

Members

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Michael Greenfield
Henry H. Lazenby, Jr.
John R. Potter
Janet C. Stevens



Ex-Officio Member

Chief Justice Paul J. De Muniz

Executive Director

Ingrid Swenson

PUBLIC DEFENSE SERVICES COMMISSION

Thursday, March 8, 2007
9 a.m. to 12:00 p.m.
Room 103, **Oregon State Library**
250 Winter St. NE
Salem, Oregon 97301-3950

AGENDA

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|--|-----------------------------------|
| 1. Action Item: Approval of the Minutes of PDSC's February 8, 2007 Meeting
<i>(Attachment 1)</i> | Barnes Ellis |
| 2. Delivery of Services in Death
Penalty cases, cont'd.
<i>(Attachment 2)</i> | |
| <ul style="list-style-type: none"> • Representation on Direct Appeal | Peter Gartlan
Rebecca Duncan |
| <ul style="list-style-type: none"> • OPDS Comments | Ingrid Swenson
Kathryn Aylward |
| <ul style="list-style-type: none"> • Review and Discussion of OPDS Draft Report | Barnes Ellis |
| 3. Action Item: Amendment to the Compensation Plan <i>(Attachment 3)</i> | Kathryn Aylward |
| 4. OPDS's Monthly Report: budget and legislative developments, new LSD employees, backlog report, law school loan forgiveness legislation, recruitment efforts, PDSC's revised 2007-2009 affirmative action plan <i>(Attachment 4)</i> | OPDS's Management Team |

Lunch will be provided at the end of the meeting, courtesy of the Oregon Criminal Defense Lawyers Association

PLEASE NOTE: THE COMMISSION WILL NOT MEET IN APRIL. The May meeting will be on May 10th from 9am to 1 pm in Hillsboro at a location to be announced.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

February 8, 2007
Room 338, Smith Memorial Student Union
Portland State University
1825 SW Broadway
Portland, Oregon

MEMBERS PRESENT: Barnes Ellis
Jim Brown
Chip Lazenby
Mike Greenfield
John Potter
Janet Stevens
Hon. Paul J. De Muniz

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Paul Levy
Rebecca Duncan
Billy Strehlow

[Tape 1, Side A]

Agenda Item No. 1 Approval of the minutes of the December 7, 2006 meeting

003 - 012 **MOTION:** Mike Greenfield moved to approve the minutes; Janet Stevens seconded the motion; hearing no objection, the motion carried: **VOTE: 5-0**

012 Chair Ellis noted the passing of Bill Linden and his many contributions to the court and to indigent defense.

Agenda Item No. 2 Delivery of Services in Death Penalty Cases

020 - 603 Professor William Long testified about the history of the death penalty in Oregon, the status of pending death penalty cases in the state and factors which may affect the cost of representation in the next several years.

[Tape 3: Side A]
031

Judge Michael McShane discussed issues related to the prosecution and defense of death penalty cases in Multnomah County. Four judges are now needed to hear death penalty cases. There are not enough qualified attorneys to handle the cases. Some attorneys do better work than others. Attorneys should be paid more and the creation of a resource attorney position would save funds in the long term. Judge McShane believes that the penalty phase could be

avoided in some cases by delaying it for a significant period of time after the guilt phase. It is difficult for judges to decline to be listed as references for attorneys.

Judge Richard Barron testified that he has presided over many death penalty cases including some under the former statute. More attorneys are needed to try these cases in Coos and Curry Counties. A substantial increase in pay would be required to create a sufficient supply of attorneys. If out of town lawyers are to be assigned there should be a local lawyer who can see the defendant immediately and who can, in some cases, be the one to develop a strong attorney-client relationship with the defendant. Lawyers should be aware of the circumstances under which removal is appropriate. Cases should be handled properly the first time so that they don't have to be retried.

Tim Sylwester has been with the Department of Justice for twenty years and has worked on all of the death penalty cases in the appellate and post-conviction stages. These cases remain in the system for many years. Recently the Department of Justice decided to consolidate the work on these cases in its Appellate Division. Post-conviction is the "black hole" in the system since the petitioner has no incentive to go forward. Both the state and the defense are inadequately funded to move cases forward more rapidly. Retrying cases after many years have elapsed is very difficult. It is imperative that the defense have all of the resources it needs on the front end, including co-counsel, investigators, mitigators and a resource attorney, in order to avoid reversal in the future. It would be helpful if defense attorneys kept better records. Prosecutors as well as defense attorneys could probably use some emotional support. Handling these cases can be very stressful.

Duane McCabe testified that he has been representing clients in death penalty cases since 1978 and is a full time contractor with PDSC. Procedural default is a major concern for defense counsel. Creating a good defense team is the most important thing the attorney needs to do. In order to do these cases well the attorney has to develop a very close working relationship with the client. Many lawyers may be experiencing post traumatic stress disorder as a result of handling these cases.

Rich Wolf noted the passing of Oregon City attorney and death penalty contractor Timothy Lyons. Mr. Wolf said that death penalty cases are different. The attorney for the defendant must develop a close relationship to the client if the client is to have faith in the advice the lawyer ultimately provides which may require the defendant to spend the rest of his life in prison. Lawyers spend a lot of their time meeting with clients in custody. He has submitted a grant application on behalf of OCDLA seeking funds to create a resource center for death penalty lawyers and to provide additional training. Lawyers are not being paid adequately for their work on these cases. There is a need for additional co-counsel and for mitigators. PDSC should contract with mitigators. Other jurisdictions require the prosecutor to conduct a review of the case and the client's circumstances before deciding whether to seek the death penalty.

Dennis Balske spent many years at the Federal Defender office in Portland and now does PCR cases. Some of his colleagues at the Federal Defender office would say that the Oregon PCR system is broken because the quality of representation is so poor. The first thing that needs to be looked at is funding. Many of these cases are handled in Marion County and those attorneys have not always provided adequate representation. In addition the court has sometimes prevented attorneys from calling witnesses and fully presenting their cases. Because of the restrictions imposed by the federal Anti-Terrorism Effective Death Penalty Act it is critical that issues be properly preserved for federal review.

Agenda Item No. 3

Approval of Contract with Matthew M. Rubenstein – Death Penalty Resource Attorney

031 – 094

Ingrid Swenson described the need for a resource attorney to assist death penalty lawyers in the preparation and presentation of their cases. She discussed Matthew Rubenstein's

qualifications for this position and recommended that the commission approve a personal services contract with him.

094 **MOTION:** John Potter moved to approve the personal services contract with Matthew Rubenstein; Chip Lazenby seconded the motion; hearing no objection, the motion carried. **VOTE: 6-0**

Agenda Item No. 4 Approval of Amendments to the Qualification Standards

098 – 170 Paul Levy explained the proposed amendments to the qualification standards. No substantive changes were made since the Commission reviewed them in December except to clarify that expunged or sealed criminal convictions would not have to be disclosed in the supplemental questionnaire.

