whether the juvenile wants counsel or not. Waiver is fairly routine on probation violations when a significant deprivation of liberty is not likely. <b>It is estimated that approximately 50% of youth waive counsel in misdemeanor cases and 60% in probation violations</b></p>
<b>Malheur</b>	<p>Child is given a packet for a court appointed attorney when arraigned. If child waives, Judge will question him/her at the release hearing. Judge tries to persuade those who are charged with a felony or sex offense to apply for counsel, and will appoint an attorney occasionally even if the youth says he/she does not want one. Judge will appoint an attorney no matter what if the youth will be going to the Youth Correctional facility or if Probation is recommending custody in OYA. <b>Attorneys are not present at initial hearings. Probation violations are prosecuted by motion.</b></p>
<b>Marion</b>	<p>Prior to the first hearing, juveniles are notified of their rights and sign a document, along with their parents, indicating they understand their rights. Judge then reviews this sheet and if the juvenile wishes to retain counsel, or have counsel appointed, he must state that. If the juvenile wishes to get counsel prior to the first hearing, he must tell the probation officer who will have him fill out a financial form. Pool of consortium attorneys is present in case a juvenile does want counsel. If the victim in the case is the juvenile's own family, the judge will usually appoint counsel. This also usually happens if the juvenile is very young or has obvious mental health issues. <b>It is estimated that 50% of youth waive counsel on delinquency petitions including some felonies, and 90% on probation violations which are initiated by affidavit.</b></p>
<b>Morrow</b>	<p>Vast majority waives counsel based on the experience of the Director. Guess is that 80% or so waive vs 20% who may retain, 90-95% of which are likely court appointed. Serious offenses notwithstanding. The department director initially meets with the youth and his/her parent and they determine whether the youth desires counsel. If so, the Director must set a hearing in front of the judge to determine whether they qualify for counsel. Court appointment in Morrow comes from the Juvenile department budget and not from State court assistance. <b>Note: This is a county court; PDSC does not provide representation in this court.</b></p>
<b>Multnomah</b>	<p>Practice is to appoint counsel at the first appearance of the youth. The Juvenile department director knows of no youth who ever waive counsel. <b>Attorneys are present for initial hearings. Counsel is never waived for formal probation violation proceedings initiated by petition.</b></p>
<b>Polk</b>	<p>Attorneys are not on hand to appear with youth at the first appearance and the court does not require any attorney to be present. Youth is provided with and signs an "advice of rights"</p>

	form that indicates whether he or she wants an attorney. The court, probation officer, and parent discuss the right to counsel. <b>No waiver rates available. Judges are reported to question youth closely regarding their capacity to waive but have permitted waiver in felony cases. Probation violations are filed as motions for review.</b>
<b>Sherman</b>	Judge's informal policy is to appoint counsel to all youth in delinquency and dependency cases. <b>Same attorney who represented youth on delinquency case is reappointed on probation violation, pursued by affidavit. Attorneys are not present for initial hearings.</b>
<b>Tillamook</b>	<b>Approximately half of youth waive counsel in delinquency proceedings, including non-person felonies. Waiver is discouraged in serious felony cases. Attorneys are not present at initial hearings. Probation violations are filed as petitions</b>
<b>Umatilla</b>	When youth is read his/her rights, notified of the right to counsel. If youth is in detention, parents are not present, if not in detention, parents are present. Judge confirms with youth and parents at detention hearing whether youth wants to waive counsel. Attorneys are present in the courtroom in cases where a youth does want to be represented. Judge continues to remind youth that counsel is available. An attorney is appointed in all cases in which the youth may be committed to the OYA or is charged with a felony. <b>Approximately 60% of youth waive counsel on delinquency petitions including on some C felonies, and 80% on probation violations, which are initiated by petition.</b>
<b>Union</b>	No information
<b>Wallowa</b>	Youth is given a form to sign if he/she desires to waive counsel. Both the juvenile department staff and the Judge review the document with the youth and his/her parents. <b>Approximately 50 % of youth waive counsel in delinquency proceeds and 40% in violation proceedings. Waiver strongly discouraged in felony cases. Probation violations are pursued as motions to show cause. Attorneys are present at initial proceedings whenever it is possible for them to get there.</b>
<b>Wasco</b>	The Youth Services director shared anecdotally that "over 97% of the youth who appear in court are represented by counsel." There is no set protocol for allowing youth to waive.
<b>Washington</b>	Policy is to ensure counsel on every hearing for a criminal offense (excluding MIP and truancy cases). The court would entertain a "request of waiving counsel if approached by the youth, however it is believed that a delinquency petition and possible consequences if adjudicated, are such that it would not be in the youths best interest to do so."
<b>Wheeler</b>	<b>Waiver is rare on delinquency petitions (approximately 10% of cases, and is not permitted in felony cases); waiver is also uncommon in violation proceedings. Attorneys are present at initial hearings, either in person or by phone.</b>
<b>Yamhill</b>	Youth is advised of the right to counsel by the juvenile department staff. Parent is also advised. The juvenile and his/her parent will meet with the defense attorney present in court on the day of the hearing to discuss waiver and the

	benefits of counsel. The Judge will again go over the youth's decision to waive counsel. <b>Waiver rates are not available. Youth are permitted to waive counsel in felony cases. Probation violation proceedings are initiated by motions to show cause.</b>
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From this data it is clear that waiver practice varies dramatically from one county to another. Some counties permit it only in rare circumstances, others on a routine basis.

If after hearing the presentations on March 4 and being provided with any additional information it might request, PDSC determines that action should be taken to ensure that youth are receiving the full benefit of the right to counsel in these proceedings, following are some of the approaches it might consider.

1. PDSC could promote a statutory or policy change that required consultation with counsel before an admission to any offense, or alternatively, to a felony or a person-misdemeanor. A number of states as indicated in Appendix One to Ms. Bates' article have enacted statutory prohibitions against wavier without consultation with counsel in any case or in particular categories of cases such as those in which a youth is subject to commitment to the state's youth authority<sup>7</sup>. Pursuant to the authority provided to it in ORS 151.216(1)(f)(B) to adopt policies, procedures, standards and guidelines regarding the appointment of counsel, PDSC could adopt a policy requiring appointment of counsel in some or all delinquency cases unless counsel were waived after the youth had conferred with counsel.
2. PDSC could propose a uniform court rule in Oregon similar to that adopted in Washington. In 2008 the Washington State Supreme Court promulgated a uniform court rule prohibiting the acceptance of waivers made without the advice of counsel<sup>8</sup>.
3. Alternatively, PDSC could attempt to make public defense attorneys available at all initial hearings in juvenile delinquency cases to confer with youth potentially considering waiver, who request advice about whether to waive and to provide representation to youth who request appointed counsel. PDSC's model contract currently requires representation of clients at all court hearings, including initial hearings. In some counties it has not been possible to have counsel present at these hearings, generally because initial hearings are held as needed and within the time frames required by statute but public defense attorneys are often scheduled for hearings in other courtrooms, sometimes in other counties. If counsel were available and consultation with counsel were offered to youth without delay, courts might be more inclined to encourage such consultation.
4. PDSC could remove some of the barriers to representation such as the need for a determination of eligibility prior to appointment. Some courts require the youth and the parent to complete an application for court appointed counsel and a sworn statement of financial condition before appointment is approved. This process can delay early resolution of the case and is dependent on the cooperation of the youth's parent

ORS 419C.200 provides that, "Whenever requested to do so, the court shall appoint counsel to represent the youth in every case filed pursuant to ORS 419C.005 in which the youth would be entitled to appointed counsel if the youth were an adult charged with the same offense." This circumstance is distinguished from a set of conditions under

<sup>7</sup> E.g., Va. Code Sec. 16.1-266 C 3.

<sup>8</sup> Rule JuCR 7.15. George Yeannakis with Team Child in Washington State will testify at the March 4, 2010 PDSC meeting regarding the Washington rule and its history.

which the court “may” appoint counsel for a youth who is without sufficient financial means to employ suitable counsel,” and at least implies that the court is required to appoint for most criminal offenses, without regard to financial eligibility.

In addition, UTCR 11.010(2) provides that “Counsel may be appointed for a child in any case” without regard to the completion of an application and statement of financial condition.

PDSC could amend its eligibility standards to make all youth eligible for court appointed counsel at initial hearings, as Virginia has done by statute<sup>9</sup>, subject to verification of eligibility if the case proceeds past the initial hearing.

OPDS could seek information from the Oregon Judicial Department to determine how often youth are found ineligible for court appointed counsel and whether the cost of determining eligibility actually exceeds the cost of court appointed counsel in the likely very few cases in which youth would be found ineligible.

5. With respect to representation in probation matters, PDSC could also seek a prohibition on waiver without the advice of counsel. If such a requirement applied to all probation sanctions it might well undermine the efforts of some juvenile departments to resolve alleged violations with minor sanctions and without formal proceedings. An example was provided by one county of what might occur if a youth came home after drinking and the parent called the probation officer. “We can either handcuff the kid and take him to detention or he can make a plan to mow the lawn and do dishes every day. There is no discussion of attorneys or waivers in this scenario.” Instead of applying to all proceedings the requirement for advice of counsel could be limited to those cases in which formal processes are initiated by petition, a motion to show cause, etc.
6. PDSC could explore the feasibility of having attorneys continue representation in delinquency matters as long as the youth offender remains under the jurisdiction of the court, or placed out of home. This is already a best practice followed by some defense providers in Oregon and is required of practitioners in some states. The Principles and Standards for Counsel in Criminal, Delinquency and Dependency Cases, Specific Standards for Representation in Criminal Juvenile Delinquency Standards 2.11, Implementation 10 requires:

If the client is a juvenile, a lawyer should inform the client of the Juvenile Court’s continuing jurisdiction and the client’s ability to request review hearings or otherwise access the court to resolve issues and seek modification, set-aside, or dismissal. When requested, a lawyer should assist the juvenile client to access the court in such matters, including seeking reappointment when necessary.

If more comprehensive representation were made available post dispositionally, compensation would have to be provided, possibly on basis similar to that used in dependency cases or on an hourly basis, but it would have to be made clear that continuing representation meant ongoing representation, not just representation in connection with particular events. Attorneys receiving compensation for post dispositional representation should be required to remain in contact with the youth, to receive progress reports, to represent youth at CRB hearings, if any, to provide counsel and advice regarding the terms of probation or other conditions arising from the adjudication and the legal avenues available to challenge decisions made regarding probation or other conditions. Many public defense attorneys have provided ongoing representation and advice to delinquency clients and have played a significant role in

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<sup>9</sup> Va. Code Sec. 16.1-266B.

assisting some clients to succeed. If juvenile counselors know that youth offenders have an ongoing relationship with their attorneys, they often alert the attorneys to problematic behavior which could result in sanctions if not addressed and ask the attorney to communicate with the client. The attorney can then assist by clarifying expectations, providing information that contradicts the information relied on by the counselor and identifying potential solutions other than violation proceedings.

# Attachment 4

# **“The Awesome Prospect of Incarceration”<sup>1</sup>: Juvenile Waiver of Counsel in Delinquency Proceedings**

Jordan Bates<sup>2</sup>

“The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice.”

*Kent v. United States*, 383 U.S. 541, 561 (1966).

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<sup>1</sup>*In re Gault*, 387 U.S. 1, 37 (1967).

<sup>2</sup> J.D. Candidate, University of Oregon School of Law, 2009; B.A., Pitzer College.

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## **I. Introduction**

A child requests counsel and the judge responds, “whether he does or doesn’t, we are going to proceed today.”<sup>3</sup> This happened in Oregon in 1983 to a teenage boy who had no understanding of the charges against him or what punishment he was facing. The judge, as the boy’s stand-in parent and protector, simply decided he would conduct this intricate legal hearing without a defense attorney for the juvenile. The boy in this case was sentenced to one year at MacLaren, Oregon’s youth correctional facility for the most serious juvenile offenders. His commitment was later overturned by the Oregon Court of Appeals because he was not represented by counsel.

In Oregon and elsewhere, young people charged as delinquents in juvenile court are allowed to waive their right to counsel. This means they may face the prosecutor and judge without consultation, advice, or support from an attorney. However, children, just like most adults without legal training, are not able to fully understand the complexities of the law without the aid of counsel. All 50 states have a law protecting a youth’s right to counsel. Most, either through statutory or case law, address waiver of counsel as well. While some states prohibit waiver altogether in certain cases, many allow youth to waive counsel with little consideration for their level of understanding of that right.

The Constitution assures defendants’ a Sixth Amendment right to be represented by counsel.<sup>4</sup> In the 1960’s, the Supreme Court in *In re Gault* and extended the right to

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<sup>3</sup> *State ex rel. Juvenile Dept. of Marion County v. Afanasiev*, 66 Or. App. 531, 533 (Or. Ct. App. 1983).

<sup>4</sup> The Sixth Amendment states “In all criminal prosecutions the accused shall enjoy the right...to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining Witnesses in his favor,

counsel to juveniles.<sup>5</sup> The *Gault* court also found that if a juvenile were to waive that right to representation, he would have to knowingly waive it, only after understanding what the right to counsel meant.<sup>6</sup> Juveniles occupy a unique place in the justice system for a reason. The juvenile justice system is designed to focus on individualized treatment, and certain rights, such as that to a jury trial, are not required for youth. This paper argues that perhaps, the right to waive counsel should also occupy a unique place in the juvenile system.

The juvenile court system has been operating on somewhat of a teeter-totter since its inception in Illinois in 1899. Due process rights are on one end, and the need to recognize the inherent differences between youth and adults are on the other. Since *In re Gault* was decided in 1967, this balancing act has changed the way the juvenile justice system works. Many of these changes are for the better, giving juveniles access to attorneys, notice of the charges filed against them, and ensuring many of the same due process rights afforded adults.<sup>7</sup> However, the juvenile court still operates very differently from the adult system and waiver of counsel is one issue that requires different rules.

Developmentally, juveniles are not in the same position as adults. Most children's brains continue developing past age twenty.<sup>8</sup> In the justice system, this means a juvenile may not understand the proceeding against him, the charges he is facing, the implications of punishment, or the possible consequences of what a guilty plea now, will

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and to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. *See also Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

<sup>5</sup> *Gault*, 387 U.S. at 41-42; *Kent v. U.S.*, 383 U.S. 541, 554 (1966).

<sup>6</sup> *Gault*, 387 U.S. at 41-42.

<sup>7</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>8</sup> Juvenile Justice Center. *Cruel and Unusual Punishment: The Juvenile Death Penalty; Adolescence, Brain Development and Legal Culpability*. ABA. January 2004.

mean in the long term.<sup>9</sup> Research showing juveniles are so developmentally different from adults that they cannot control their behavior or comprehend the consequences of their actions is becoming prevalent in medical communities and needs to be recognized in the juvenile justice system. A young person is likely not equipped with the tools to grasp what it means to waive counsel without, at minimum, a discussion with a defense attorney.

Most of the 50 states specifically address waiver of counsel either statutorily or in case law.<sup>10</sup> Several states require an initial consultation with counsel in the early stages of the proceeding and others completely prohibit waiver in certain circumstances.<sup>11</sup> Many have few restrictions on waiver and the law often mirrors that governing adult waiver.<sup>12</sup> In Oregon, no law exists that *prevents* a juvenile from waiving counsel. However, the law does require the court to discuss the decision with each juvenile on the record or in writing. This should include ensuring that each juvenile understands the charges against him and what the risks are of proceeding without counsel.<sup>13</sup> Though this is what the law requires in Oregon, each county interprets the law pertaining to waiver

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<sup>9</sup> Richard Rogers, Lisa L. Hazelwood, Kenneth W. Sewell, Daniel Shuman, Hayley L. Blackwood. *The Comprehensibility and Content of Juvenile Miranda Warnings*. 14 Psychol. Pub. Pol’y & L. 63, 66-67 (2008).

<sup>10</sup> See Appendix One for more detailed information.

<sup>11</sup> See Appendix One.

<sup>12</sup> Some of these states require consultation with a youth’s parents, though most follow the standard set in adult courts that requires a knowing, voluntary, and intelligent waiver, based on the totality of the circumstances. *Zerbst*, 304 U.S. 458.

<sup>13</sup> *State v. Riggins*, 180 Or. App. 525 (Or. Ct. App. 2002).

differently. The practices among counties range from allowing waiver in almost 80 percent of the cases to requiring counsel at the very first appearance.<sup>14</sup>

Juveniles often give up their right to counsel without understanding how the assistance may benefit them, or even what the right to counsel actually means. As a result, young people face harsh consequences alone. Though the juvenile system is meant to be more protective than the adult system, young people are still subject to proceedings where facts are disputed, complicated legal rules govern, and the state is adverse to the juvenile. Oregon should follow the lead of states like Kentucky and Texas that ensure a juvenile understands the right he is waiving by requiring an initial consultation with counsel before waiver is allowed. The extra protection this would provide could balance the developmental differences and the long-lasting effect of a criminal record by offering assistance through an attorney's familiarity with the justice system. The "awesome prospect of incarceration"<sup>15</sup> at the front end of any proceeding is too much for a juvenile to face without the aid of an attorney.

## **II. Legal Requirements**

### **A. The Adult Justice System**

#### **i. Right to Counsel**

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<sup>14</sup> See Appendix Two for more detailed information. Morrow County and Marion County seem to allow waiver regularly whereas Harney County and Multnomah County appoint counsel at a juvenile's first appearance.

<sup>15</sup> *Gault*, 387 U.S. at 36.

The Sixth Amendment<sup>16</sup> guarantees the right to be represented by counsel to criminal defendants in the justice system.<sup>17</sup> “[T]his is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.”<sup>18</sup> The Supreme Court has addressed the question of a defendant’s right to counsel in numerous situations. The reasoning behind the right to counsel is relatively simple. Under the Sixth Amendment, defendants have a right to be heard and a right to trial. And as the court in *Powell v. Alabama*, one of the foremost cases on the right to counsel, noted:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.<sup>19</sup>

Though the language is somewhat antiquated, this excerpt from *Powell v. Alabama* indicates that lay people are simply not trained to handle the complications of the legal system. Attorneys are trained in order to understand the complexities of the law. They

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<sup>16</sup> The Sixth Amendment is made applicable to the states through the Fourteenth Amendment, giving defendants the right to counsel in both state and federal courts. See *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 30-31 (1972) (holding the right to counsel is not restricted only to serious offenses and is available to all facing criminal prosecution).

<sup>17</sup> See *Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938); *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963) (holding that a defendant unable to afford counsel, has the right to have counsel appointed).

<sup>18</sup> *Zerbst*, 304 U.S. at 462.

<sup>19</sup> 287 U.S. at 68-69.

learn the way the courtroom works, the rules of evidence, and most importantly, they zealously represent their clients. The right to assistance of counsel exists because most laymen are not trained to handle these complex issues.

Many other early court decisions emphasized that a majority of defendants simply were not equipped to face a tribunal alone.<sup>20</sup> *Johnson v. Zerbst* extended the reasoning from *Powell* and stated the “obvious truth” that an average defendant cannot protect himself in front of a court because he lacks the legal skills to fully understand the process before him, and is facing an experienced opposition from the prosecution.<sup>21</sup> The court in *Gideon v. Wainwright* recognized the right to counsel in all situations, even if a defendant was unable to afford his/her own. Decided four years before *In re Gault*, this court championed the procedural and substantive safeguards in place to assure everyone stands equal before the law and receives a fair trial.<sup>22</sup> The assistance of counsel provides unskilled defendants with the tools necessary to navigate the justice system. Considering that youth are much less skilled than many adults, this right was eventually extended to them.<sup>23</sup>

## ii. The Right to Waive Counsel

Along with the right to be represented by counsel comes the right to waive it. Though courts practice reasonable presumptions against the waiver of fundamental

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<sup>20</sup> “The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights...” *Zerbst*, 304 U.S. at 465.

<sup>21</sup> *Zerbst*, 304 U.S. at 462-63. “That which is simple, orderly and necessary to the lawyer – to the untrained layman – may appear intricate, complex, and mysterious.”

<sup>22</sup> *Gideon*, 372 U.S. at 344.

<sup>23</sup> *In re Gault*, 387 U.S. 1. See the discussion below for a more detailed analysis.

constitutional rights,<sup>24</sup> they do allow the waiver of counsel based on the reasoning behind the Sixth Amendment.<sup>25</sup> The Sixth Amendment does not explicitly state a defendant has the right to waive counsel, though this right is implied. Waiver is based on the conception of fairness before the law, which includes allowing a defendant to conduct his own defense in the way he desires.<sup>26</sup> “When the administration of the criminal law...is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards...is to imprison a man in his privileges and call it the Constitution.”<sup>27</sup> This is one of the reasons it would be difficult to do away with a juvenile’s ability to waive counsel entirely.

*Johnson v. Zerbst* addresses the standard for the waiver of one’s right to counsel.<sup>28</sup> A valid waiver of counsel must be voluntary, knowing, and intelligent.<sup>29</sup> Courts will typically apply a totality of the circumstances test to determine whether waiver was valid in a given case, taking into account the particular facts of the case and the background, experience, and conduct of the accused.<sup>30</sup> This means that a defendant shall not only be competent to waive his right to counsel but he must also understand the

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<sup>24</sup> *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937).

<sup>25</sup> See *Zerbst*, 304 U.S. 458; *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942).

<sup>26</sup> *Adams*, 317 U.S. at 279.

<sup>27</sup> *Faretta v. California*, 422 U.S. 806, 815 (1975) (quoting *Adams*, 317 U.S. at 280).

<sup>28</sup> 304 U.S. at 464.

<sup>29</sup> See *Id.*; *Schneckloth v. Bustamonte*, 412 U.S. 218, 237 (1973) (recognizing that the knowing and intelligent waiver standard is used for waiver of rights at trial or during a guilty plea.); *Faretta*, 422 U.S. at 835 (discussing the right to waiver and the right to self-representation); *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (discussing what constitutes a voluntary waiver); *North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979) (discussing the need for an explicit waiver of the right to counsel).

<sup>30</sup> *Id.*

right to be represented by counsel in the first place.<sup>31</sup> The trial court should also clearly document, on the record, whether the defendant properly waived his/her right to counsel.<sup>32</sup>

Not only must a defendant submit a knowing and intelligent waiver of counsel, he must also be competent.<sup>33</sup> The standard for competency is based only on a defendant's competency in choosing to waive his right to counsel, not the competency to represent oneself.<sup>34</sup> Competence to stand trial and to waive counsel is evaluated under the same standard; though the court must first ensure that a defendant is competent to stand trial<sup>35</sup> and then, that he knowingly and intelligently waived his right to counsel.<sup>36</sup> The initial inquiry is whether the defendant has "a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him."<sup>37</sup> The waiver of one's right to counsel requires a real inquiry into the facts and a consideration of each defendant's position. Thus, for a juvenile, it is necessary to take one's age and development into consideration.

## **B. The Juvenile Justice System**

### **i. The Right to Counsel**

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<sup>31</sup> See *Edwards*, 451 U.S. at 484.

<sup>32</sup> *Zerbst*, 304 U.S. at 465.

<sup>33</sup> *Godinez v. Moran*, 509 U.S. 389 (1993).

<sup>34</sup> *Id.* at 399.

<sup>35</sup> A court is not required to make a competency determination in every case, only when the court has a reason to doubt a defendant's competence will it make the inquiry. See *Drope v. Missouri*, 420 U.S. 162, 180-81 (1975).

<sup>36</sup> *Id.* at 401.

<sup>37</sup> *Dusky v. U.S.*, 362 U.S. 402, (1960).

Youth, like adults, are also faced with the prospect of a loss of liberty when in the justice system. However, youth do so with a different set of rights and rules based on their unique position in society. The juvenile court system was established in 1899 with the goal of having the state act as more of a caretaker for juveniles (delinquents *and* dependents) entering the justice system.<sup>38</sup> The reasoning behind this new system resulted from a believed failure of many parents to properly care for their children. Prior to the development of this new system, juveniles often spent time in jails and prisons, alongside adult criminals. The new juvenile system was very informal, mimicking the way a parent and child might interact, and it lacked any of the procedural safeguards adults were entitled to, such as the right to counsel.<sup>39</sup>

The goals of this new system focusing on rehabilitation were initially accepted. However, youth often ended up worse off because of the informality and the lack of procedural safeguards their adult counterparts enjoyed.<sup>40</sup> In 1967, the Supreme Court in *In re Gault* expanded certain due process rights to juveniles, including the right to counsel. Prior to *Gault*, youth would face the court with no right to notice of the charges against them; no right to counsel; no right to confrontation of witnesses against them; and no privilege against self-incrimination.<sup>41</sup>

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<sup>38</sup> See Harris & Teitelbaum. *Children, Parents, and the Law: Public and Private Authority in the Home, Schools, and Juvenile Courts*. Aspen Publishers. 2006. Pg. 273-77 for a discussion on the development of the juvenile court.

<sup>39</sup> *Id.*

<sup>40</sup> The court in *Kent* stated, “[t]here is evidence...that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.” 383 U.S. at 556. And *Gault* also noted, “[j]uvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.” 387 U.S. at 18.

<sup>41</sup> *Gault*, 387 U.S. 1.

Several cases prior to *Gault* “unmistakably indicate[d] that...neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”<sup>42</sup> However, it wasn’t until this landmark case, that the court explicitly held that the assistance of counsel is required in juvenile delinquency cases, at all stages of a proceeding, as a matter of due process.<sup>43</sup> “A proceeding where the issue is whether the child will be found to be ‘delinquent’ and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.”<sup>44</sup> Though the juvenile court was meant to act as a protector, youth still faced a system adverse to their interests that was restricted to operating under the rule of law.<sup>45</sup>

## ii. A Child’s Right to Waive Counsel

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<sup>42</sup> *Gault*, 387 U.S. at 13. See also, *Kent v. United States*, 383 U.S. 541 (1966) (emphasizing the need for due process and fairness in juvenile matters); *Haley v. State of Ohio*, 332 U.S. 596 (1948) (holding the Fourteenth Amendment applied in a juvenile case to prevent the use of a coerced confession in trial).

<sup>43</sup> *Gault*, 387 U.S. at 41.

<sup>44</sup> *Id.* at 36.

<sup>45</sup> “The most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot. Papers are drawn and charges expressed in legal language. Events follow one another in a manner that appears arbitrary and confusing to the uninitiated. Decisions, unexplained, appear too official to challenge. But with lawyers come records of proceedings; records make possible appeals which, even if they do not occur, impart by their possibility a healthy atmosphere of accountability...Informality is often abused. The juvenile courts deal with cases in which facts are disputed and in which, therefore, rules of evidence, confrontation of witnesses, and other adversary procedures are called for. They deal with many cases involving conduct that can lead to incarceration or close supervision for long periods...And in all cases children need advocates to speak for them and guard their interests...informality has no necessary connection with therapy.” *Gault*, 387 U.S. at 38, n.65 (quoting the Nat’l Crime Comm’n Report, 86-87).

The court in *Gault* held that the knowledge of the right to counsel, by a youth or his parent, does not amount to a waiver of counsel if they fail to request or retain an attorney's assistance.<sup>46</sup> A youth and his parents have "...a right expressly to be advised that they might retain [or have appointed] counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right."<sup>47</sup> In order to waive the right, the youth or his parent must intentionally relinquish the right to counsel.<sup>48</sup> Without conducting an investigation into whether a youth actually understands the right to counsel, it is unlikely a court would be able to find he intentionally gave up that right.

Though waiver was accepted in *Gault* as a real possibility, the court still cited authority suggesting that perhaps appointing counsel was necessary, regardless of waiver. Citing a recommendation from the President's Crime Commission, the court recognized, "...that in order to assure 'procedural justice for the child,' it is necessary that 'Counsel\*\*\*be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent.'"<sup>49</sup> This recommendation was not accepted across the board, though many states do require counsel for juveniles over a desire to waive it.

Justification for allowing juvenile waiver may center on the fact that both the judge and the probation officers, those that interact most with the juvenile, are looking

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<sup>46</sup> *Id.* at 41-42.

<sup>47</sup> *Id.* at 42.

<sup>48</sup> *Id.* (citing *Zerbst*, 304 U.S. at 458).

<sup>49</sup> *Id.* at 38 (citing the Nat'l Crime Comm'n Report, 86-87)

out for the young people's best interests.<sup>50</sup> However, as *Gault* noted, “[p]robation officers...are also arresting officers. They initiate proceedings and file petitions which they verify...alleging the delinquency of the child; and they testify...against the child...The probation officer cannot act as counsel for the child...Nor can the judge represent the child.”<sup>51</sup> This is exactly the reason youth need the assistance of someone skilled to represent only their interests, as opposed to someone who is representing the system itself.<sup>52</sup> By allowing waiver with consultation only between a youth and the judge or probation officer, the juvenile loses an advocate for their interests. It is the state's job to protect citizens and punish those violating the rights of others. It is overly optimistic to suggest that those opposing a youth in court have the youth's best interests in mind.

### **III. Juveniles are Distinct from Adults and Warrant Unique Treatment in the Justice System**

The juvenile justice system was officially created in Illinois in 1899. The concept was based on the principle of *parens patriae*, or the idea that the state should care for children.<sup>53</sup> This developed into a system that championed individualized treatment for juveniles. One of the main reasons for the creation of this system stemmed from the

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<sup>50</sup> However, even in adult court, it is apparent that the court plays somewhat of a protective role. See *Zerbst*, 304 U.S. at 465.

<sup>51</sup> *Gault*, 387 U.S. at 36.

<sup>52</sup> “[c]ommentators have noted a variety of barriers to appropriate access to counsel (including parental reluctance to retain attorneys, judicial hostility to appointment of counsel, an improper ‘waivers’ of counsel by juveniles)...” A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings. Pg. 6. Prepared By: Patricia Puritz, *et. al.* Reprinted June, 2002.

<sup>53</sup> Harris & Teitelbaum. *Children, Parents, and the Law: Public and Private Authority in the Home, Schools, and Juvenile Courts.* Pp. 273-77. Aspen Publishers. 2006.

recognition that many juveniles simply could not care for themselves. Though the developmental differences that are being studied today were not a factor in 1899, the general reasoning was that juveniles occupy a unique place of innocence in our society.