MOTION: Chip Lazenby moved to adopt the standards; Jim Brown seconded the motion; hearing no objection, the motion carried: **VOTE: 6-0**

Agenda Item No. 5 Multnomah Defenders, Inc. – Proposal regarding Expanded Felony Caseload

182 –
[Tape 3; Side B] 029

Paul Petterson discussed the proposal he had presented to the Commission in November regarding felony case assignments to Multnomah Defenders, Inc. Mr. Petterson requested that the Commission remove the limitation that allowed MDI to take felony cases only when MDI already represented the client. Jim Hennings presented information about caseload trends in Multnomah County.

029 **MOTION:** John Potter moved to remove the limitation on MDI’s appointment in felony cases. Janet Stevens seconded the motion; hearing no objection, the motion carried. **VOTE: 4-0**

Agenda Item No. 6 OPDS’s Monthly Report and Progress Report (Tabled)

Agenda Item No. 7 Approval of Minutes of Executive Session relating to Selection of Executive Director

032 **MOTION:** Janet Stevens moved to approve the minutes of the executive session from September 15 and 21, 2006; John Potter seconded the motion; hearing no objection, the motion carried. **VOTE: 4-0**

083 **MOTION:** The motion to adjourn was made and seconded. Hearing no objection, the motion carried: **VOTE 4-0**

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Room 338 (Vanport), Smith Memorial Student Union
Portland State University
1825 SW Broadway
Portland, Oregon

MEMBERS PRESENT: Barnes Ellis
Jim Brown
Chip Lazenby
Mike Greenfield
John Potter
Janet Stevens
Paul J. De Muniz

STAFF PRESENT: Ingrid Swenson
Kathryn Aylward
Paul Levy
Rebecca Duncan
Billy Strehlow

TAPE 1, SIDE A

[The meeting was called to order at 9:12 a.m.]

Agenda Item No. 1 Minutes of the December meeting

003 Chair Ellis The first item is the approval of the summary minutes of the December 7 meeting. Are there any additions or corrections to those?

MOTION: Mike Greenfield so moved; Janet Stevens seconded the motion; hearing no objection, the motion carried.

VOTE 5-0.

Are there any additions or corrections to the transcript?

009 J. Potter Mr. Chair, on page 7, at the top of the page, line 411, the third word probably should be "year".

012 Chair Ellis Commissioner Potter has demonstrated a close reading of the text and the correction will be noted. Before we go to the next item, I did want to acknowledge the passing of Bill Linden. He was great friend to indigent defense and worked hard on both sides of the issue, both as a court administrator and his work for OCDLA. We are very saddened at his passing.

Agenda Item No. 2 Delivery of Services in Death Penalty Cases

020 Chair Ellis Ingrid, do you want to introduce the death penalty case delivery service presentation?

021 I. Swenson Thank you. I will do that Mr. Chair. I would also like to acknowledge Chip Lazenby's contribution to our meeting today. He is not here yet but we have held it close enough to his

office that I'm quite sure that he will arrive. He arranged for the space and asked his staff member, Annie Kirk, to assist us with all of the arrangements. She has been wonderful. The background materials I provided you are pretty lengthy and dense and I apologize for that. I sent you the ABA Standards on death penalty representation and then the Spencer report on representation in federal death penalty cases. I had hoped that you could just glance through them, certainly not study them.

031 Chair Ellis Our host has arrived.

033 C. Lazenby I apologize.

033 I. Swenson The ABA Standards basically talk about two things. One, the obligation of the oversight agency or the administrative agency responsible for arranging for representation in death penalty cases, and then the obligation of the attorneys and other members of the defense teams in terms of what they need to do to provide adequate representation. The United States Supreme Court and the Federal Circuit Courts have used those standards as guides to what is necessary for adequate representation in a number of cases. The Spencer Report on the death penalty was a report which was forwarded to us by Rich Wolf and we were very appreciative of that. It grew out of a desire in the federal system to look at the costs and quality of representation in these cases, and the recommendations that were made by that federal group are extremely useful. Some of them apply directly to what happens here in our state and so we have provided you with that. It was interesting to look at costs in that system. That report was done in 1998. Paul Levy has inquired about increases in costs in the federal system since then, and when we talk about that issue we can tell you what the current costs in the federal system are for representation in death penalty cases. We have with us today, a number of the most knowledgeable people in the State of Oregon about representation in these cases, and I want to introduce them to you. I provided you with a brief, written biography of each of them so that we wouldn't spend our meeting time making the introductions, but as you will see, we have today some very helpful resources on this issue. Without further introduction, I would like to ask Professor Long to begin the discussion this morning.

065 Chair Ellis Well, welcome Bill. We were colleagues for four years and I know Bill quite well and thank you for coming. Just a little bit of background on that. Bill was working in our firm and he knew of my interest in indigent defense and he said "Well, would you be interested in seeing a script; it is just an old typed document but you might be interested." So I took this stack home and I dutifully started to read it and I couldn't put it down. It was terrific, so I came back and I said "Bill, you are going to publish this aren't you?" and at that point there were no plans. I said "Let me show this to a few people. This is really good stuff." And that led to what became a publication that he, I am sure, will talk about, but it is one of the most interesting books you can imagine reading for people in this room. Nice to see you.

081 W. Long Thanks very much Barnes, I appreciate that. Mr. Chair and members of the Commission, as Ingrid said I am Bill Long and I am here to speak for about 20 minutes. My understanding is I will speak for about 20 minutes on issues in the Oregon death penalty, past and present, and then perhaps provoke a discussion on those issues. My perspective is more historical and perspectival, rather than looking at the particular instances of any case or cost, even though I have some of that data if you are interested. Perhaps I could start with the personal note that Barnes just mentioned. As you may know, I did work with Stoel Rives for a while my last semester of law school. I came to law school late. As a matter of fact I started at age 44, and during my last semester of law school I was bored and so I decided to write a book. While other students were out playing golf, I decided to write on the death penalty. They said that told them more about me than anything else, but that is what I did. I started then at Stoel Rives and Barnes popped into my office the next day, or one day. Actually they put me next to Barnes because I guess they felt that was the way one should really learn law in this state. And so he popped in and asked if I knew anything about the death penalty and I just happened to have my 300 page manuscript sitting there. I handed it to Barnes and Barnes muttered