#### **A. Children are developmentally different from adults**

Over the last decade or so, scientists have discovered that adolescent brains are far less developed than previously believed.<sup>54</sup> Many adolescents' brains are not developed fully when they enter the juvenile justice system. Researchers have in fact discovered that a person's full brain development continues past twenty.<sup>55</sup> The frontal lobe and the pre-frontal cortex, the parts of the brain that control the most advanced functions, "allow us to prioritize thoughts, imagine, think in the abstract, anticipate consequences, plan, and control impulses."<sup>56</sup> The frontal lobe changes more during adolescence than during any other time during our lives.<sup>57</sup> Thus, logic and reasoning during adolescence is not as advanced as it is during adulthood. What does it all mean? This means that juveniles faced with complicated decisions are often more likely to come up with the easiest answer instead of considering what the long-term consequences may be.<sup>58</sup> This developmental aspect is something that affects a youth's decision to waive counsel.

Because of the new research mentioned above, states should begin to re-assess how juveniles act and are treated in the early stages of the delinquency proceedings.

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<sup>54</sup> Juvenile Justice Center. *Cruel and Unusual Punishment: The Juvenile Death Penalty; Adolescence, Brain Development and Legal Culpability*. ABA. January 2004.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Juveniles often choose to waive counsel because it seems to be the easiest way for them to get out of the current situation they are in, such as in detention or in front of a judge.

“Age is closely associated with maturity and the capacity to make rational decisions.

Two conceptual models (Cauffman & Steinberg, 2000; Grisso, 1997) provide a formal analysis of legal decision making and have been applied to juvenile offenders.”<sup>59</sup> A summary of the basic results from this study is below:

Using a formal analysis of alternatives, consequences, and probabilities, Grisso’s (1997) seminal review identified developmental differences that likely affect the decision making of adolescent offenders. Delinquent youth often give the most weight to anticipated and immediate gains (e.g., stopping the pre-interrogation), without due consideration of long-term negative consequences (e.g., convictions and lengthy sentences). Developmentally, adolescent offenders often have difficulty grasping the full meaning and implications of Miranda constructs. For example, Grisso found delinquents often misunderstand the concept of a right; most inaccurately believe that exercising this option would result in court sanctions. Grisso et al. (2003) corroborated earlier findings about risk appraisal and time perspective (immediate v. long term) and found that compliance with authority also affected the legal decision making of young adolescents. Taken together, data from Grisso’s model revealed that adolescent offenders have deficits in understanding their alternatives, considering the likelihood of different alternatives, and appreciating the long-term negative consequences.<sup>60</sup>

This study highlights how easily a juvenile may decide to waive counsel if he is not given proper assistance in making the decision. By giving more weight to immediate gains, a juvenile may choose to waive counsel because it will get him out of the immediate hearing sooner, rather than requiring for him to wait for an attorney. In some states, and some counties in Oregon,<sup>61</sup> an attorney is not even present in the courtroom should a youth choose to waive his right. This means the time he waits in detention, or the number of times he may have to appear in front of the judge will only increase. For juveniles, waiving counsel might simply be an easier path. Further, a juvenile may plead

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<sup>59</sup> Richard Rogers, Lisa L. Hazelwood, Kenneth W. Sewell, Daniel Shuman, Hayley L. Blackwood. *The Comprehensibility and Content of Juvenile Miranda Warnings*. 14 Psychol. Pub. Pol’y & L. 63, 66-67 (2008).

<sup>60</sup> *Id.* at 67.

<sup>61</sup> See Appendix Two for more detailed information.

guilty and accept a punishment because it means immediate release. The fact that this may be on one's record their entire life does not necessarily occur to the juvenile when they make that decision. Conferring with counsel before waiving the right will give youth in Oregon more time to consider the consequences of their decisions and a better understanding of what it is they are undertaking.

#### **IV. State Practices - Juvenile Waiver of Counsel**

##### **A. Oregon**

###### **i. Statutory and Case Law.**

Oregon statutory law requires the court to appoint counsel if the youth or his/her parent or guardian requests counsel but lack the financial means to employ suitable counsel.<sup>62</sup> This occurs if the youth is determined to be financially eligible based on current State policy and procedures.<sup>63</sup> The court is also required to appoint counsel in every delinquency case filed pursuant to O.R.S. § 419C.005 in which the youth would be entitled to appointed counsel if the youth were an adult charged with the same offense.<sup>64</sup> Nothing in this statute requires the court to inform a juvenile and his/her parent or guardian of a right to counsel in the first place. Case law, discussed below, suggests that a juvenile must be informed of his/her right to counsel, but that requirement has not yet been adopted by the legislature.

Several appellate and Supreme Court decisions in Oregon have addressed juveniles' right to counsel and their right to waive counsel. A juvenile has a right to

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<sup>62</sup> OR. REV. STAT. § 419C.200 (2003). Suitable counsel is defined as one "possessing skills and experience commensurate with the nature of the petition and the complexity of the case."

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

counsel in a delinquency proceeding, and must be informed of that right if the adjudication could result in a loss of liberty.<sup>65</sup> This court solidified a juvenile’s right to first be informed of the right to counsel as opposed to suggesting he or she only need request counsel before the court must appoint. As required in adult cases, the law in Oregon requires a youth to make a knowing and valid waiver. “[A] waiver of a youth’s right to counsel must be no less voluntary, knowing, and intelligent than a waiver by an adult facing a criminal prosecution.”<sup>66</sup> And this right applies to both retained and appointed counsel.<sup>67</sup> The law is silent on whether a parent must be present in order for a juvenile to waive counsel. The Court explicitly declined to adopt a rule that would require an interested adult to be present and apprised of a juvenile’s rights before a juvenile may validly waive counsel.<sup>68</sup>

Simply being made aware of one’s right to counsel and failing to retain or request it – whichever is appropriate – is not enough to constitute a valid waiver in a juvenile case. “The point of obtaining a valid waiver is to ensure that a youth and his parents in a juvenile case – just as would be true of an adult in a criminal case – go forward not only with the knowledge and awareness of the right to be represented by retained or court-appointed counsel but also with an appreciation of the risks of self-representation.”<sup>69</sup>

Oregon also requires the waiver to either be through colloquy on the record with the court

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<sup>65</sup> *State v. Riggins*, 180 Or. App. 525, 529 (Or. Ct. App. 2002) (citing *Gault*, 387 U.S. at 36) *abrogated on other grounds by State v. Probst*, 339 Or. 612, 622 (Or. 2005) (the burden of persuasion is on a defendant when collaterally attacking a prior conviction, for reasons such as an un-counseled prior conviction).

<sup>66</sup> *Id.* at 530 (citing *Gault*, 387 U.S. at 42).

<sup>67</sup> *Id.*

<sup>68</sup> *State v. Rivas*, 99 Or. App. 23, 30 (Or. Ct. App. 1989).

<sup>69</sup> *Id.* at 530-31.

or through a signed written waiver.<sup>70</sup> Either must also indicate that the juvenile understood the risks of self-representation.<sup>71</sup> A signed waiver of Miranda rights will not suffice to prove waiver of counsel.<sup>72</sup>

In a criminal proceeding, the court must determine that a waiver was made intelligently and competently.<sup>73</sup> One must understand the nature of the charges against him/her, the elements of the offense, and the punishment faced in order to make a valid waiver.<sup>74</sup> If a juvenile waives counsel but is not apprised of the information noted above, it will not be a valid waiver. In *Anzaldua*, a child was committed to a training school after having initially appeared with counsel and then reappearing at a continuance hearing without counsel. The court reasoned that a valid waiver of counsel was just as necessary in the second proceeding, because “the result of the hearing will affect the child’s liberty interests as much as an adjudicatory hearing.”<sup>75</sup>

In *State v. Riggins*, the court was determining whether prior, un-counseled juvenile adjudications might be used to enhance a sentence. The juvenile (appellant)

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<sup>70</sup> For example, Union County provides a one page “Constitutional Rights Certificate” that informs a youth of his rights and allows for check boxes to determine if a youth understands the rights and/or if he wants an attorney.

<sup>71</sup> *Id.* at 531.

<sup>72</sup> *Id.* (citing *State v. Jackson*, 172 Or. App. 414, 424 (Or. Ct. App. 2001) (applying the standard from adult court to juvenile cases).

<sup>73</sup> *State ex rel. Juvenile Dept. Linn County v. Anzaldua*, 109 Or. App. 617, 620 (Or. Ct. App. 1991) (applying the standard from *State v. Verna*, 9 Or. App. 620, 626 (Or. Ct. App. 1972) for waiver of counsel to juvenile cases).

<sup>74</sup> See *State ex rel. Juvenile Dept. of Marion County v. Cheney*, 960 Or. App. 680 (Or. Ct. App. 1989) superseded by statute, O.R.S. § 419A.200(3)(c), as stated in *State ex rel. Juv. Dept. of Polk County v. J.H.-O.*, 223 Or. App. 412 (Or. Ct. App. 2008); *State ex rel. Juv. Dept. v. Afanasiev*, 66 Or. App. 531 (1984).

<sup>75</sup> *Anzaldua*, 109 Or. App. at 620; see also *J.H.-O.*, 223 Or. App. at 419-20 (holding that a youth is entitled to counsel at a dispositional hearing regarding whether to revoke youth’s probation because it may result in the loss of liberty.)

argued that the adjudications were constitutionally defective.<sup>76</sup> The appellant's father had the financial ability to retain counsel, but chose not to do so. As a result, the court did not appoint counsel because the juvenile, based on his father's income, did not qualify.<sup>77</sup> This leaves juveniles in the position of relying on their parents to retain counsel if they are financially eligible. In a footnote, the court noted that other jurisdictions mandate a youth who desires counsel, yet whose financially eligible parents choose not to retain counsel, be entitled to court-appointed counsel. However, because there was no valid waiver on the record at all, the court did not address the issue of whether the youth had a right to appointed counsel in this situation, or whether a youth's parents may waive counsel on their behalf in this situation.<sup>78</sup> To date, no law in Oregon allows for a youth to obtain appointed counsel if there is a conflict between him and his parents.<sup>79</sup>

One case, not directly on point, suggests that a child's right to remain silent cannot be "effectively invoked by a third party, such as a parent, so as to supersede a juvenile's own valid waiver of that right."<sup>80</sup> This case involved custodial interrogation of a youth. The youth never requested counsel, though his mother did. The court held that because the youth had already waived counsel, his mother had no power to do otherwise.<sup>81</sup> This reasoning has not been applied juvenile waiver of counsel in

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<sup>76</sup> *Riggins*, 180 Or. App. at 529.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 620 n.5.

<sup>79</sup> In examining state statutes from around the country, it is apparent that many provide counsel for a youth in this exact situation, or if there is a conflict between the youth and parent.

<sup>80</sup> *State ex rel. Juvenile Dept. of Lincoln County v. Cook*, 138 Or. App. 401, 407-08 (Or. Ct. App. 1996), *aff'd on other grounds* 325 Or. 1 (1997).

<sup>81</sup> *Id.*

delinquency proceedings, though it suggests that a parent may not waive a juvenile's right to counsel.

Though Oregon Courts and legislatures have addressed the issue of juvenile waiver of counsel, many gaps still exist. No attorney must be present; no clear answer presents itself when a juvenile and his parent disagree about retaining counsel; the law is unclear on whether a parent may waive counsel for his/her child; and no situations exist in which waiver of counsel is not permitted. Many states require more protections when it comes to juvenile waiver of counsel. Oregon should rethink the current law and provide for more assistance at the front end of a case in order to properly deal with juveniles in the justice system.

## **ii. Practice by County**

Each county in Oregon treats juvenile waiver of counsel differently, as the law gives little direction. No department or agency tracks how many youth in Oregon waive counsel in a given year. The Oregon Judicial Department, Court Programs & Services Division compiled a set of statistics based on certain statistics available in 2008 to assist with this paper. In 2008 between 60.3 – 66.7% of delinquents were appointed attorneys.<sup>82</sup> This statistic includes on the original petition as well as probation violation proceedings.<sup>83</sup> Thus, roughly 33.3%-39.7% were either unrepresented or had privately retained counsel.<sup>84</sup> That possibly one-third of juveniles appearing in court do so without

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<sup>82</sup> Email from Rebecca Orf, Juvenile Law Staff Counsel, Court Programs and Services Division. Received 04/07/2009.

<sup>83</sup> The OJD based this on the number of cases filed in 2008. A probation violation and an original petition are considered separate "events" for purposes of appointing counsel. *Id.*

<sup>84</sup> *Id.* Though the statistic is also not available, the percentage of youth who retain counsel (according to those working in the juvenile justice system in Oregon) seems to be relatively low. Some would guess around 2%.

the aid of an attorney may seem somewhat astonishing.<sup>85</sup> It is unlikely that a youth understands the complicated court proceedings he/she is facing without the aid of counsel to explain to him/her exactly what is at stake.

In order to become more familiar with the practice in Oregon I examined the disparity among the counties in handling juvenile waiver of counsel. I contacted the Juvenile Department Director in each county to determine the different practices relating to waiver of counsel.<sup>86</sup> Appendix Two summarizes the responses I received and the practices instituted in some counties in Oregon.<sup>87</sup> Below is an analysis of the variety of practices, which can be divided into several categories.

#### **a. Counsel Appears with Youth**

Many counties already require a youth to meet with counsel prior to their first appearance in court. In Clackamas, the court requires counsel at the first appearance and then has the parent or guardian complete the financial forms to determine if the youth is eligible for appointed counsel. The Harney County Judge appoints counsel at a juveniles' first appearance and then requires representation at all stages of the proceedings. This is also the case in Multnomah, Washington, and Yamhill counties. In Lane County, Judge

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<sup>85</sup> Keep in mind that these statistics come from limited sources of information. This information is not formally tracked in Oregon and could be much more beneficial if county juvenile departments and courts kept track of exactly how many juveniles waived counsel.

<sup>86</sup> In some counties, I spoke with other personnel including counselors, court staff, and Judges.

<sup>87</sup> I was able to obtain information about juvenile waiver practice from twenty-two of Oregon's thirty-six counties and thus, this is only a sampling of general practices in some counties.

Leonard will appoint counsel at a youth's first appearance as well.<sup>88</sup> Even if a parent is able to retain counsel, and if the parent refuses to do so, Judge Leonard will appoint counsel.

**b. Waiver is restricted in certain situations**

In Benton County, waiver is not allowed in serious cases where placement outside the home may occur. The Columbia County judge will explain to the youth and his parents the right to counsel and will often appoint counsel over any objection, especially if there is a question about the age or mental status of a juvenile. In Malheur County, the Judge will always appoint counsel if the youth is facing time at the youth correctional facility or if probation is recommending placement at the Oregon Youth Authority. Hood River does not allow waiver if the charge is a felony. In Umatilla County, attorneys are present when youth first appear and appointed in all cases in which the youth may be committed to OYA or charged with a felony.

**c. Waiver is rare**

Deschutes, Josephine, Lincoln, Sherman, and Wasco counties did not give an extremely detailed description of waiver practice, though stated that they rarely have a juvenile appear without counsel. In Josephine, even if a juvenile signs a waiver, the court usually persuades the youth that he/she should have representation anyway. Lincoln county judges look at it as almost an un-waivable right as well.

**d. Waiver is common**

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<sup>88</sup> In a phone conversation with Judge Leonard, he noted that youth are often unable to equate moral responsibility with legal responsibility and need the assistance of counsel to help differentiate between the two.

Though many counties make a juvenile's decision to waive counsel difficult, there are still several that allow juveniles to appear without counsel regularly. Clatsop County does not necessarily allow waiver on a regular basis, though it is moving toward a standard practice of having a written waiver of counsel. Currently, the Judge will advise a youth of his/her right to counsel and if appearing without counsel, will inquire as to whether he/she has consulted with a parent or guardian and will ask the parent or guardian whether they approve of proceeding without counsel. In Marion county, the practice seems to suggest that youth often appear without counsel. Youth must tell a probation officer that they wish to get counsel prior to the first hearing and then are required to fill out financial forms.<sup>89</sup> In Polk County, attorneys are not even on hand in the courtroom at a juveniles' first appearance. The youth is then presented with an "advice of rights" form, which he discusses with the court, probation, and his parents.

Morrow County presents an interesting situation. The juvenile court in Morrow is a county court, and thus, funds for public defenders do not come from the state indigent defense fund, but from the county juvenile department fund. A majority of juveniles waive counsel in Morrow County according to the Juvenile Department director. In fact, if a youth desires counsel, they will set a hearing with the judge to determine if the youth qualifies for appointed counsel. If the youth waives counsel, he or she will sign an admissions form 99% of the time, after consulting with the department director and his/her parents, which is then given to the Judge. This practice is one that places the juvenile in a situation where it is likely very easy to appear without counsel.

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<sup>89</sup> Based on the discussion of juvenile development earlier in the paper, it would seem that filling out financial paperwork and having to affirmatively request counsel prior to the first hearing may not be an easy task for a youth in detention.

### **e. County summary**

The variety of practices in each county should become more uniform. Because a majority of counties that responded to requests for information provide extra safeguards to the juvenile, it would not likely be a burden on the state if counsel were required to appear with a youth initially. Further, prohibiting waiver in serious cases ensures a youth will be provided with the fairest representation.

### **B. All Fifty States**

Every state has a law addressing a juvenile's right to counsel. Most have provisions addressing waiver of counsel. Among the fifty approaches to juvenile waiver of counsel are provisions preventing it entirely, statutes limiting the ages that may waive, and some states that barely address the issue. Many of the states employ a totality of the circumstances test to ensure that waiver was voluntary, knowing, and intelligent.<sup>90</sup> However, several states go beyond the totality of the circumstances test and require more protective rules. Some states require an initial consultation with counsel before the right may be waived.<sup>91</sup> This rule protects the right to waive counsel while ensuring that a youth is able to fully understand what it is the aid of an attorney may do for him/her.

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<sup>90</sup> See e.g., Alaska Stat. § 47.12.090; Georgia, *In the Interest of T.D.W.*, 493 S.E.2d 736 (1997); California, *In re Ricky H.*, 468 P.2d 204 (1970).

<sup>91</sup> Indiana, Kentucky, Maryland, Minnesota, New Jersey, Texas, and West Virginia all have laws requiring a juvenile to first consult with counsel, regardless of the circumstances, before the juvenile may make a valid waiver. See e.g. Ind. Code Ann. § 31-32-5-1(1)-(3); Ky. Rev. Stat § 610.060; *D.R. Commonwealth*, 64 S.W. 3d 292 (Ky. Ct. App. 2001); Md. Code Ann., Cts. & Jud. Proc. § 3-8A-20(b)(2); Minn. Juv. Ct. R. P. 3.04; N.J. Stat. § 2A:4A-39(b)(1), (2); Tex. Fam. Code § 51.09; *State ex rel. J.M. v. Taylor*, 276 S.E. 2d 199 (W. Va. 1981).

Other states require a parent/guardian to be present or actually representing the youth in court.<sup>92</sup>

Several states treat the right to counsel as non-waivable in certain serious situations. In Illinois, a juvenile may not waive counsel if he wants to plead guilty, guilty but mentally ill, or waive trial by jury.<sup>93</sup> In Iowa, where juvenile waiver of counsel is very restricted, a child cannot waive his right to counsel in a detention or shelter care hearing, a hearing for waiver to adult court, an adjudicatory hearing, a dispositional hearing, or a hearing to review and modify a dispositional order.<sup>94</sup> Kentucky prohibits waiver if the child is accused of committing a felony, sex offense, or any other offense for which the court intends to impose detention or commitment.<sup>95</sup> Children may not waive counsel in Louisiana in a proceeding in which, (1) it has been recommended that a youth be placed in a mental hospital, psychiatric unit, or substance abuse facility; (2) he or she is charged with a felony grade delinquent act; or (3) in probation or parole revocations.<sup>96</sup> Michigan does not allow a juvenile to waive counsel if the parent or guardian objects.<sup>97</sup> Many other states prohibit waiver in other serious situations.<sup>98</sup>

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<sup>92</sup> Alaska Stat. § 47.12.090; Ariz. Juv. Ct. P. 10(D); Ark. Code Ann. § 9-27-317(a)-(c); Fla R. Juv. P. Rule 8.165(b); La. Child Code art. 810(A)(1)-(3) (juvenile may waive counsel after consultation with attorney, parent, *or* caretaker); Mont. Code Ann. § 41-5-1413; *Edward C. v. Collings*, 632 P.2d 325 (Mont. 1981); N.H. Rev. Stat. § 169-B:12(II); *In re C.S.*, 115 Ohio St. 3d 267, 282 (2007); 42 Pa. Cons. Stat. Ann. § 6337; Tenn. R. Juv. P. 30.

<sup>93</sup> 725 Ill. Comp. Stat. § 5/113-5.

<sup>94</sup> Iowa Code § 232.11.

<sup>95</sup> Ky. Rev. Stat. § 610.060(2)(a).

<sup>96</sup> La. Child Code art. 810(D)(1)-(3).

<sup>97</sup> Mich. Comp. Laws § 712A.17c(3).

<sup>98</sup> *See*, Mont. Code Ann. § 41-5-1413 (waiver prohibited if commitment to the department for more than six months may result); N.J. Stat. § 2A:4A-39(3) (an incompetent minor may not waive any right); *In re C.S.*, 115 Ohio St. 3d at 282-83 (counsel may not be waived if there is a conflict between the child and his/her parent or

Based on the wide range of approaches and in light of the new research, states should reconsider their laws on juvenile waiver of counsel. Many laws are based on cases decided over twenty or thirty years ago.<sup>99</sup> Many simply mimic the adult waiver of counsel provisions. Nebraska has even held that the court does not need to inform a juvenile of the dangers and disadvantages to self-representation.<sup>100</sup> Though all states conform to the minimum federal requirements of a voluntary, intelligent, and knowing waiver, many ignore a juvenile's comprehension and decision-making capabilities as distinct from adults, by not requiring more protections.

## V. Conclusion

Federal case law requires that a court may not appoint counsel over the objection of a person wishing to waive it, so long as they are competent and make a knowing and intelligent waiver.<sup>101</sup> However, not one of the fifty states has a law in place suggesting this is the case in juvenile courts. The practice in Oregon, and the laws of many other states suggest that Judges often *will* appoint counsel over the objection of a juvenile. Children need the aid of counsel to ensure their rights are protected and to represent their best interests. Perhaps really ensuring that a juvenile understands what the right to counsel means, and what it means to waive that right, means allowing him or her to consult with an attorney, to be able to understand how representation may help. Though

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guardian); Vt. Fam. Pro. R. 6(d)(4) (a child under the age of 13 shall be rebuttably presumed incapable of understanding the nature and consequences of waiver); Wis. Stat. § 938.23 (A child under the age of fifteen may not waive the right to counsel.).

<sup>99</sup> See *In re Ricky H.*, 468 P.2d 204 (Cal. 1970); *In re Manuel R.*, 543 A.2d 719 (Conn. 1988); *McBride v. Jacobs*, 247 F.2d 595 (D.C. 1957); *Mederios v. State*, 623 P.2d 86 (Haw. 1981).

<sup>100</sup> *In re Interest of Dalton S.*, 730 N.W. 2d 816 (Neb. 2007).

<sup>101</sup> *Faretta*, 422 U.S. at 807.

many in the juvenile justice system have the best intentions, it is still a system in which a juvenile may lose his liberty.<sup>102</sup>

Oregon should follow the lead of states like New Jersey, Minnesota, Illinois, and Texas and change the practice on juvenile waiver of counsel. One of the ways to ensure that a juvenile understands the risks of waiving counsel, would be to require him first consult with an attorney. All counties should require an attorney to be present in juvenile court at a youth's first appearance. If waiver does occur, consultation with counsel will support any contention that the waiver was knowing, voluntary, and intelligent. In cases where a juvenile is charged with a serious felony, waiver should not be permitted, as the loss of liberty is great in these situations. The best place to start changing Oregon's practice may be to actually get the statistics from each county to determine how many youth end up waiving in a given year. No agency in the state currently tracks this data.<sup>103</sup> This would allow policy makers in the state to properly analyze the occurrence of juvenile waiver.<sup>104</sup> Further, it may encourage counties to actually consider their practices when dealing with juvenile waiver.

The right to waive counsel is constitutionally protected and in some cases, youth should still maintain that right. However, based on a youth's developmental capabilities,

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<sup>102</sup> "There have been, at one and the same time, both an appreciation for the juvenile court judge who is devoted, sympathetic, and conscientious, and a disturbed concern about the judge who is untrained and less than fully imbued with an understanding approach to the complex problems of childhood and adolescence. There has been praise for the system and its purposes, and there has been alarm over its defects." *McKeiver v. Pennsylvania*, 403 U.S. 528, 534 (1971).

<sup>103</sup> The Oregon Youth Authority Juvenile Justice Information System currently tracks recidivism trends, referral trends, detention, and case dispositions. An agency like this may be best equipped to track juvenile waiver of counsel. The courts may also be able to employ the use of a new code to determine if a youth waived.

<sup>104</sup> The Federal Advisory Committee on Juvenile Justice recently released a report that addresses juvenile waiver of counsel as an issue that needs attention.

conferring with counsel first will allow a juvenile to fully understand the right they are waiving. By providing more protections, courts are not taking away any due process rights of juveniles. “The same considerations that demand extreme caution in fact finding to protect the innocent adult apply as well to the innocent child.”<sup>105</sup> If youth are allowed to consult with an attorney before waiving that right, it will be much more likely that any waiver will truly be intelligent, voluntary, and knowing.

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<sup>105</sup> *In re Winship*, 397 U.S. 358, 365 (1970) (quoting *Gault*, 387 U.S. at 24).

**APPENDIX ONE**

**FIFTY STATE SURVEY ON JUVENILE RIGHT TO, AND WAIVER OF COUNSEL**

<b>STATE</b>	<b>RIGHT TO COUNSEL</b>	<b>WAIVER OF COUNSEL</b>
<b>Alabama</b>	Child shall be advised at intake by an officer of the court of the right to counsel. Right to be represented at all stages of the proceeding. Counsel shall be appointed where there is reasonable likelihood that child's freedom may be curtailed. Ala. Code § 12-15-63 or Ala. R. Juv P. 11(F).	Waiver of a constitutional right must be made knowingly, intelligently and voluntarily. <i>Russell v. State</i> , 739 So. 2d 58 (Ala. Crim. App. 1999). No specific law prevents waiver.
<b>Alaska</b>	The court must inform a juvenile of his or her right to be represented by counsel at the first hearing. Alaska Sup. Ct. Delinquency R. 16. Alaska Stat. § 47.12.090 (minor has a right to be represented by counsel, or appointed counsel in all proceedings).	Minor can waive counsel if voluntary, knowing, and intelligent <i>and</i> a parent or guardian concurs. If minor is charged with an act that would be considered a felony if committed by an adult, waiver will not be accepted unless minor has consulted with an attorney first. Alaska Stat. § 47.12.090.
<b>Arizona</b>	Right to be represented by counsel if the offense may result in detention. Ariz. Rev. Stat. § 8-221(A). If offense will not result in detention, no absolute right to counsel, though court has discretionary authority to appoint counsel. Ariz. Rev. Stat. § 8-221(H).	May waive counsel if it is knowing, intelligent, and voluntary in view of juvenile's age, education, and apparent maturity. Should be obtained in the presence of parent, guardian, or custodian. Shall be set out in writing or in the minute entry of the court. Ariz. Juv. Ct. P. 10(D). A juvenile may be prevented from waiving counsel if there is a conflict of interest between him or her and parent or guardian. In this case, the court shall impose safeguards on the waiver so it is in the best interest of the minor. <i>Id.</i>
<b>Arkansas</b>	Juvenile and parent or guardian shall be advised of right to counsel at all proceedings by 1) the law enforcement official taking juvenile into custody, 2) by the intake officer at the initial interview, and 3) by the court during the first appearance. Ark. Code Ann. §	A juvenile can only waive right to counsel upon a finding by the court from clear and convincing evidence after questioning the juvenile that 1) juvenile understands the full implications of the right to counsel; 2) freely, voluntarily, and

	9-27-316. Court must appoint counsel far enough in advance of court appearance to allow meeting with client and adequate preparation. <i>Id.</i> at (e).	intelligently wishes to waive the right to counsel; and 3) parent, guardian, or custodian agrees. Ark. Code Ann. § 9-27-317(a)-(c). Court does a six-factor analysis to determine if waiver was intelligent, knowing, and voluntary and also considers three factors of parent or guardian's involvement. Juvenile may not waive counsel when; 1) parent, guardian, or custodian initiated filing against juvenile; 2) counsel was appointed due to likelihood of commitment to an institution; 3) juvenile has been designated an extended juvenile jurisdiction offender; 4) juvenile is in the custody of DHS. Ark. Code Ann. § 9-27-317(d)-(g). All waivers shall be in writing and signed. <i>Id.</i>
<b>California</b>	The Court may appoint counsel when it appears the juvenile desires counsel but cannot afford it. If a minor is alleged to be a person described in Section 601 or 602, the court shall appoint counsel whether or not minor can afford it, unless there is an intelligent waiver. Cal. Welf. & Inst. Code § 634.	Minor may waive counsel if it is an intelligent waiver. Cal. Welf & Inst. Code § 634. Court will consider totality of the circumstances to determine if waiver was knowing, intelligent, and voluntary. <i>In re Ricky H.</i> , 468 P.2d 204 (1970). No conditions prevent waiver.
<b>Colorado</b>	The right to counsel shall be provided. Colo. Rev. Stat. § 19-1-105	No statute on waiver but the case law suggests a waiver must be knowing, intelligent, and voluntary. <i>People v. Blankenship</i> , 30 P.3d 698 (Colo. App. 2000). When a juvenile waives a constitutional right it must be done in the presence of a parent, guardian, or custodian. Colo. R. Juv. P. 3.
<b>Connecticut</b>	Juvenile and parent or guardian shall be informed of the right to counsel at the commencement of any proceeding. Conn. Gen. Stat. § 46b-135(A). Upon a determination of indigency, counsel must be appointed prior to a juvenile's first appearance in court. Conn. Gen. Stat. § 51-296(c).	Same as statute used for adults. Four factor test that considers whether the person, 1) has been clearly advised of right to assistance and/or appointment in case of indigency; 2) possesses the intelligence and capacity to appreciate decision to represent oneself; 3) comprehends nature of the charges, proceedings, and