something about we are getting good associates these days. Then I saw it in his hands and he put it on his desk. Now Barnes had a huge desk up on floor 27 of the building. He put it on the side of his desk and every day I would walk past his office and there was the book way on the side of his desk. As time went on, I just have to confess, Barnes, I walked into your office when you weren't there at times, and inched it a little closer to the center of the desk, in the hope that you would actually look at it. Eight months later, Barnes came bursting back into my office and said "Where did you get this? This is great." He then gave it to Laura Graser, and anybody who knows Laura knows that once she gets it it is going to be published, so it came through Barnes and then through John and it was published a few years ago. So thank you for that introduction. I have a brief outline and I only have a few minutes so here is what I would like to do is to say a few words about where we are today. My thesis of the introduction is that this is, in my judgment, a time in which more changes happened in one year in the death penalty than in the previous 25 years. We are in a cultural moment that I think is extremely interesting for those of you who follow the death penalty. I will talk very briefly about my book and what I was trying to do there, and then speak very briefly historically about how we understand the growth and the development of the death penalty, both in the U.S. and Oregon, and I have some comments here. Then I would like to turn briefly to issues in the development of the modern Oregon death penalty since 1984. If you have questions or clarifications, please ask me, but if you want to discuss an issue that should be after I complete my remarks in just a few minutes. A couple of things that we are learning just today, as I am sitting before you, is that the use of the death penalty is going down in our culture. Only 53 people were executed in 2006, which compares to 60 in 2005 and 98 in 1999. In other words, the incidences of its application has about halved in eight years. We haven't seen that since the re-imposition of the death penalty in 1977. More interesting to me than that, the number of sentences of death are down too. They are down more than 50 percent since 1999. A Gallop poll was taken last year, and going back a couple of years, asking people what the penalty should be for the conviction of the crime of first degree murder -- that is the way it was framed. In 2005 the numbers were as follows when these two options were given; should they be given life without parole or the death penalty? In 2005 the numbers showed that 39 percent of the respondents said that a person convicted of first-degree murder should get life without parole, and 56 percent said the death penalty. This is 2005. That same survey was given in 2006 and the numbers were life without parole, 48 percent, death penalty, 47 percent. That kind of dramatic shift in one year means there was something going on there. I think you, as well as I, know what some of those issues are. I don't want to get into those issues unless you want to pursue them further. I have data on the states that are pursuing a moratorium, that are pursuing legislation to perhaps put the death penalty on hold. The uncertainty about lethal injection and other issues have made this, I think, a time different than the past 25 years in people's interests in the death penalty. I will add though, in my final introductory point, however, that five states are introducing legislation to toughen the death penalty, that is, to include a broader class of potential defendants as death eligible. My interest in the death penalty goes back only about 10 years when I was, as I say, in law school looking for a project to interest me in my last year. I realized as I started reading cases in Oregon law at that time, that the death penalty was quite a mess and that nobody had, in a sense, brought it together historically, had explained the development of it, had looked at some of the legal issues that were being probed, and so that was the genesis of my book which is called "A Tortured History, the Story of Capital Punishment in Oregon." It was written in 1999 and published in 2001. The major thing that I wanted to do in the book was to get beyond the moral debate, and I think you know what I mean by that. You meet people who say "I am unalterably opposed to the death penalty" or "fry um". There just seems to be so little movement in my judgment, and what I wanted to do in the book was to get beyond the rhetoric and ask about the question of the death penalty as a public policy issue, as a way of spending state resources, and what the costs are to the state and to the people of the state. I think this was a relatively new approach in that day and it has framed the issue in a way that others, even in this audience today, have been able to build on by trying to carry it further. That was my interest. In terms of my background people might say "Well, why aren't you interested in the moral issue of the death penalty?" And I suppose

I am, but I am interested in it as a public policy choice and the use of state resources for it. Well, just a word about how to look at the death penalty. I am an historian by training. Basically, our country has been pro death penalty but there have been three periods in our history where the death penalty has been abolished. The first was the 1840's, and any of you who know that decade know that it was the era of communitarianism, of radical reform. Many states came into the nation not having the death penalty -- Michigan, Wisconsin, Minnesota -- in those days. That was the first period of abolition. The second was the progressive era from the end of the 19th Century until about World War I. Oregon was one of the states in that period that abolished the death penalty, but you see just in that whole act of abolition the great irony that there isn't a death penalty, because the only governor in the history of this state who has vowed never to execute a person under his watch, had more people executed under his watch than anybody else, and that was Oswald West, from 1911-1914. So ironies abound, but that was the period in which Oregon abolished the death penalty for the first time -- 1914 to 1920 and then reinstated it. The third period of abolition was in the '50's and '60's, and I am sure it is in the historical memory of many of you who have been Oregonians for a long time, and perhaps you even can even remember the campaign of '64, which I write about quite a bit in the book, when Oregon abolished it. And what was key, in that instance of abolition, I think, was the fact that the Republican leaders to a person in the state in that day, said that the death penalty was an (inaudible); it was something that we needed to get rid of, so Oregon did by quite a wide margin. In terms of our history, we have been following the national trends but we are a little more progressive than the average state on the death penalty. In 1914 we were the eighth of the states to abolish. There have been about four or five that didn't have it and we were three or four down the list of those who abolished in this period. In the 1950's and 60's, we were about the ninth state. We reinstated the death penalty in 1984. Actually it was voted in in 1978 but the Oregon Supreme Court threw it out in 1981. The people of Oregon know when their will has been disregarded. What they do the second time around -- they clobber the courts. So it passed by 65/35 in 1978 and then 1984 it was 75/25. It was a dramatic vote in 1984, I think in Oregon, to reinstate the death penalty. I think influential in that was the founding of Crime Victims United and what you might call the Victims' Rights Movement, that really started getting up steam in the early 1980's in this state and we were riding that. In addition, Oregon has an interesting and unique history and you will talk to people who have been doing these things for a long time who say "Well, if you gave the person life that meant seven years." Have you ever heard that? If you gave a person life in Oregon that meant seven years? So I think there was a sense in '84 that we were going to deal with the issue once and for all. Let me move then to my final point in the history of the development of our modern death penalty, because I think there are interesting issues for you to understand here. As I mentioned, it was passed by a huge margin in 1984, and then -- I can't put it in any other way -- we had a sentencing frenzy in 1986-89 in this state. We sentenced so many men to death and there were no women. We sentenced so many men to death that for a year and a half in there we equaled the rate of Oklahoma in sentencing to death. If you notice some figures that I give here, Oklahoma, combined with Virginia and Texas, has executed the most people in the modern period. Oregon was sentencing people to death in enormous numbers. It was basically one a month during a period from the beginning of '88 to the middle of '89, and for those of us today who see about 1.2 a year, that is a truly amazing number. There is a reason for it. In the late 80's we only had two penalties if you were guilty or convicted of aggravated murder. There were only two penalties available to a jury in those days, and those were life and death. Life meant a 25-year minimum but with that shadow hanging over us about if you commit murder in Oregon you are out in seven years, which I mentioned to you before. For many juries that really wasn't an option and so you had life or death. It was not until 1989 that we introduced LWOP into our jurisprudence, life without parole, so we had this huge number of men on death row between '86 and '89 and then something big happened in our state in '89 that changed things dramatically, and that was the Wagner case. Sorry, I almost said "Wagner" because Hans Linde is across the way and he pops in all the time and he talks about "Wagner." I am starting to think of Rheingold and he is thinking of the 1989 case. In 1989, the Wagner case -- you know Oregon law is based on Texas law which is another interesting