		punishment; and 4) has been made aware of the dangers of representing oneself. <i>In re Manuel R.</i> , 543 A.2d 719 (Conn. 1988).
<b>Delaware</b>	The Court shall inform a child and his or her custodian of the right to counsel, or right to be appointed counsel if indigent, prior to the commencement of the arraignment. Del. Fam. Ct. R. of Crim P. 10.	A waiver of the right to counsel by a child shall be in writing unless made in Court on the record or in the presence of the custodian. Del. Fam. Ct. R. of Crim P. 44(a).
<b>District of Columbia</b>	A child alleged to be delinquent or in need of supervision is entitled to be represented by counsel at all critical stages of Division proceedings. Counsel will be appointed if a child cannot afford it. In its discretion, the Division may appoint counsel for the child over his objection or that of his parent or guardian. DC Code § 16-2304(a).	A juvenile can waive the right to counsel if the court properly considers the juvenile's age, education, information, and all other pertinent facts, to determine if the waiver was intelligent. <i>McBride v. Jacobs</i> , 247 F.2d 595 (1957).
<b>Florida</b>	The court shall advise a child of his right to counsel. Fla R. Juv. P. Rule 8.165.	A child may waive counsel only after the entire process of offering counsel has been completed and a thorough inquiry into the child's comprehension of that offer and capacity to make the choice has been intelligently and understandingly made. If a waiver is made and accepted, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceeding. The waiver must be in writing and submitted to the court in the presence of a parent, custodian, etc. Fla. R. Juv. P. Rule 8.165(b). Waiver will not be accepted when it appears the minor is unable to make an intelligent and understanding choice. <i>Id.</i>
<b>Georgia</b>	A juvenile is entitled to representation by legal counsel at all stages of any proceeding. If indigent, counsel will be appointed. Ga. Code Ann. § 15-11-6(b). Counsel must be appointed as soon as is feasible, and no later than 72 hours after the initial detention or	Waiver must be knowing and voluntary based on the totality of the circumstances. <i>In the Interest of T.D.W.</i> , 493 S.E.2d 736 (1997). Juvenile may not waive counsel where the interest of the child is adverse to the parent. <i>McBorough v.</i>

	charging. Ga. Code Ann. § 17-12-23(b).	<i>Department of Human Resources, 257 S.E. 2d 35 (Ga. Ct. App. 1979).</i>
<b>Hawaii</b>	The court may appoint counsel for the child in any situation in which it deems it advisable. Haw. Fam. Ct. R. 155.	Juvenile may waive counsel when intelligent, voluntary, and knowing based on a totality of the circumstances. <i>Medeiros v. State, 623 P.2d 86 (Haw. 1981).</i>
<b>Idaho</b>	As early as possible in the proceedings, a juvenile and his parents shall be notified of his right to counsel. Id. Code § 20-514. If unable to afford it, the court shall appoint counsel. <i>Id.</i>	A minor may waive the right to counsel if it is competent and intelligent and the court determines that the best interest of the child does not require the appointment of counsel. Id. Code § 20-514; Id. Juv. Ct. R. 9.
<b>Illinois</b>	A minor has the right to counsel and if financially unable to afford counsel, the court shall appoint the public defender. 705 Ill. Comp. Stat. § 405/1-5(1). Any child younger than 13 who is accused of enumerated serious offenses must be represented by counsel during the entire custodial interrogation. 705 Ill. Comp. Stat. § 405/5-170.	A minor may waive his/her right to counsel if it is competently and intelligently waived. The court should affirmatively find as a fact that by reason of age, education and information and all other pertinent facts, the minor was able to and did make an intelligent waiver. <i>People v. Giminez, 319 N.E. 2d 570 (Ill. App. Ct. 1974).</i> No person under 18 shall be permitted to plead guilty, guilty but mentally ill or waive trial by jury unless he is represented by counsel. 725 Ill. Comp. Stat. § 5/113-5. A minor may not waive counsel if under 13 and accused of enumerated serious offenses. 705 Ill. Comp. Stat. § 405/5-170
<b>Indiana</b>	Counsel must be appointed for a child accused of delinquency at the detention hearing or the initial hearing, whichever occurs first. The court is free to appoint counsel earlier. Ind. Code Ann. § 31-32-4-2. The court shall notify the child and his parent, guardian, or custodian of the right to counsel. Court may appoint counsel if child doesn't have own attorney and child has not waived counsel. Ind Code Ann. §§ 31-37-6-5. 31-32-4-2.	Right to counsel may only be waived 1) by counsel retained or appointed and the child voluntarily and knowingly joins the waiver; or 2) by the child's custodial parent, guardian, or custodian, if: A) that person knowingly and voluntarily waives the right; B) that person has no interest adverse to the child; C) meaningful consultation has occurred between that person and the child; and D) the child knowingly and voluntarily joins the waiver; or 3) by the child, without the presence of a custodial parent or

		guardian if : A) the child knowingly and voluntarily consents to the waiver; and B) the child is emancipated or married. Ind. Code Ann. § 31-32-5-1(1)-(3).
<b>Iowa</b>	A child has the right to be represented by counsel from the moment the child is taken into custody during all proceedings and questioning. Iowa Code § 232.11(1)(a)-(d). The court must appoint counsel for the child if there is a conflict of interest between the parent and child and the parent has already retained counsel for the child. Iowa Code § 232.11(4)	A child cannot waive his or her right to counsel if the proceedings are: a detention or shelter care hearing; a waiver hearing; an adjudicatory hearing; a dispositional hearing, or a hearing to review and modify a dispositional order. Iowa Code § 232.11. A child younger than 16 can waive the right to counsel during questioning only with the written consent of the child's parent or guardian. A child 16 or older can waive the right to counsel during questioning only if a good faith effort has been made to find and notify the child's parent or guardian. <i>Id.</i>
<b>Kansas</b>	A juvenile is entitled to have the assistance of counsel at every stage of the proceedings. The court shall inform a juvenile of his right to counsel if he appears without counsel and shall appoint an attorney if a juvenile is unable to retain one. Kan. Stat. Ann. § 38-1606(a).	A juvenile may waive the right to counsel provided that it is a knowing and intelligent waiver, based on the totality of the circumstances. Op. Kan. Att'y Gen. No. 94-53 (1994).
<b>Kentucky</b>	The Court shall explain to the child and his parents, guardian, or custodian, their respective rights to counsel and the ability to have counsel appointed if they cannot afford it on their own. Ky. Rev. Stat. § 610.060	In order to waive counsel, the court shall (1) conduct a hearing about the waiver and (2) make specific findings of fact that the child knowingly, voluntarily, and intelligently waived his right to counsel. Ky. Rev. Stat § 610.060(2)(b). Counsel cannot be waived by parent, custodian or guardian. Ky. Rev. Stat. § 610.060(1)(e). This has been interpreted to mean that a child cannot waive counsel without first consulting with appointed counsel. <i>D.R. v. Commonwealth</i> , 64 S.W.3d 292 (Ky. Ct. App. 2001). Also, child cannot waive counsel in a hearing involving a child accused of

		committing a felony, sex offense, or any other offense for which the court intends to impose detention or commitment. Ky. Rev. Stat. § 610.060(2)(a).
<b>Louisiana</b>	At every stage of the delinquency proceedings, the child is entitled to counsel. La. Child Code art. 809(A)	Child may waive counsel (1) after consultation with an attorney, parent, or caretaker; (2) if both the child and parent have been instructed by the court about the child's rights and the consequences of waiver; and (3) if the child is competent and knowingly and voluntarily waives his right. La. Child Code art. 810 (A)(1)-(3). Child may not waive counsel (1) in a proceeding in which it has been recommended he be placed in a mental hospital, psychiatric unit, or substance abuse facility; (2) in a proceeding in which he/she is charged with a felony grade delinquent act; or (3) in probation or parole revocations. La. Child. Code art. 810(D)(1)-(3)
<b>Maine</b>	At his first appearance, the juvenile and his parents or guardian shall be advised of the right to be represented by counsel at every stage of the proceedings. The court may appoint counsel without the juvenile requesting counsel if it deems it necessary to protect the interests of the juvenile. Me. Rev. Stat. Ann. Tit. 15 § 3306	Commentary following Me. Rev. Stat. Ann. Tit. 15 § 3306 suggests that waiver is possible if juvenile has been informed of his right to counsel and knowingly fails to request it. Uniform Juvenile Court Act § 26a.
<b>Maryland</b>	A party is entitled to the assistance of counsel at every stage except a peace order proceeding. Md. Code Ann., Cts. & Jud. Proc. § 3-81-20.	A child may waive his/her right to counsel if (i) the child is in the presence of counsel and has consulted with counsel and (ii) the court determines that the waiver is knowing and voluntary. Md. Code Ann., Cts. & Jud. Proc. § 3-8A-20(b)(3). A parent may not waive the child's right to counsel. Md. Code Ann., Cts. & Jud. Proc. § 3-8A-20(b)(2). The court shall do an in depth analysis to determine whether the waiver was actually knowing and

		voluntary, consider five separate factors before coming to a legal conclusion. §3-8A-20(b)(4); Md. R. 11-106(b).
<b>Massachusetts</b>	Child shall be informed of his right to counsel at all hearings and shall be appointed counsel if he is unable to retain it. Mass. Gen. Laws 119, § 39F	No specific statute or case law exists on juvenile waiver of counsel. Common practice allows a juvenile to waive counsel if it is knowing and intelligent, to be judged based on totality of the circumstances. No conditions exist preventing a minor from waiving counsel.
<b>Michigan</b>	The court shall inform a child of his right to counsel at every stage of the proceeding. The court shall appoint an attorney if there is a conflict between the child and parent or the child is otherwise unable to retain counsel. Mich. Comp. Laws § 712A.17c(2).	Child may waive counsel if it is on the record and in open court and it was voluntary and knowing. Mich. Comp. Laws § 712A.17c(3). Waiver is disallowed if the parent or guardian objects or if the court determines it is in the best interest of the child and the public. <i>Id.</i>
<b>Minnesota</b>	Child has a right to effective assistance of counsel unless he is charged with a status offense. This exception does not apply if it is a repeat alcohol or controlled substance offense and the child may be subject to placement in a substance abuse treatment facility. Minn. Stat. Ann. § 260B.007(16), 260B.163; Minn. Juv. Ct. R. P. 3.01.	May waive if knowing, intelligent, and voluntary so long as it is on the record and in writing. Child must be fully informed of his right to counsel and the disadvantages of representing oneself by an in-person consultation with an attorney, and counsel shall appear with the child in court and inform the court that such a consultation occurred. Court will consider totality of the circumstances. Minn. Juv. Ct. R. P. 3.04. Child may not waive counsel if subject to competency proceedings. <i>Id.</i> Extra safeguards are in place if the child does waive counsel. Minn. Juv. Ct. R. P. 3.02.
<b>Mississippi</b>	Each party shall have the right to be represented by counsel at all proceedings. If the party is a child, the child shall be represented by counsel at all critical stages. If indigent, the child shall have the right to counsel appointed for him by the youth court. Miss. Code Ann. § 43-21-201(1).	No specific statute on juvenile waiver of counsel. Case law suggests that a waiver of rights should be knowing, voluntary, and intelligent based on the totality of the circumstances test. <i>Edmonds v. State</i> , 955 So. 2d 787 (Miss. 2007).
<b>Missouri</b>	A party is entitled to be represented by	A child may waive his right to

	counsel at all proceedings. Mo. Rev. Stat. § 211.211.	counsel only with approval of the court. Mo. Rev. Stat. § 211.211(8). A waiver is only valid if the child understands (1) the nature of charges, (2) the statutory offenses included within them, (3) the range of allowable punishments thereunder, (4) possible defenses to the charges and circumstances in mitigation thereof, and (5) all other facts essential to a broad understanding of the whole matter. <i>State v. Schnelle</i> , 924 S.W. 2d 292, 296-97 (Mo. Ct. App. 1996). No conditions exist that prevent waiver.
<b>Montana</b>	The youth may be represented by counsel at all stages of the proceedings. Counsel must be appointed if not retained. Mont. Code Ann. § 41-5-1413.	Youth and parents or guardian can waive the right to counsel. Mont. Code Ann. § 41-5-1413. The waiver must be intelligently and understandingly given by both the youth and the parent or guardian. <i>Edward C. v. Collings</i> , 632 P.2d 325 (Mont. 1981). Neither a child nor his/her parent can waive counsel if commitment to the department for more than six months may result from the adjudication. Mont. Code Ann. § 41-5-1413.
<b>Nebraska</b>	The court shall advise the juvenile of his right to retain counsel and that counsel will be appointed if he does not retain counsel. Neb. Rev. Stat. § 43-272.	No specific statute on waiver. Court considers the totality of the circumstances to determine whether a waiver is knowing, intelligent, and voluntary. The court has also held there is no need to inform the juvenile of the dangers and disadvantages of self-representation. <i>In re Interest of Dalton S.</i> , 730 N.W.2d 816 (Neb. 2007).
<b>Nevada</b>	The court shall advise the child and his parent or guardian that he is entitled to be represented by an attorney at all stages of the proceedings. The court shall appoint counsel if not retained. Nev. Rev. Stat. § 62D.030.	The child may waive the right to an attorney if done knowingly, intelligently, voluntarily and in accordance with any applicable standards established by the juvenile court. Nev. Rev. Stat. § 62D.030(4).
<b>New Hampshire</b>	Absent a valid waiver the court shall appoint counsel at the time of	The child may waive counsel if (a) the minor is represented by a non-

	arraignment of an indigent minor, provided that an indigent minor securely detained pending adjudication shall have counsel appointed upon the issuance of the detention order. N.H. Rev. Stat. § 169-B:12.	hostile parent, guardian, or custodian; and (b) both the minor and parent, guardian or custodian agree to waive counsel; and (c) in the court's opinion the waiver is made competently, voluntarily and with full understanding of the consequences. N.H. Rev. Stat. § 169-B:12(II).
<b>New Jersey</b>	A juvenile shall have the right to be represented by counsel at every critical stage in the proceeding which, in the opinion of the court may result in the institutional commitment of the juvenile. N.J. Stat. § 2A:4A-39.	Juvenile may waive his/her right to counsel if the juvenile is competent and consulted with counsel and a parent has been afforded a reasonable opportunity to consult with the juvenile and the juvenile's counsel regarding the decision. The waiver must be in writing or recorded. The court must determine whether the decision was made knowingly, willingly, and voluntarily. N.J. Stat. § 2A:4A-39(b)(1), (2). The parent or guardian may not waive the rights of a competent juvenile. N.J. Stat. § 2A:4A-39(2). An incompetent juvenile may not waive any right. N.J. Stat. § 2A:4A-39(3). A waiver must be made in the language regularly spoken by the juvenile. N.J. Stat. § 2A:4A-39(4).
<b>New Mexico</b>	The child and the parent, guardian or custodian of the child shall be advised by the court or its representative that the child shall be represented by counsel at all stages of the proceedings on a delinquency petition. N.M. Stat. Ann. § 32A-2-14(B). If after due notice to the parent, guardian, or custodian and after a hearing determining indigency, the parent, guardian or custodian is declared indigent by the court, the public defender shall represent the child. N.M. Stat. Ann. § 32A-2-14(B).	Any person who is entitled to representation by the district public defender may intelligently waive his right to representation. The waiver may be for all or any part of the proceedings. The waiver shall be in writing and countersigned by a district public defender. N.M. Stat. Ann. § 31-15-12(E).
<b>New York</b>	At the time the respondent first appears before the court, the respondent and his parent or other person legally responsible for his care shall be	A minor may waive his/her right to counsel but it shall be presumed that a minor lacks the requisite knowledge and maturity to waive the

	advised of the respondents'...right to be represented by counsel chosen by him or by a law guardian assigned by the court. N.Y. Fam. Ct. Act § 320.3.	appointment of a law guardian. The presumption can be rebutted after a hearing at which a law guardian appears and participates, in which the judge finds by clear and convincing evidence that: (a) the minor understands the nature of the charges, the possible dispositional alternatives and the possible defenses to the charge; (b) the minor possesses the maturity, knowledge and intelligence necessary to conduct his own defense; and (c) waiver is in the best interest of the minor. N.Y. Fam. Ct. Act § 249-a.
<b>North Carolina</b>	Juvenile has the right to be represented by counsel in all proceedings. Counsel shall be appointed if juvenile is found indigent. All juveniles shall be presumed indigent. N.C. Gen. Stat. Ann. § 7B-2000(a).	No specific statute on juvenile waiver of counsel. However, courts have held that juvenile waiver is permissible if the youth is advised of her rights and confronted with the question of waiver. <i>In re Garcia</i> , 177 S.E. 2d 461 (N.C. Ct. App. 1970).
<b>North Dakota</b>	A party is entitled to representation by legal counsel at custodial, post-petition, and informal adjustment stages of proceedings, and if unable to employ counsel to have the court provide counsel. Counsel must be provided for a child who is under the age of eighteen years and is not represented by the child's parent, guardian or custodian at custodial, post petition, and informal adjustment proceedings in delinquency court. N.D. Cent. Code § 27-20-26. A child will not be considered indigent if his/her parent can provide full payment for counsel and legal representation. The court may require payment by court order. <i>Id.</i>	No specific statute on juvenile waiver of counsel. Case law suggests a juvenile may waive the right to counsel when represented by her parents or guardian and if, considering the totality of the circumstances, the waiver is made knowingly, intelligently and voluntarily. <i>In the Interest of R.D.B.</i> , 575 N.W.2d 420 (N.D. 1998). A child may not waive his/her right to counsel if he/she is not represented by the parent, guardian, or custodian. <i>In the Interest of D.S.</i> , 263 N.W.2d 114 (N.D. 1978).
<b>Ohio</b>	A child, or the child's parents, custodian, or other person <i>in loco parentis</i> of such child is entitled to representation by legal counsel at all stages of the proceeding. Counsel will be provided if such person is indigent.	A child may waive his/her right to counsel if he/she is advised by his/her parent, custodian, or guardian, or if he/she has consulted with an attorney and so long as the waiver is knowing and voluntary. <i>In re C.S.</i> , 115 Ohio

	OHIO REV. CODE ANN § 2151.352.	St. 3d 267, 282 (2007). Counsel may not be waived if there is a conflict between child and parent regarding waiver. <i>Id.</i> at 282-83. A child's right to be represented by counsel at a hearing conducted to determine if the juvenile court shall relinquish jurisdiction, may not be waived. Ohio Juv. R. Rule 3.
<b>Oklahoma</b>	When it appears that a minor desires counsel but is indigent and cannot employ counsel, the court shall appoint counsel. OKLA. STAT. ANN. TIT. 10 § 24.	No specific statute. Case law suggests that a juvenile may waive counsel if it is knowing, intelligent, and voluntary. <i>See T.C. v. State</i> , 740 P.2d 739 (Okla. 1987).
<b>Oregon</b>	If youth, parent, or guardian requests counsel but is without financial means to retain counsel, the court may appoint counsel. Whenever requested to do so, the court shall appoint counsel to represent the youth in a delinquency case in which the youth would be entitled to appointed counsel if the youth were an adult charged with the same offense. The juvenile department counselor shall inform the youth and the youth's parents or guardian of the right to counsel and the right to have counsel appointed. OR. REV. STAT. § 419C.200.	No specific statute. Case law indicates that a child can waive his/her right to counsel if the waiver is intelligent and competent. The child must understand the nature of the charge, the elements of the offense and the punishments which may be exacted. In addition to informing him of the pitfalls of defending himself, the court must inform the child of the possible advantage that an attorney would provide and the responsibility he incurs for undertaking his own defense. <i>State ex rel. Juvenile Dep't of Marion Cty v. Afanasiev</i> , 674 P.2d 1199 (Or. Ct. App. 1984) (applying to juvenile cases the standard of <i>State v. Verna</i> , 498 P.2d 793 (Or. Ct. App. 1972)). No conditions exist that prevent a minor from waiving his/her right to counsel.
<b>Pennsylvania</b>	A party is entitled to representation by legal counsel at all stages of any proceedings and if he/she is unable to afford it, the court shall appoint counsel. 42 PA. CONS. STAT. ANN. § 6337. Counsel must be assigned before the detention hearing for any detained youth, and before the adjudication for any youth not in custody. Pa. R. Juv. Ct. P. 151(B). c	Waiver is allowed if the child's parent, guardian, or custodian is present in court and affirmatively waives it. 42 PA. CONS. STAT. ANN. § 6337. The waiver must be knowing, voluntary, and intelligent, and the court must conduct a colloquy with the juvenile on the record. 237 Pa. Code § 152. The court may appoint stand-by counsel if

		the youth waives. <i>Id.</i> Waiver only applies to the proceeding at which counsel was waived. <i>Id.</i> Parent, guardian, or custodian may not waive counsel for the child when their interests may be adverse. 42 PA. CONS. STAT. ANN. § 6337.
<b>Rhode Island</b>	The public defender shall appear on behalf of an accused delinquent child who is financially unable to afford counsel. R.I. GEN. LAWS § 14-1-58. The child and his/her parents must be notified in writing of the right to counsel and if indigent, or the right to have counsel appointed. <i>Morris v. D’Amario</i> , 416 A.2d 137, 141 (R.I. 1980).	No specific statute. Case law indicates that waiver of counsel by juveniles unable to afford counsel should not routinely be allowed. <i>In re John D.</i> 479 A.2d 1173, 1178 (R.I. 1984). A valid waiver is determined based on the totality of the circumstances, one of the circumstances considered is whether a parent or guardian was present. <i>In re Kean</i> , 520 A.2d 1271 (R.I. 1987).
<b>South Carolina</b>	In every delinquency proceeding, there shall be served upon the child, his parent, guardians or persons with whom the child resides a notice that he has a right to be represented by an attorney and if the parents are not able to employ an attorney, that an attorney will be appointed by the court to represent the child. S.C. Fam. Ct. R. 36.	Case law indicates: The child can waive counsel if it is knowing and intelligent but he has to be advised of his right to counsel and adequately warned of the dangers of self-representation. The court engages in a ten factor analysis <i>In the Interest of Christopher H.</i> , 596 S.E. 2d 500 (S.C. Ct. App. 2004). Also, the South Carolina Bar House of Delegates on Jan. 22, 2004 approved a principle that “No child under the age of 18 should be allowed to waive counsel in the juvenile or criminal courts of this state when the child is facing the possibility of detention or confinement.”
<b>South Dakota</b>	The court shall advise the child and the child’s parent, guardian or custodian involved in any action or proceedings of their constitutional and statutory right including the right to be represented by an attorney at the first appearance of the parties before court. S.D. Codified Laws § 26-7A-30.	No specific statute on juvenile waiver exists. Case law indicates: A juvenile can waive the right to counsel if it is knowing and intelligent and if the child is aware of the dangers and disadvantages of self-representation. <i>In the Matter of R.S.B.</i> , 498 N.W. 2d 646 (S.D. 1993).
<b>Tennessee</b>	In delinquency hearings a party is entitled to representation by legal counsel at all stages of any proceeding	A child can waive the right to counsel if (1) the entire process of notification of the right to an attorney has been

	and, if the person is needy and unable to retain counsel, to have the court provide it. Tenn. Code § 37-1-126(a)(4). In delinquency hearings in which a child is in jeopardy of being removed from the home and is not represented by a parent or guardian, he/she is entitled to representation by legal counsel. Tenn. Code § 37-1-126(a)(4).	completed; (2) after thorough inquiry, the court has determined that the respondent thoroughly comprehends the right to an attorney, has the experience and intelligence to understand, and does understand the consequences of any waiver; (3) the child has knowingly and voluntarily waived the right to an attorney; and (4) the child has consulted with a knowledgeable adult who has no interest adverse to the child. Waivers shall be made in writing and in open court. Tenn. R. Juv. P. 30.
<b>Texas</b>	A child has the right to counsel at every stage of proceedings. Tex. Fam. Code § 51.10. Counsel paid for by the county must be appointed within five working days of when a delinquency petition is served on an accused child. Tex. Fam. Code § 51.10(d). Counsel is entitled to have ten days to prepare for an adjudication or transfer hearing. Tex. Fam. Code § 51.10(h).	The child may waive the right to counsel if (1) the waiver is made by the child and the attorney for the child; (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it; (3) the waiver is voluntary; and (4) the waiver is made in writing or in court proceedings that are recorded. Tex. Fam. Code § 51.09. A child may not waive counsel in (1) a hearing to consider transfer to criminal court, (2) an adjudication hearing, (3) a disposition hearing, (4) a hearing prior to commitment to the Texas Youth Commission as a modified disposition, and (5) hearings required for children with mental illness. Tex. Fam. Code § 51.10(b).
<b>Utah</b>	The parents, guardian, custodian, and the child, if competent, shall be informed that they have a right to be represented by counsel at every stage of the proceedings. Counsel will be appointed if any of them is indigent. The court may appoint counsel without a request if it considers representation by counsel necessary to protect the interest of the child or of other parties. Utah Code Ann. § 78A-6-1111.	A minor 14 years of age and older is presumed capable of intelligently comprehending and waiving the right to counsel regardless of the presence of a parent, guardian or custodian and may do so if the court finds the waiver to be knowing and voluntary. A child under 14 may not waive his/her right to counsel outside the presence of a parent, guardian, or custodian. Utah Juv. P. R. 26(e).
<b>Vermont</b>	The court shall assign counsel to	A child's waiver is only valid if (A)

	<p>represent the minor pursuant to Administrative Order No. 32 unless counsel has been retained by that person. Vt. Fam. Pro. R. 6.</p>	<p>there is a factual and legal basis for the waiver; (B) the attorney has investigated the relevant facts and law, consulted with the client and guardian <i>at litem</i> and the guardian <i>at litem</i> has consulted with the ward; (C) the waiver is in the best interest of the ward; and (D) the waiver is being entered into knowingly and voluntarily by the ward and the guardian <i>ad litem</i>. In addition, in a delinquency case, the child's knowing and voluntary consent shall be required with respect to the waiver. Vt. Fam. Pro. R. 6(d)(3), (4). A child under the age of 13 shall be rebuttably presumed to be incapable of understanding the nature and consequences of the waiver. Vt. Fam. Pro. R. 6(d)(4).</p>
<b>Virginia</b>	<p>Subsequent to the detention hearing and prior to the adjudicatory or transfer hearing by the court of any case involving a child who is alleged...delinquent, such child and his parent, guardian, or legal custodian shall be informed by a judge, clerk, or probation officer of the child's right to counsel and the liability of the parent, guardian, or legal custodian for the costs of such legal services. They shall be given the opportunity to obtain and employ counsel, or request that the court appoint counsel. Va. Code Ann. § 16.1-266(C)(1), (2).</p>	<p>A child may waive the right to counsel if the the child and the parent, guardian, or legal custodian consent in writing and such a waiver is consistent with the interests of the child. A child who is alleged to have committed an offense that may result in secure commitment to the Department of Juvenile Justice may waive the right to counsel only after he consults with an attorney and the court determines that his waiver is free and voluntary. The waiver shall be in writing, signed by both the child and the child's attorney and shall be filed with the court records of the case. Va. Code Ann. § 16.1-266(C)(3).</p>
<b>Washington</b>	<p>A juvenile and his or her parent, guardian, or custodian shall be advised by the court or its representative that the juvenile has the right to be represented by counsel at all critical stages of the proceedings and counsel will be provided to a juvenile who is financially unable to obtain counsel on</p>	<p>A juvenile who is at least 12 years old may waive the right to counsel if the waiver is express and is intelligently made by the juvenile after the juvenile has been informed of the right being waived. If a juvenile is under twelve years of age, the juvenile's parent, guardian, or</p>

	his own. In no case may a juvenile be deprived of counsel because of a parent, guardian, or custodian refusing to pay. Wash. Rev. Code § 13.40.140(2).	custodian shall give any waiver. Wash. Rev. Code §§ 13.40.140(9), (10).
<b>West Virginia</b>	If a juvenile is not represented by counsel the court shall inform the juvenile and his or her parents, guardian or custodian or any other person standing <i>in loco parentis</i> to him or her of the juvenile's right to be represented at all stages of proceedings under this article and the right to have counsel appointed. W. Va. Code § 49-5-9(a)(1), (2).	A juvenile can waive the right to counsel if the waiver is knowing. W. Va. Code § 49-5-9(a)(2). The Supreme Court of Appeals of West Virginia has held that a juvenile's waiver of a constitutional right is valid and knowing only if it is done upon the advice of counsel. <i>State ex rel. J.M. v. Taylor</i> , 276 S.E. 2d 199 (W. Va. 1981).
<b>Wisconsin</b>	Any juvenile alleged to be delinquent or held in a secure detention facility shall be represented by counsel at all stages of the proceedings. Youth are entitled to counsel at a hearing to impose a sanction for violation of a previous court order. Youth are entitled to counsel at hearings on aftercare revocation or transfer to a secure placement. Wis. Stat. § 938.23.	A child who is 15 years or older may waive the right to counsel if the court accepts the waiver after being satisfied that it is knowing and voluntary. Wis. Stat. § 938.23(1m)(a). A child under the age of 15 may not waive the right to counsel. Wis. Stat. § 938.23. If the court accepts the child's waiver the court may not place the juvenile in a secure facility, transfer supervision of the juvenile to the serious juvenile offender program, or transfer the juvenile to adult court jurisdiction. Wis. Stat. § 938.23(1m)(a)
<b>Wyoming</b>	At their first appearance before the court the child and his parents, guardian, or custodian shall be advised by the court of their right to be represented by counsel at every stage of the proceeding including appeal. The court shall upon request appoint counsel, who may be the guardian <i>at litem</i> , to represent the child if the child, his parents, guardian, or custodian is unable to obtain counsel. Wyo. Stat. Ann. § 14-6-222(a), (b).	No specific statute on waiver exists. Case law suggests that a waiver must be knowing and voluntary, in fact, not merely in form, based on the totality of the circumstances. <i>Rubio v. State</i> , 939 P.2d 238 (Wyo. 1997).

## APPENDIX TWO

### OREGON PRACTICE ON WAIVER OF COUNSEL – BY COUNTY

<b>County</b>	<b>Waiver Practice</b>
<b>Baker</b>	Youth appear initially with a parent or guardian and are given the opportunity to discuss with them whether they want to waive or not. If the parent or guardian is the victim, the Judge will appoint counsel at the first appearance. <sup>106</sup>
<b>Benton</b>	A majority of youth are represented by attorneys. When a youth waives the right, the judge consults with the youth and parents about the reasons and possible consequences. Judges do not allow waivers on serious cases where placement could be outside the home. <sup>107</sup>
<b>Clackamas</b>	Court requires counsel at the first appearance (preliminary hearing). Youth's parents then complete financial forms to determine whether youth is eligible for court appointed counsel. Very rare that counsel is waived, estimate is less than 5%. <sup>108</sup>
<b>Clatsop</b>	Moving toward a standard practice of having a written waiver of counsel, though not currently the case. Judge advises youth of his/her right to counsel and regularly asks youth if s/he has consulted with his/her parents before making an admission if doing so without counsel. Judge will also ask parents whether they are ok with the child proceeding without counsel. Occasionally the Judge will appoint counsel in a serious case (serious charges, conflict with parents, age) even if the youth desires to waive. <sup>109</sup>
<b>Columbia</b>	Never have a juvenile waive counsel. <sup>110</sup> Court explains the rights to the youth and the parents. Judges will often appoint counsel even if the youth wants to waive if there is a question about the age or mental health status of the youth. The Juvenile Department can also request counsel

<sup>106</sup> Email from Staci Erickson, Supervisor, Baker County Juvenile Department.