issue -- but the Wagner case was based on the *Penry* case in Texas -- *Penry I* it is called now - which said that the Oregon statute didn't give the jury enough opportunity to express what O'Connor called "their reasoned, moral sentiment. And so, therefore, all of the Oregon cases had to be remanded and reconsidered by the Oregon Supreme Court, not the guilt phase but the sentencing phase. So from 1989 to '92, we went through throes in this state as every one of those cases was reconsidered. Many of those were plea bargained to life without -- that new penalty -- or to life; and some continued on as death sentences in many instances. The reason I am making that distinction to you today is because the major cost of the Oregon death penalty now is in about six of those cases which arose before 1989. They are tremendously expensive cases. I was pursuing numbers, not for this testimony but for other purposes. You take the Randy Guzek case, just the U.S. Supreme Case which went there last year or two years ago. It cost probably a half a million dollars to do. That is just a blip in his 20-year odyssey. He isn't yet to step 1 out of 10 steps. These cases are enormously expensive -- Guzek, Dayton Leroy Rogers (and I have written extensively on that case as some of you know), McDonnell from Douglas County, Langley from Salem and a few others too. They had to be remanded two or three times, and Justice De Muniz knows sometimes the courts have tried to sort out which statute applies at which time in their proceedings, and so Guzek has three remands, four jury trials, and so on. That is why I emphasize 1986 to '89 because we sentenced all these men to death. We solved, I think, most of the issues, but about eight or 10 slipped through and have become the bane of the last 20 years of the Oregon death penalty. Then we have the people from after the remand period, what I call the period from 1990 to the present, who have been convicted of aggravated murder, sentenced to death, and their cases are going much more smoothly. Much more smoothly means between 20 and 25 years from the time of commission of the crime to possible execution. That means smooth. Not smooth means 40 to 45 years and I can give you the details if you want on that. But now we are in a situation where you have in the mid-30's, I think 33 or 34, men on death row, and what we have is a kind of unique situation where the old guys, that is the people who have been there for 15 or 20 years now, the pre-1989 group, are lumbering along whereas the others are kind of moving along and they are going to meet in about 2012 in Salem, and the state is going to sit up and say "Why are we executing all of these people?" We don't have that now and we are still several years away from that because things are working through the system now. So my final comment is that we have two kinds of cases in the system. Those from pre-'89 which are horrendously expensive for the system, and when I was an expert witness in two cases last year I wrote a memo trying to detail exactly how expensive they were for the system, and I posted them on my website and have given Ingrid the link if you are interested. The costs are at least four to five times more for executing some of them than putting them in for life without parole. So you have those cases, the horrendously expensive ones, and then the more modern ones that are moving along much more smoothly. In my judgment, the Oregon Supreme Court now is really clear about how it is reading the statute and there are some issues, of course, for remand, but I don't think a case has been remanded fully in the last 15 years. I was an expert witness last year on a couple of cases dealing with costs, but that, I guess, is where I should probably stop right now and I hope that gives you a little bit of an overview from my perspective of how the system is working. I guess I would close with the statement that the costs are going up and we are not paying our defenders anything, as you know. You folks know that much better than I and so the issue will become more acute I think as the costs go up. That is a whirlwind tour, Mr. Chair, I'm sorry I couldn't dive in . . .

334 Chair Ellis

Hang on, you may get that chance. Are there questions for Professor Long? I wanted to ask you this. The statute that created our Commission and that we are guided by, gives us two standards that we are to try and apply. One is that we are to provide defense, I think the statutory language is something like "the most cost-effective manner", and then the second guide we have is consistent with national standards of justice. I am interested if you have any information on how Oregon's death penalty defense compares in structure and cost to other states?

- 350 W. Long I don't have that Barnes, I just have anecdotal stories about working with individual attorneys and I haven't seen one yet whose competence I would question. I'm sorry but I don't have statistics on that.
- 356 Chair Ellis Okay. Any other questions?
- 356 J. Brown I'm curious whether or not the estimate of costs take into account the collateral expenses? I have in mind a current trial in Marion County where there are two penitentiary inmates accused of capital murder of another inmate, so most of the witnesses are also inmates and I think there are two security officers for each accused and then two security officers for each of the witnesses, and then there are four to five armed sheriff's deputies and so on. Does anybody capture those kinds of costs?
- 371 W. Long Mr. Brown, when I did my cost analysis it was primarily the easily accessible costs of the attorneys. Now when I looked at the costs of the case they do include the costs of witnesses, costs of experts that you fly in from sometimes out of the country, and so on like that, so generally if those costs are something that are reimbursed than I will pick them up. Let me add one thing though, one piece of data we haven't had, which we may start having as of this week, are costs broken down from the state's side. It has not been too onerous for me to find the costs from the defense side but in terms of the state, the Department of Justice, Appellate Section, how much they have spent on cases, that figure wasn't available until this week. It is starting to become available before Representative Shields in the Public Safety Committee. Let me make one other distinction that I make in the book. I make a distinction in Oregon between what we call the costs of the death penalty and the toll of the death penalty, the costs and the toll. The cost is something that probably you are interested in. It is the dollar and cents and budgets and so on, but to me as I am writing about it, there is this larger issue. There is the larger toll that it takes on people too that is harder to quantify. You have the costs of witnesses but then just the culture that is created as a result of the trials, the retrials, and so on.
- 401 Chair Ellis I would ask for a little more detail. You indicated that in 2012 it will all come together. It sounded like the 10 step process, even though many of these cases are still early, will come to a conclusion for many of these cases. My belief from my recall of your book is that several of those steps are in the federal system not in the state system. So what I am interested in is, given the cluster of convicted persons in that position, still in the state system, what do you project for us as costs in the next four to six years for this cluster of people we are talking about. You may not have dollars but I am interested whether we should anticipate that there is a significant bump or decline in the cost that we have been experiencing.
- 425 W. Long Excellent question whether the costs will increase over the next few years, the major costs as I see them are going to be in the post conviction phase in Marion County. I don't believe that it will be a significant bump. I think we have several cases that already show us how much that is going to be. The Cunningham case and a few others, so the more numbers you have, of course, the costs go up. I think this is an extremely front loading process where the costs are at the trial and the first appeal.
- 436 Chair Ellis Intuitively I would have thought the trial is certainly going to be a huge cost and then I would have thought the appellate costs, even though it is a lot of work, is much more concentrated. I would have thought PCR where you get back into fact issues would actually be a bump up and not a bump down.
- 442 W. Long Yes, it does increase, but I guess the only reason I am qualifying a little is because some of the PCR cases have taken six years. So the costs for each case is stretched out over such a long period, whereas the appeal process now is down to pretty close to two years, and so if you have an appeal process that costs the state \$200,000 and the PCR one is stretched over six

years and one is just a shorter period. For any particular case the outlay for PCR I think will be less.

- 452 Chair Ellis I am sure you have the picture. We have sort of two centers of activity. We have our FTE appellate group and then we have our contract, largely trial level group. Would you project that we will have less pressure on our appellate group from death penalty cases in the next four to six years?
- 458 W. Long I think that is where the action is going to be because as people move through – well I don't know who does the PCR work for you, if it is your appellate people or if it is your trial people.
- 462 Chair Ellis Contract.
- 462 W. Long It is your contract folks. That is where the action has been, at the PCR stage. They stretch out a long time and one of the reasons, I understand, is that they are all in Marion County. That puts a lot of stress on the system I think -- stretches it out longer and as you know every page of the transcript is pored over.
- 470 Chair Ellis We have had a legislative package that we have urged, we will see how it fairs, trying to have a cluster of full-time PCR defenders. How do you view that as a way of responding to what I think I hear you saying -- that there is going to be significant growth?
- 478 W. Long So what you are considering is just isolating a group of people who develop expertise in that, and then for whom that is their work?
- 480 Chair Ellis Yes and they would be full-time.
- 481 W. Long I think that makes a lot of sense. Up until 10 years ago ... you see we didn't... when you go back to the 1983 testimony, and I have read some of that as we were thinking about reinstating the death penalty. One of the questions that was raised, there was some senate discussion on it, one of the questions raised was "Well, how long will this take" and Senator Norm Smith at the time from Tigard, maybe you remember him, said "Well this will be really" -- he didn't say "slam dunk" because I don't think that was in our vocabulary at the time, but this was going to be very quick. The reason for that was we didn't know how post conviction worked. The statute was only enacted in 1959 and then remember the death penalty went out in '64. There were only two cases where we had anything called PCR between '59 and '64. Those things went very quickly. About six months or something like that, so the sense was, coming into '83 or '84 that PCR was just going to be a quick look or something like that. As it started to develop it has taken on a life of its own. The Smith case, for example, took more than six years in Marion County and then they ended up giving him LWOP, you know. I think in the mid-'90's it started dawning on a few people that that is where a lot of the action is. I think that is one of the things I mentioned in the book that that is where the flow is going to be. It does make sense to have people who are skilled principally in that and have a PCR group.
- 509 C. Lazenby In the presentation and the materials you provided it seems that about every 60 years the death penalty seems to fall out of favor in one way or another. We seem to be coming up on another one of those 60 year periods and you also indicated that the surveys that are done seem to show that public sentiment is also moving away from that. Is that just an interesting historical anecdote or can we derive something from that as policy makers?
- 518 W. Long Thank you. Historians are always hesitant to predict unless they want to be on T.V. I just find it really fascinating the way it ebbs and flows and the more you study history the more you do see certain kinds of patterns. We know that to be the case just from the lives we have lived. I think that there is something significant going on. I think there is a cluster of factors

that are emerging out there where people.... It is not that these issues haven't been around but they are kind of clustering together and making people question them. There are about 10 states now that are considering a moratorium, one for abolition right now in Maryland, so I think we are sort of at the front end of that. I actually don't think Oregon is going to be on the front burner of that though, as we were in some of these earlier moments because I don't think that anybody has been able to point to egregious abuses in Oregon, which is one of the things that catches the headlines. Yes, I think we have crossed the bridge in the last year and you folks are in the front line on some of that. I don't know how it is going to work out in the next few years but there will be change.

546 J. Potter

A little bit of a follow up to Jim Brown's question. I think I understand the economics of studying the cost for the defense and we can figure that out. I understand the economics of studying the cost of the prosecution, a little more difficult but certainly we can figure that out as well. Then we compare those costs on a death penalty case to a non-death penalty murder case and we can figure that out. Has anybody in the nation done a study that says, as Jim has suggested in his example, in the correction setting when you have a death penalty and you have to have extra security, and it costs corrections extra money, above and beyond a case that might be a murder case, in a penitentiary and the courts. Does it cost the courts more in time and effort to do a death penalty case than a regular murder?

562 W. Long

You have asked two questions and let me deal with the prison case. I am not the expert who would know about the internal workings of the court, but in the prison, yes, there are increased costs along the way but especially in the last month. It is sort of the analog of our health. We pay what, 50 percent of our health costs in the last six months of our life? That is the way it is going to be with death penalty too. I have seen some studies on that that talk about hundreds or thousands of extra because it usually involves 50 to 100 staff members in some capacity who are overtime or engaged for this one process. You are going to have some back end costs and then there will be last minute legal appeals you can bet and the courts will be convened and all those types of things. One thing that I don't know but that is a little suspicion in my mind, when I did my research on costs and tried to ascertain what they were in Oregon for a person sentenced to death versus a person who is a murderer in the pen and not in ad seg or anything like that, I was told that the costs were the same, but other states say that it costs much more to house such an inmate. I would need somebody to do some more on that to see if that is actually correct in Oregon. My numbers are based on that. I think that is an open question on the costs of the continuing care of the inmate, but definitely it is going to cost several hundred thousand more in the last month for execution. In terms of the court system itself, I couldn't say.

600 Chair Ellis

Thank you.

601 W. Long

Thank you. I am leaving a couple of copies of my book here if anyone wants to take it.

606 I. Swenson

Mr. Chair, I just wanted to point out to Commission members that on the last page of the handout No. 2, which is just before Attachment No. 3, there are a couple of graphs which I was looking at as you listened to the testimony today. Kathryn put these together and the one talks about where these particular cases are in the system and then the second graph talks about the growth in the number of PCR cases. The next two presenters are Judge Barron and Judge McShane. If we can proceed with them, I'd ask them to both come forward at the same time.

621 J. McShane

I am Judge Michael McShane from Multnomah County. Mostly, I want to answer questions that you folks might have, for instance, about the collateral court costs which are phenomenal, about the quality of defense which is both good and bad. We can talk about that and some of the unique problems, perhaps, in Multnomah County and maybe some of the reasons for the delays and costs that happen on the trial level, and maybe some thoughts on how we can cut some of those delays and costs. I am happy to voice opinions about this. I can talk about it

forever and I don't want to do that. I want to answer questions. The one thing I would say in Multnomah County is that we obviously have a lot of cases. For decades we have had three judges handling all of the death penalty cases. We have added a fourth judge simply because we have too many cases for three judges to do in any kind of timely manner. Some of our judges were having to docket these cases two years out because of the court schedule and the attorneys' schedules. We don't have enough attorneys in Multnomah County to handle the cases. We don't have enough stepping up to the plate. I have noticed in my recent cases that we are bringing in attorneys from out of county because we don't have attorneys in Multnomah County to handle all of them.