<sup>107</sup> Email from Al Krug, Director, Benton County Juvenile Department.

<sup>108</sup> Email from Ellen Crawford, Director, Clackamas County Juvenile Department.

<sup>109</sup> Email from Greg Engebretson, Juvenile Court Counselor, Clatsop County Juvenile Department.

<sup>110</sup> Email from Susan Hill, Trial Court Administrator, Columbia County Circuit Court.

	on behalf of the youth if they have reason to believe it would be in the youth's best interest. <sup>111</sup>
<b>Coos</b>	<b>No information</b>
<b>Crook</b>	<b>No information</b>
<b>Curry</b>	<b>No information</b>
<b>Deschutes</b>	It is rare if a juvenile does not have an attorney. Almost all of them do. <sup>112</sup>
<b>Douglas</b>	<b>No information</b>
<b>Gilliam</b>	<b>No information</b>
<b>Grant</b>	<b>No information</b>
<b>Harney</b>	In Harney County, by order of the circuit court judge, each juvenile that is petitioned into court for an allegation of delinquency is assigned an attorney at his first appearance. The juvenile is represented at all stages of the jurisdiction process. The only exception is when a juvenile is petitioned for a violation i.e. Curfew, Minor in possession of alcohol or possession of less than 1 oz of marijuana. <sup>113</sup>
<b>Hood River</b>	An attorney is typically retained or appointed on all delinquency cases. If a youth does not want an attorney, they are again made aware of their right to one and are given time, if needed, to speak with a parent or guardian. If the youth and his/her family can convince the court they do not need counsel, the court will not appoint counsel. Counsel may not be waived if the petition is a felony. <sup>114</sup>
<b>Jackson</b>	<b>No information</b>
<b>Jefferson</b>	<b>No information</b>
<b>Josephine</b>	The judge almost insists that every youth be represented by an attorney. Even if the youth signs a waiver, the Court usually persuades the youth that he/she should have representation. <sup>115</sup>
<b>Klamath</b>	<b>No information</b>
<b>Lake</b>	<b>No information</b>
<b>Lane</b>	Attorneys appear with youth at their first hearing. An attorney is appointed in all situations. If a parent is able

<sup>111</sup> Email from Stan Mendenhall, Director, Columbia County Juvenile Department.

<sup>112</sup> Email from Bob LaCombe, Division Administrator, Deschutes County Juvenile Community Justice.

<sup>113</sup> Email from John Copenhaver, Director, Harney County Juvenile Department.

<sup>114</sup> Email from Michelle Hughes, Juvenile Counselor Supervisor, Hood River, OR.

Received 04/14/09.

<sup>115</sup> Email from Janine Wilson, Juvenile Division Manager, Josephine County.

	to retain counsel and chooses not to, the judge will appoint counsel for the youth. <sup>116</sup>
<b>Lincoln</b>	Very few formal cases where an attorney is not appointed and then in only fairly minor matters. Most of the judges look at it as almost an unwaivable right. <sup>117</sup>
<b>Linn</b>	Judge conducts a colloquy on the record with the juvenile, being sure to advise him/her of the disadvantages of representation. The waiver must be in writing if the charge is a serious misdemeanor or felony. If a parent is able to afford counsel and chooses not to, the Judge will appoint counsel and enter a judgment against the parent. If the offense is serious, the Judge appoints counsel in almost all situations, whether the juvenile wants counsel or not. Waiver is fairly routine on probation violations when a significant deprivation of liberty is not likely. <sup>118</sup>
<b>Malheur</b>	Child is given a packet for a court appointed attorney when arraigned. If child waives, Judge will question him/her at the release hearing. Judge tries to persuade those who are charged with a felony or sex offense to apply for counsel, and will appoint an attorney occasionally even if the youth says he/she does not want one. Judge will appoint an attorney no matter what if the youth will be going to the Youth Correctional facility or if Probation is recommending custody in OYA. <sup>119</sup>
<b>Marion</b>	Prior to the first hearing, juveniles are notified of their rights and sign a document, along with their parents, indicating they understand their rights. Judge then reviews this sheet and if the juvenile wishes to retain counsel, or have counsel appointed, he must state that. If the juvenile wishes to get counsel prior to the first hearing, he must tell the probation officer who will have him fill out a financial form. Pool of consortium attorneys is present in case a juvenile does want counsel. If the victim in the case is the juvenile's own family, the judge will usually appoint counsel. This also usually happens if the juvenile is very young or has obvious mental health issues. <sup>120</sup>
<b>Morrow</b>	Vast majority waives counsel based on the experience of the Director. Guess is that 80% or so waive vs 20% who

<sup>116</sup> Phone conversation with Judge Kip Leonard on 04/17/09.

<sup>117</sup> Email from Alan Peterson, Director, Lincoln County Juvenile Department.

<sup>118</sup> Email from Judge Daniel R. Murphy, Circuit Judge, Linn County Circuit Court.

<sup>119</sup> Email from Linda M. Cummings, Director, Malheur County Juvenile Department.

<sup>120</sup> Email from Faye Fagel, Director, Marion County Juvenile Department.

	may retain, 90-95% of which are likely court appointed. Serious offenses notwithstanding. <sup>121</sup> The department director initially meets with the youth and his/her parent and they determine whether the youth desires counsel. If so, the Director must set a hearing in front of the judge to determine whether they qualify for counsel. Court appointment in Morrow comes from the Juvenile department budget and not from State court assistance. <sup>122</sup>
<b>Multnomah</b>	Practice is to appoint counsel at the first appearance of the youth. The Juvenile department director knows of no youth who ever waive counsel. <sup>123</sup>
<b>Polk</b>	Attorneys are not on hand to appear with youth at the first appearance and the court does not require any attorney to be present. Youth is provided with and signs an “advice of rights” form that indicates whether he or she wants an attorney. The court, probation officer, and parent discuss the right to counsel. <sup>124</sup>
<b>Sherman</b>	Judge’s informal policy is to appoint counsel to all youth in delinquency and dependency cases. <sup>125</sup>
<b>Tillamook</b>	<b>No information</b>
<b>Umatilla</b>	When youth is read his/her rights, notified of the right to counsel. If youth is in detention, parents are not present, if not in detention, parents are present. Judge confirms with youth and parents at detention hearing whether youth wants to waive counsel. Attorneys are present in the courtroom in cases where a youth does want to be represented. Judge continues to remind youth that counsel is available. An attorney is appointed in all cases in which the youth may be committed to the OYA or is charged with a felony. <sup>126</sup>
<b>Union</b>	<b>No information</b>
<b>Wallowa</b>	Youth is given a form to sign if he/she desires to waive counsel. Both the juvenile department staff and the Judge review the document with the youth and his/her parents. <sup>127</sup>
<b>Wasco</b>	The Youth Services director shared anecdotally that “over 97% of the youth who appear in court are represented by

<sup>121</sup> Email from Tom Meier, Director, Morrow County Juvenile Department.

<sup>122</sup> *Id.*

<sup>123</sup> Email from David Koch, Assistant Director, Juvenile Services Division.

<sup>124</sup> Email from Becky Koloen, Polk County Juvenile Court Clerk.

<sup>125</sup> Email from Amber DeGrange, Director, Sherman County Juvenile Department.

<sup>126</sup> Email from Charles Logan-Belford, Administrator, Umatilla County Youth Services.

<sup>127</sup> Email from John Lawrence, Director, Wallowa County Department of Youth Services.

	counsel.” There is no set protocol for allowing youth to waive. <sup>128</sup>
<b>Washington</b>	Policy is to ensure counsel on every hearing for a criminal offense (excluding MIP and truancy cases). <sup>129</sup> The court would entertain a “request of waiving counsel if approached by the youth, however it is believed that a delinquency petition and possible consequences if adjudicated, are such that it would not be in the youths best interest to do so.” <sup>130</sup>
<b>Wheeler</b>	<b>No information</b>
<b>Yamhill</b>	Youth is advised of the right to counsel by the juvenile department staff. Parent is also advised. The juvenile and his/her parent will meet with the defense attorney present in court on the day of the hearing to discuss waiver and the benefits of counsel. The Judge will again go over the youth’s decision to waive counsel. <sup>131</sup>

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<sup>128</sup> Email from Molly Rogers, M.J.M, Director, Wasco County Youth Services.

<sup>129</sup> Email from Joe Christy, Director, Washington County Juvenile Department.

<sup>130</sup> Email from Joan McCumby, Manager, Washington County Juvenile Department Court Unit.

<sup>131</sup> Email from Tim Loewen, Director, Yamhill County Juvenile Department.

# Attachment 5

**Public Defense Services Commission  
Report to Joint Ways and Means Committee  
75th Oregon Legislative Assembly  
Submitted: February 8, 2010**

The Public Defense Services Commission submits this report pursuant to the following 2009-11 budget note:

The Commission is instructed to report to the 2010 Special Session of the Legislature on current caseload trends and any resentencing costs required by legislation enacted during the 2009 Session.

**Caseload Trends**

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

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

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

The agency does not have an explanation for this unprecedented drop in caseload in FY2008 but in prior budget requests has identified a non-exclusive list of budget driving factors including changes in crime rates, law enforcement funding and practices, prosecution practices and the like. The majority of the decrease is attributable to Class B and C felonies and traffic misdemeanors. Caseload continued to decline slightly in FY2009 but increased in FY2010 (projection based on data through 12/31/09).

There would not have been an increase in FY2010 absent the HB3508 (2009) resentencing hearings. If we subtract the number of resentencing hearings, the underlying caseload has decreased 1.6% from FY2009.

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

During the remainder of the 2009-11 biennium, the agency expects to provide updated caseload figures to each Emergency Board and Interim Joint Ways and Means Committee and the Joint Committee on Ways and Means at the beginning of the 2011 Legislative Session.

## **Resentencing costs**

HB 3508 (2009) allowed for increased earned time eligibility from 20% to 30% for certain offenders. If the District Attorney, the victim, or the court objects to the increased earned time credit, a resentencing hearing is held, for which counsel must be appointed.

Through December 31, 2009, the agency provided court-appointed counsel for 1,940 resentencing hearings with a total cost of \$656,440. In addition, there were 148 appeals of resentencing hearings with an estimated cost of \$40,108.

The trial-level costs incurred as a result of HB3508 were offset by the overall reduction in trial-level caseload. Contracts for trial-level representation supplanted anticipated new appointments that did not materialize with the HB3508 resentencing hearings. Therefore, the agency does not require additional funding for trial-level HB3508 resentencing hearings.

Appellate-level costs for resentencing hearings, however, cannot be absorbed within existing resources. Appellate-level caseload, which varies depending on a different set of factors than trial-level caseload, increased 33% in calendar year 2009. One quarter of that increase was attributable to HB3508 appeals. The agency has requested a transfer of \$155,000 from the appropriation for trial-level representation to the appropriation for appellate-level representation to fund this unbudgeted increase.

Public Defense Caseloads  
FY1998-FY2010

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

\* Appointments were deferred to the following biennium

\*\* Projected (actual data through 12/31/09)



**February 2010 Session Actions Impacting Public Defense Services Commission**

<b>Bill #</b>	<b>Description</b>	<b>001-00-00-00000 Appellate Divison</b>	<b>002-00-00-00000 PDSA GF</b>	<b>PDSA OF</b>	<b>004-00-00-00000 CBS-GF</b>	<b>ACP Balance</b>
HB5100	Sec 46 Moves Chief Defender	\$298,317			-\$298,317	
HB5100	Sec 48 Increases OF Limitation			\$8,880,573		
HB5100	Sec 76 Expenditures re-forecast		-\$1,000,000			
HB5100	Sec 98 Rebalance trial/appellate		-\$155,000			
HB5100	Sec 99 Rebalance trial/appellate	\$155,000				
HB3696	Sec 77 ACP fund sweep					-\$500,000

Also, Sec 77 of HB5100 makes a Special Purpose Appropriation to the Emergency Board in the amount of \$3,500,000 GF for PDSC.

# Report on the Third Annual Statewide Public Defense Performance Survey

By Paul Levy, OPDS General Counsel

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In early January 2010, the Office of Public Defense Services (OPDS) conducted its third annual statewide public defense performance survey. A summary of the survey results, along with the results of the 2009 survey, is attached to this report. Because OPDS used a somewhat different instrument for its first survey in late 2007, the results of that survey are not provided here but will be mentioned in pertinent parts of this report.

Overall, the 2010 survey shows general satisfaction with the quality of public defense representation in Oregon, a result similar to that seen in the two earlier surveys. With the caveat that the survey is not a scientifically designed or validated instrument, the survey appears to confirm that efforts by the Public Defense Services Commission, its staff, and many others to improve representation in juvenile court are achieving some success. As with the two previous surveys, the written comments on the 2010 survey are especially useful, particularly where they address specific concerns in local justice systems. OPDS is in the process of reviewing each of the comments and, where appropriate, following-up with local courts and public defense providers.

## **Conduct of Survey**

OPDS uses an online survey tool, SurveyMonkey.com, to collect and tabulate responses. OPDS sent a link to its online survey to all Circuit Court judges, all elected district attorneys, the director of each county juvenile department, and to all coordinators of local Citizen Review Boards. As in prior years, Chief Justice Paul De Muniz sent an email message to all Circuit Court judges endorsing the survey and urging judges to respond. Responses to the survey were received from January 8, 2010 to January 29, 2010. This year for the first time a reminder (and thank you) was sent to all potential respondents a week prior to the close of the survey which significantly increased the total number of responses.

## **Criminal Representation**

As in previous surveys, most respondents (87.6%) reported that overall representation in criminal cases was good (74.2%) or excellent (13.4%). Respondents remain concerned, although slightly less so than in previous years, that criminal caseloads are too large. However, unlike past surveys, a majority of respondents are now informing us that they question the competence of some attorneys handling criminal cases. In connection with this information, the 50 comments provided by respondents are especially helpful. As mentioned above, OPDS will follow-up on comments concerning specific providers. More generally, the comments express concerns about inadequate

client contact, lack of training, poor skill development and insufficient oversight by some providers. Other comments address issues of professionalism, work ethic, and lack of zealous representation by some attorneys.

### **Juvenile Representation**

In response to the first annual survey in late 2007, respondents rated the overall quality of juvenile representation slightly less favorably than the representation in criminal cases. Now representation in both dependency and delinquency cases is said to be good or excellent by a higher percentage of people than for criminal cases, with no indication that opinions about criminal representation have worsened. Unlike in criminal cases, the vast majority of respondents do not question the competency of any attorney providing representation in either dependency or delinquency cases. Those respondents who do question the competency of juvenile court practitioners informed us, in their comments, that failure to maintain appropriate client contact is by far their greatest concern. Other concerns include access to relevant training, case preparation, and apparent lack of understanding or appreciation of the responsibilities of counsel, especially for those representing children in dependency cases.

### **Death Penalty Representation**

The 2010 survey presented one open-ended question concerning death penalty representation, inviting any comments concerning representation in those cases. Of the 30 comments received, the majority described the representation as either “excellent,” “fabulous,” “extremely qualified,” “great,” or “very good.” One person commented, however, that “we have a number of attorneys who present as lazy and unqualified,” with similar comments from a few other respondents. One comment questioned defense expenditures in death penalty cases.