654 Chair Ellis I know MPD doesn't do death penalty and MDI doesn't, is that part of why you think we have a shortage of death penalty attorneys in Multnomah County because the bulk of the felony defenders are not taking DP cases?

665 J. McShane That is correct. There are a group of defenders who take them. They get too many cases and they can only handle so many. They will start declining to take them at some point and then we need to go out of town. There are only really two kinds of attorneys who do these cases. Some of them are in this room. They are just phenomenal attorneys who are committed to defending death cases and you see some of the best. Then there are a group of attorneys, who quite frankly ought to retire, who are doing death penalty cases. They are doing it because that is their livelihood. If you can imagine that being their livelihood given what they get paid, we have some issues, but we have don't have enough of the former, quite frankly, to actually take all of the appointments that we currently have. Our DA's office will take any murder case and bump it up to an aggravated murder case if there is any theory that can make it an aggravated murder case. I think in other smaller counties they are much more conscious about the costs because they know the commitment the courts and their own office has to put into one of these cases. In Multnomah County, just because they are so large, we don't have that kind of review when the DA's office is going to bring a death penalty case if it can. As a result, we go to trial on many cases where, quite frankly, at the sentencing phase the state is not particularly seeking the death penalty. There is nothing more frustrating than setting aside two months for a trial, getting to that death penalty phase that you have spent hundreds and hundreds or thousands to go forward on, to have the DA step up and say "We have no evidence to present at the death phase." We end up going to trial on these cases that are, quite frankly, very run-of-the-mill murder cases. The difficulty is there are defendants who just don't know how to negotiate. It has nothing to do with the seriousness of the murder itself. A psychopath is actually very good at negotiating and they are in the general population. The cases that are going to trial are often cases where there are attorney relationship issues that the client is having and often we end up substituting three attorneys on. If they don't have confidence in their attorney they don't negotiate. If they have personality disorders, as you can imagine, that makes it difficult for them. We go to trial often on cases where nobody realistically believes that they are going to get the death penalty. It is frustrating, in Multnomah County -- the numbers we have versus the reality that they are not the kind of cases where people are seriously considering the death penalty.

731 Chair Ellis Why don't we get your input now, Judge.

734 J. Barron I think I am one of those historical things the Professor was talking about. I have been on the bench so long, in fact I told somebody the other day that we swore in a new judge in Curry County and it was discouraging to find out that he was the same age as my older son. It was more discouraging to find out he was 13 when I went on the bench. I have had a history of these cases since 1980 and have tried them under the original death penalty statute. I have had attorneys from the public defenders and I think Mr. McCabe might have tried one particular case when he was with the public defender and for some reason didn't have a conflict, which happens with public defenders quite often. I have had private attorneys that I have had to call upon and I call it a request but they felt it was an order, to take a case. I have had contract attorneys and private hourly attorneys in front of me. I think your contracting

system is probably the best system you have had. I have always felt that we have had adequate representation.... [end of tape]

TAPE 1: SIDE B

008 J. Barron

...to have other attorneys be willing to take the case, maybe even larger law firms, not on a pro bono basis, but willing to take those cases. I note in your guidelines that there is a segment that says you can have somebody who has a lot of experience, including civil experience. I think we lose something by not having some of the attorneys, who are very good attorneys in trying cases, and who you see in the civil arena all the time. I think we need to substantially increase the pay for the people taking these cases. I don't know what contractors make but I know what the hourly rate is for these other cases. I realize that there is a priority. The legislature has the money. It is just a question of priorities to decide where the money is going to go. If we had an increase we might be able to get other attorneys coming in here. I can tell you that if Multnomah County is having trouble getting attorneys, rural Oregon is having more trouble getting attorneys. In our county, which is the Fifteenth Judicial District, Coos and Curry, and just to digress a little bit, I will tell you that ... I don't know that it is a crisis yet but I think it will be a crises in having attorneys just do criminal work in smaller counties. Right now we have, for instance, in Curry County three lawyers who are doing criminal work. One of them quit the consortium and that is two. We have a judgeship coming up at the end of March and possibly two of the people remaining, the two people remaining, might put their names in for a judgeship. Coos County has five in a consortium. We have seven in the other PD's office. We are getting lawyers out of Portland, Medford, Josephine County, Lane County to come down and take some cases where there are substantial conflicts and the consortium group is not increasing. It is going down. There are probably at least two of the five now where one of them had already quit and came back for awhile because we needed somebody, but we will be woefully lacking in attorneys to do criminal work in a while. I have talked to the previous directors about that problem and I don't know whether it is within your powers to do something about it. You can't force somebody to live in Coos County or Curry County as opposed to the valley.

040 Chair Ellis

You can make requests that they can construe as directives.

041 J. Barron

I used to be able to do that. In fact I had one time where it actually got down to the lawyers not wanting to take them because of money and payment and there was discussion of a contempt hearing. Fortunately, after a week, the Indigent Defense Board and the lawyers settled the matter and so we didn't have to have it. It is not a hearing that I wanted and I am not too sure that we are ever going to get to that state again, but rural Oregon is facing a point where there will not be a lot of lawyers that want to do this for the pay. I think recently OCDLA came down and there was a lawyer from Burns and I forget his name, but he said their situation was similar. You are going to face a real problem getting lawyers to represent people, or you are going to pay a lot of money to have somebody drive down from Portland and take a case. In a death penalty case it is the same thing. If we get a death penalty case, we are calling Salem and Salem acts very quickly on that, but sometimes it is a day or two days at most. That doesn't sound like a long time unless you have somebody sitting in custody without an attorney. So one of the things I would certainly suggest is that there be a way for the judges to immediately appoint somebody who is going to get reimbursed, even though we didn't call Salem, for the cost of going over there and saying "Keep your mouth shut" until we get a lawyer out here. There are some people who have had some experience that I certainly would call up and say "Come over and advise this person of their rights." I think there needs to be somebody immediately there. There also needs to be a video hookup, where somebody, and we get people out of Corvallis and other places, where there is an immediate video hookup for the lead attorney and the client. I would also suggest that two attorneys are exactly what you need on a case and maybe you should have a third attorney, and that is just somebody locally, especially somebody local who has handled a person's case. As we all know many of the people who are charged with these crimes have been in the