### **Civil Commitment Representation**

The 2010 survey is the first to ask about the quality of representation in civil commitment cases. The survey results show a very high level of satisfaction with public defense representation in these cases.

### **Conclusion**

As with previous surveys, the overall favorable opinion about the quality of public defense services is belied to some extent by the many comments, invited at the conclusion of the survey, that identify general and specific concerns with representation. While some of the comments also commend the high quality of representation or identify recent changes or developments that promise improved representation, many respondents express concerns about high caseloads, inadequate client contact, need

for better or more training, access to litigation support resources, and problems with professionalism. The comments are very helpful to OPDS in identifying both specific problems that staff might be able to resolve in a particular jurisdiction and areas of statewide concern that need to be addressed on a systemic basis.

# 2010 Annual Statewide Public Defense Performance Survey

1. Please tell us your role in your county's justice system.				
			Response Percent	Response Count
			( 2009 )	
Judge		( 95 )	65.7%	92
Prosecutor		( 11 )	9.3%	13
Juvenile Department		( 16 )	17.9%	25
Citizen Review Board		( 14 )	7.1%	10
Other			0.0%	0
			Other (please specify)	0
			( 136 ) <i>answered question</i>	<b>140</b>
			<i>skipped question</i>	<b>0</b>

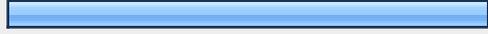
2. How long have you worked in your county's justice system?				
			Response Percent	Response Count
			( 2009 )	
1 to 3 years		( 8 . 8% )	7.2%	10
3 to 5 years		( 7 . 4% )	6.5%	9
5 to 10 years		( 11 . 0% )	10.9%	15
10 years and more		( 72 . 8% )	75.4%	104
			<i>answered question</i>	<b>138</b>
			<i>skipped question</i>	<b>2</b>

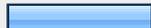
### 3. Please tell us where you work (Judicial District).

		Response Percent	Response Count
JD 1 Jackson County		6.4%	9
JD 2 Lane County		5.0%	7
JD 3 Marion County		7.9%	11
<b>JD 4 Multnomah County</b>		<b>17.1%</b>	<b>24</b>
JD 5 Clackamas County		7.1%	10
JD 6 Morrow & Umatilla Counties		2.9%	4
JD 7 Hood River, Wasco, Sherman, Wheeler, Gilliam Counties		5.0%	7
JD 8 Baker County		1.4%	2
JD 9 Malheur County		1.4%	2
JD 10 Union & Wallowa Counties		2.1%	3
JD 11 Deschutes County		3.6%	5
JD 12 Polk County		1.4%	2
JD 13 Klamath County		1.4%	2
JD 14 Josephine County		2.1%	3
JD 15 Coos & Curry Counties		5.0%	7
JD 16 Douglas County		0.0%	0
JD 17 Lincoln County		2.9%	4
JD 18 Clatsop County		3.6%	5
JD 19 Columbia County		1.4%	2
JD 20 Washington County		7.9%	11
JD 21 Benton County		2.9%	4
JD 22 Crook & Jefferson Counties		2.1%	3
JD 23 Linn County		2.1%	3

JD 24 Grant & Harney Counties		2.1%	3
JD 25 Yamhill County		3.6%	5
JD 26 Lake County		0.7%	1
JD 27 Tillamook County		0.7%	1
		<b>answered question</b>	<b>140</b>
		<b>skipped question</b>	<b>0</b>

4. Are you able to comment on the quality of public defense representation in adult criminal cases?			
		Response Percent	Response Count
Yes		74.6%	103
No (the survey will skip questions related to these cases)		25.4%	35
		<b>answered question</b>	<b>138</b>
		<b>skipped question</b>	<b>2</b>

5. Please rate your overall impression of the quality of public defense representation in adult criminal cases.				
		(2009)	Response Percent	Response Count
Excellent		(15.8%)	13.4%	13
<b>Good</b>		(68.3%)	<b>74.2%</b>	<b>72</b>
Fair		(15.8%)	12.4%	12
Poor		(0.0%)	0.0%	0
		<b>answered question</b>	<b>97</b>	
		<b>skipped question</b>	<b>43</b>	

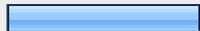
6. Within the past year, has the quality of public defense representation changed in adult criminal cases?				
		( 2009 )	Response Percent	Response Count
Improved significantly		( 1.0% )	1.0%	1
Improved somewhat		( 20.0% )	21.9%	21
<b>Remained about the same</b>		( 69.0% )	<b>68.8%</b>	<b>66</b>
Worsened somewhat		( 10.0% )	8.3%	8
Worsened significantly		( 0.0% )	0.0%	0
			<i>answered question</i>	<b>96</b>
			<i>skipped question</i>	<b>44</b>

7. Do public defense attorneys in your judicial district provide satisfactory representation of clients in adult criminal cases?				
		( 2009 )	Response Percent	Response Count
Always		( 22.0% )	18.9%	18
<b>Often</b>		( 65.0% )	<b>73.7%</b>	<b>70</b>
Sometimes		( 13.0% )	7.4%	7
Rarely		( 0.0% )	0.0%	0
Never		( 0.0% )	0.0%	0
			<i>answered question</i>	<b>95</b>
			<i>skipped question</i>	<b>45</b>

8. Do you question the competence of any public defense attorneys in your jurisdiction who provide representation in criminal cases?				
		( 2009 )	Response Percent	Response Count
Yes		( 44 . 4% )	54.6%	53
No		( 55 . 6% )	45.4%	44
If "yes," please describe your concerns.				50
<b>answered question</b>				<b>97</b>
<b>skipped question</b>				<b>43</b>

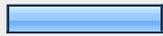
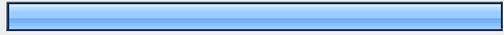
9. How would you describe the adult criminal caseloads of public defense attorneys in your judicial district?				
		( 2009 )	Response Percent	Response Count
Significantly too large		( 9 . 3% )	16.0%	15
<b>Somewhat too large</b>		( 60 . 8% )	41.5%	39
<b>About right</b>		( 29 . 9% )	41.5%	39
Somewhat too small		( 0 . 0% )	0.0%	0
Significantly too small		( 0 . 0% )	1.1%	1
<b>answered question</b>				<b>94</b>
<b>skipped question</b>				<b>46</b>

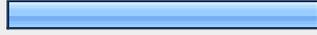
10. Are you able to comment on the quality of public defense representation in juvenile dependency cases?				
			Response Percent	Response Count
Yes			57.0%	77
No (the survey will skip questions related to these cases)			43.0%	58
<b>answered question</b>				<b>135</b>
<b>skipped question</b>				<b>5</b>

11. Please rate your overall impression of the quality of public defense representation in juvenile dependency cases.				
		( 2009 )	Response Percent	Response Count
Excellent		( 24 . 4% )	29.5%	23
<b>Good</b>		( 61 . 0% )	<b>61.5%</b>	<b>48</b>
Fair		( 14 . 6% )	7.7%	6
Poor		( 0 . 0% )	1.3%	1
<i>answered question</i>				<b>78</b>
<i>skipped question</i>				<b>62</b>

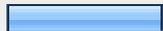
12. Within the past year, has the quality of public defense representation changed in juvenile dependency cases?				
		( 2009 )	Response Percent	Response Count
Improved significantly		( 4 . 8% )	1.3%	1
Improved somewhat		( 27 . 7% )	28.2%	22
<b>Remained about the same</b>		( 63 . 9% )	<b>67.9%</b>	<b>53</b>
Worsened somewhat		( 3 . 6% )	2.6%	2
Worsened significantly		( 0 . 0% )	0.0%	0
<i>answered question</i>				<b>78</b>
<i>skipped question</i>				<b>62</b>

13. Do public defense attorneys in your judicial district provide satisfactory representation of clients in juvenile dependency cases?				
			Response Percent	Response Count
			( 2009 )	
Always		( 34.1% )	31.6%	25
<b>Often</b>		( 48.8% )	<b>58.2%</b>	<b>46</b>
Sometimes		( 17.1% )	10.1%	8
Rarely		( 0.0% )	0.0%	0
Never		( 0.0% )	0.0%	0
				<b>answered question</b>
				<b>79</b>
				<b>skipped question</b>
				<b>61</b>

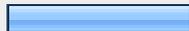
14. Do you question the competence of any public defense attorneys in your jurisdiction who provide representation in juvenile dependency cases?				
			Response Percent	Response Count
			( 2009 )	
Yes		( 21.7% )	23.4%	18
<b>No</b>		( 78.3% )	<b>76.6%</b>	<b>59</b>
If "yes," please describe your concerns.				19
				<b>answered question</b>
				<b>77</b>
				<b>skipped question</b>
				<b>63</b>

<b>15. How would you describe the juvenile dependency caseloads of public defense attorneys in your judicial district?</b>				
		( 2009 )	Response Percent	Response Count
Significantly too large		( 11.1% )	4.1%	3
Somewhat too large		( 43.2% )	45.2%	33
<b>About right</b>		( 44.4% )	<b>47.9%</b>	<b>35</b>
Somewhat too small		( 1.2% )	1.4%	1
Significantly too small		( 0.0% )	1.4%	1
			<i>answered question</i>	<b>73</b>
			<i>skipped question</i>	<b>67</b>

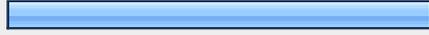
<b>16. Are you able to comment on the quality of public defense representation in juvenile delinquency cases?</b>				
			Response Percent	Response Count
Yes			85.9%	67
No (the survey will skip questions related to these cases)			14.1%	11
			<i>answered question</i>	<b>78</b>
			<i>skipped question</i>	<b>62</b>

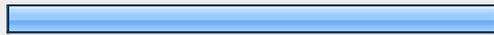
17. Please rate your overall impression of the quality of public defense representation in juvenile delinquency cases.				
		( 2009 )	Response Percent	Response Count
Excellent		( 22.1% )	23.5%	16
<b>Good</b>		( 63.6% )	<b>67.6%</b>	<b>46</b>
Fair		( 14.3% )	8.8%	6
Poor		( 0.0% )	0.0%	0
<i>answered question</i>				<b>68</b>
<i>skipped question</i>				<b>72</b>

18. Within the past year, has the quality of public defense representation changed in juvenile delinquency cases?				
		( 2009 )	Response Percent	Response Count
Improved significantly		( 1.3% )	4.4%	3
Improved somewhat		( 26.9% )	20.6%	14
<b>Remained about the same</b>		( 67.9% )	<b>73.5%</b>	<b>50</b>
Worsened somewhat		( 3.8% )	1.5%	1
Worsened significantly		( 0.0% )	0.0%	0
<i>answered question</i>				<b>68</b>
<i>skipped question</i>				<b>72</b>

19. Do public defense attorneys in your judicial district provide satisfactory representation of clients in juvenile delinquency cases?						
				(2009)	Response Percent	Response Count
Always		(32.5%)		27.9%	19	
<b>Often</b>		(53.2%)		<b>64.7%</b>	<b>44</b>	
Sometimes		(14.3%)		7.4%	5	
Rarely		(0.0%)		0.0%	0	
Never		(0.0%)		0.0%	0	
					<b>answered question</b>	<b>68</b>
					<b>skipped question</b>	<b>72</b>

20. Do you question the competence of any public defense attorneys in your jurisdiction who provide representation in juvenile delinquency cases?						
				(2009)	Response Percent	Response Count
Yes		(20.5%)		23.5%	16	
<b>No</b>		(79.5%)		<b>76.5%</b>	<b>52</b>	
If "yes," please describe your concerns.						14
					<b>answered question</b>	<b>68</b>
					<b>skipped question</b>	<b>72</b>

21. How would you describe the juvenile delinquency caseloads of public defense attorneys in your judicial district?					
				Response Percent	Response Count
				( 2009 )	
Significantly too large		( 5.3% )		3.0%	2
Somewhat too large		( 30.7% )		25.8%	17
<b>About right</b>		( 62.7% )		<b>65.2%</b>	<b>43</b>
Somewhat too small		( 1.3% )		4.5%	3
Significantly too small		( 0.0% )		1.5%	1
				<i>answered question</i>	<b>66</b>
				<i>skipped question</i>	<b>74</b>

22. Are you able to comment on the quality of public defense representation in death penalty cases?					
				Response Percent	Response Count
Yes				24.4%	33
<b>No (the survey will skip questions related to these cases)</b>				<b>75.6%</b>	<b>102</b>
				<i>answered question</i>	<b>135</b>
				<i>skipped question</i>	<b>5</b>

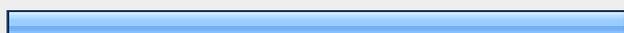
23. Please provide any comments you have concerning the quality of public defense representation in death penalty cases.					
				Response Count	
				30	
				<i>answered question</i>	<b>30</b>
				<i>skipped question</i>	<b>110</b>

24. Are you able to comment on the quality of public defense representation in civil commitment cases?			
		Response Percent	Response Count
Yes		34.6%	46
<b>No (the survey will skip questions related to these cases)</b>		<b>65.4%</b>	<b>87</b>
<i>answered question</i>			<b>133</b>
<i>skipped question</i>			<b>7</b>

25. Please rate your overall impression of the quality of public defense representation in civil commitment cases.			
		Response Percent	Response Count
Excellent		23.4%	11
<b>Good</b>		<b>70.2%</b>	<b>33</b>
Fair		6.4%	3
Poor		0.0%	0
<i>answered question</i>			<b>47</b>
<i>skipped question</i>			<b>93</b>

26. Within the past year, has the quality of public defense representation changed in civil commitment cases?			
		Response Percent	Response Count
Improved significantly		0.0%	0
Improved somewhat		16.7%	8
<b>Remained about the same</b>		<b>81.3%</b>	<b>39</b>
Worsened somewhat		2.1%	1
Worsened significantly		0.0%	0
<i>answered question</i>			<b>48</b>
<i>skipped question</i>			<b>92</b>

27. Do public defense attorneys in your judicial district provide satisfactory representation of clients in civil commitment cases?			
		Response Percent	Response Count
Always		48.9%	23
Often		40.4%	19
Sometimes		10.6%	5
Rarely		0.0%	0
Never		0.0%	0
		<i>answered question</i>	<b>47</b>
		<i>skipped question</i>	<b>93</b>

28. Do you question the competence of any public defense attorneys in your jurisdiction who provide representation in civil commitment cases?			
		Response Percent	Response Count
Yes		4.3%	2
No		95.7%	45
		If "yes," please describe your concerns.	2
		<i>answered question</i>	<b>47</b>
		<i>skipped question</i>	<b>93</b>

29. How would you describe the civil commitment caseloads of public defense attorneys in your judicial district?			
		Response Percent	Response Count
Significantly too large		0.0%	0
Somewhat too large		0.0%	0
<b>About right</b>		<b>91.3%</b>	<b>42</b>
Somewhat too small		8.7%	4
Significantly too small		0.0%	0
	<i>answered question</i>		<b>46</b>
	<i>skipped question</i>		<b>94</b>

30. Please provide any comments, concerns, or suggestions that you may have about the quality of public defense representation in your county or judicial district.		
		Response Count
		67
	<i>answered question</i>	<b>67</b>
	<i>skipped question</i>	<b>73</b>

31. Your name (optional)		
		Response Count
		47
	<i>answered question</i>	<b>47</b>
	<i>skipped question</i>	<b>93</b>