system before. If you had somebody locally who had handled them that is a good thing because they have a relationship going. The last case that I had that ended in a plea was exactly that way. We had a local attorney, who had moved but had been local, and had represented the guy several times and he had a relationship with him. The lead attorney did not. The man had some mental issues and there was a question about whether or not he was competent, but he had some issues and he wouldn't talk to the attorney and he wanted to fire him. The other attorney could certainly calm him and they eventually got to the point where the relationship was there. That brings me to another point and that is that I think there should be a panel of attorneys who do nothing but come in if there is a rift between the attorney and the client, and are able, without being contractors themselves, to look at the situation. I have done that before when an attorney has come in and a defendant has wanted to fire an attorney and we have been able to resolve the issue without going through the cost of having to replace the attorney and starting all over again. There has to be some relationship there. A local attorney, possibly who has had some contact with them, could serve that purpose. In this last case I was talking about, the lead attorney came in and let me know that the person wanted to fire him. He said "Well, I will quit if you want." I said, "I don't want you to quit. I want you to stay in there." He is an excellent attorney and I have had him several times before. He stayed in there. We went through the issue. I talked to the defendant in court, on the record about the problem and we worked through the issue. But if there is somebody they trust you will save yourself some money. If you want to pay for something, have a group of people come in to do that. Certainly, the best thing is to raise the pay. That would increase the pool of attorneys available. If Multnomah County is running out, the rest of us are going to run out much faster and we have all of these other expenses. Attorneys ought to be aware of what the law is on removal and firing court-appointed attorneys, so it is not merely a request immediately. There are some things that the court can do. The Supreme Court has told us what we have to do and what we don't have to do in deciding whether to remove an attorney. I think the lawyers should be aware of that instead of just expecting that I'll remove if the attorney and client don't have a relationship right now. When lawyers say "If they want to fire me, then I'll quit." that increases costs tremendously. I don't think that you can forget the emotional impact that there is on lawyers, on the whole system. These cases are very emotional and I think that you need support for the lawyers. I think one of the guidelines says that you need somebody who knows something about psychological conditions to assess the defendant. Well, I think that probably everybody in the system needs somebody to talk to, including the lawyers involved. I think of one of the first cases that I tried in Coos County. After the case I complimented the lawyer and that lawyer actually broke down. I think there needs to be good support for the lawyers and I think that might assist in getting lawyers to do it more, which brings me to another point and that is retrials, which we have had. I was also in that '87-'89 group the professor was talking about, and we had two cases where the total number of trials they had was five. We had different attorneys for each trial. Now if somebody gets the death penalty the defendant may not want to see the same attorneys walk in the room, but it wasn't because the attorneys didn't do a good job. Frankly, it was the facts of the case that drove the verdict in the case as opposed to the attorney. I think, probably, it would be very helpful to have the same attorneys, assuming there is not a completely broken relationship, try the cases. It is going to save some money because they have the expertise, they have tried the case. If they feel they have done something wrong then they know what the issue is. They should handle the case again if it can be done. I think if there is some support in there that can also help. Some people do one of these cases and then they are done. They don't want to be involved with these cases again. We look at jurors and we give jurors some psychological help if they need it, need to talk to somebody else about it. They become part of your life for a time and you loose that as soon as you are done. It is like a hole. I should probably have done what Mike did and say I'll just answer questions rather than go on. I was going to say that I had a few things to say, but I knew no one can ever trust a lawyer who says that. One thing that I would mention is post-conviction which has become a bigger issue now than it ever was for lawyers. I think lawyers are consistently thinking about that in trial and in death penalty cases especially, and that is not a bad thing.

- 154 Chair Ellis When you say that you are talking about adequacy of counsel at post-conviction?
- 154 J. Barron Well the whole thing. There is constant concern, I think, about what is going to happen in post-conviction. There should be in these types of cases, because they are gone over with a fine-toothed comb. That puts the lawyer in a position of knowing that the biggest claim in post-conviction, I think, is ineffective assistance of counsel. So, you know, somebody has to keep track of what, and I think it is the lawyer, what you have told the defendant and what the defendant's choices have been, so it puts them in a position of possibly thinking "well I'm recording things because of what might happen. If a defendant says I'm not doing my job and I have all this stuff on the defendant himself who I am supposed to zealously represent." I think that is probably just a fact of life but that is another emotional pressure I see. Post-conviction is there and we should all work to make these cases as right as they can be the first time so we are not going through three retrials or two retrials. I had, I am forgetting the man's name now, a case we tried three times. The costs of these are going up. I think the state should be required to make an election before you come up to the penalty phase itself. I think the defense bar needs to file motions with the court that inquire of the state "Are you going to make this decision and when are you going to make it?" As long as it is a death penalty case, the rate stays at the death penalty level. There could be a lot of savings. Certainly, now, I think it is going to be easier. Our county is one of the O&C fund counties and has lost substantial monies. I think decisions will be much easier to make now. Our jail, for instance, will go down from 189 to 97; the sheriff's office has lost most of their road deputies. If it gets much worse we can go down to 49 capacity. The amount of money the prosecution is going to spend in some of these counties is going to be a lot less. They are just not going to be able to do it, so you will be saving money. I think the resources the defense has are very good. Decisions should be made as early as possible to keep costs down.
- 193 Chair Ellis I had a question for Judge McShane. In your testimony you described some of the contractors in the death penalty area who are quite good and then you described another group that you said do it to make a living, I take that as pretty strong criticism of some of the lawyers. Have you communicated that to our OPDS staff so they know your views on the lawyers in that second group?
- 201 J. McShane It is somewhat hard to know how to handle that issue along with the issues that might go along with post conviction relief, so if a judge in a case that is now on appeal, and post-conviction is coming down the road, jumps up and says "Now I want to list all the issues with this particular attorney." As judges we haven't been real sure how we should go about doing that. The fear is that we are basically creating a situation where we are going to be witnesses in a post-conviction case. I know I am sounding critical. I was put on the death penalty panel two and a half years ago and I have seen some of the most amazing lawyering I ever imagined. But then when you have a lawyer who doesn't present jury instructions in a death penalty case it is shocking. When you have a lawyer who doesn't show up with his notebook because he forgot it at home, these are the kinds of things I would expect out of a misdemeanor case. What we don't have, and what I think we need to talk with the Commission about, is a way for judges to safely say things. We have depended on judges to write letters for people to get them qualified and I think that is kind of a mistake, because as judges we don't get to say no to people. We hate to be critical. When people come up and say "I want to get on the list. Can you write me a letter?" I think there should be some form that we fill out with objective data that we can plug in so that you folks can make a decision whether somebody should or should not be on the list. It is my experience that we send letters because it is in the nature of people, when they are asked to do something, to send a letter on somebody's behalf. I know judges have recently sent some letters in on behalf of one lawyer who I think we all believe shouldn't be doing the work.
- 233 Chair Ellis I would like to find a way to facilitate communicating because that is just unacceptable to us to have lawyers that we are financially responsible for, that you as someone who is watching this process just don't think are qualified. That is just unacceptable. We will hear from

Kathryn and Ingrid a little later, but we need to be sure there is a way you can communicate that doesn't jeopardize the process. A belated question I have is -- there are, in my belief, a lot of issues that are unique to death penalty cases that are not generic to criminal defense. I think one place that we can try to advance this twin criteria that I have described earlier, where we are supposed to be cost effective but consistent, is to avoid reinventing the wheel and to make sure that sophisticated death penalty lawyers are counseling trial lawyers as they go through. One concept we had is to have a dedicated FTE death penalty specialist available all around the state, Coos, Curry, Multnomah, wherever, to work with trial lawyers to make sure that some of these complex things are done, and done properly, which does preserve those issues over time. What is your reaction to that? Do you think that is a good use of resources?

- 265 J. McShane I think in the long run it is going to save you a lot of money, especially -- most of the attorneys by and large when they come in, they know the death penalty law well. They don't always know how to preserve all of the issues. I had three cases that were tried last year. One of the attorneys, with the assistance of another very qualified attorney, actually came in with a sheet on every motion, and as you know there are probably dozens and dozens of motions having to do with preserving appeals on death penalty cases, and he presented me with a folder that simply had findings for me to check off on each one. They were able to preserve all of their arguments by training me how to make those findings correctly. It is kind of mind-boggling. If you don't have a lawyer who is there to clarify it, to train you, to make sure you are getting every constitutional provision.... And then other lawyers present it very well but aren't always presenting all of the issues in terms of how a judge is supposed to make a finding. I think having an expert would help lawyers present this a lot better in the long run especially in motion practice.
- 286 Chair Ellis Other questions for the judges?
- 288 J. Potter Judge McShane, I want to follow up a little bit, maybe it was your third comment, about the cases that are coming before you that you don't believe are really death penalty cases in your judgment. Conceivably it is outside our purview to make that determination.
- 291 J. McShane Certainly outside of mine.
- 292 J. Potter Yes, Tim Sylwester is here and I am sure we will hear his view. Nevertheless, is there an economic incentive that can guard against cases that are coming into the system that shouldn't be charged with death penalty, that everybody knows aren't going to be death penalty, that turn out to be something else? Is there something -- I'm not looking for a political solution here -- I'm just wondering if there is an economic solution?
- 300 J. McShane I don't know of any. In a large county I think, unfortunately, we don't think of the money issue and we certainly don't often think of the collateral cost. For every time we have a trial setting a month in advance in Multnomah County to get 50 qualified jurors, 50 death penalty qualified jurors, we need to send out 2,000 subpoenas just to get 150 to show up, and from that 150 to get to 50 so that we can pick 12 plus the alternates. Think about that cost alone and often we get right up to trial and disaster strikes. Those 2,000 mailings mean nothing and we do it all over again a couple months down the road. Very few of those cases are actually going to trial. All of the costs and delays have to do with the penalty phases of these cases. The trial phase is often shorter than voir dire. Voir dire lasts about two weeks to get a death qualified jury. The one thing that the judges in Multnomah County talked about and I know this sounds very counter-intuitive, is that instead of a single bifurcated trial with the same jury, we really bifurcate these trials.
- 319 Chair Ellis Have separate juries?

- 320 J. McShane Right. We set the trial date under the same guidelines we would set any serious felony case that requires extra time. In Multnomah County that is 200 days to six months. Most murder cases are tried – we set them about six months out -- a regular murder case. For motion practice we wouldn't have to have a death qualified jury. A huge amount of investigation is expected of the attorneys, and they have to go right into the penalty phase right after trial. They have one to two days after the trial to begin the long and expensive presentation with experts. All the witnesses have to be flown in from Mexico to be ready for the penalty phase. That penalty phase probably happens -- I don't know what statistics are -- but out of the total number of cases where the death penalty is charged, it rarely happens. Most of the cases settle but they don't settle until the trial comes up. One thing we have kicked around about talking with the defense bar in the state, is this idea that lets go forward on the trial phase. Most of the cases are going to settle before the trial starts. Then set it over six to nine months or a year to do the penalty phase, where the true costs, the motion practice, the death qualified jury, the huge amount of investigation takes place.
- 341 Chair Ellis Do you think you would have that same close to trial settlement rate if the penalty phase were six to eight months out?
- 344 J. McShane I think so. The consequences are going to be the same for the defendant. Maybe for some defendants it is going to seem a little too distant, but I think the culture could change in Multnomah County. We spend a lot of judicial resources in Multnomah County trying to settle cases. The last case I settled I had seven conferences with the defendant to work on settlement. It takes a lot of time to get a case to settle, but we can start the process earlier with a few more resources up front. The other is collateral costs I wanted to mention. Last year we had two cases going at the same time, one in my court and one in Judge Beckhman's court. Because of the number of inmate witnesses who were testifying, at one point I had eight guards my courtroom for two days. Aside from the fact that the jury started asking questions about why are all these armed men in the courtroom, which creates other issues about what message that sends to the jury, we set over one week 15 cases, in custody trial cases, that other judges were prepared to go forward on because there weren't enough guards to transport the defendants from the 7th floor to the courtroom floors. I think there are typically a total of nine guards to transport defendants to and from the jail. They brought on extras just to man those two courtrooms and they had nobody to transfer anyone to these other courtrooms, 15 custody cases, and you start wondering what is the cost of that?
- 371 Chair Ellis Other questions?
- 373 J. Brown Judge McShane, my impression, and that is always dangerous, is that prosecutors would argue that the death penalty contributes to negotiated pleas. It seems kind of intuitive that there aren't negotiations in cases where they really don't intend to seek the death penalty?
- 382 J. McShane Well it is a huge leveraging tool and that is why I think in Multnomah County it is brought whenever they can bring it. If there is a theory on which they can bring the death penalty, they will bring it. Now, it may be that the individual defendant has no criminal history – a love triangle would be a typical murder case -- and there really isn't any evidence on future dangerousness, and yet that individual is unable, unfortunately, to negotiate his case. Maybe this individual is fighting with his attorney or there is a personality disorder, which is not a surprise because people who commit murders have these kinds of disorders. But we find ourselves failing to negotiate and judges rip their hair out trying to get this person to accept. In my last case, there was an offer of a 17 year sentence, and he went forward to the death penalty phase. The jury came back with life without parole. Here is a kid who at the age of 19 could have been out in a reasonable amount of time. There was no ability to negotiate because he just could not do it. Nobody went forward thinking this was ever going to be a death penalty case, but the case has to go forward because it is a death penalty case.
- 407 Chair Ellis Thank you both.

409 I. Swenson

Tim Sylwester.

410 T. Sylwester

Chair Ellis and members of the Commission, I am Tim Sylwester and I will give you just a little bit of background. I came to the Department of Justice 20 years ago and started working on death penalty cases 20 years ago. I have personally handled or worked on virtually all of them starting with Cesar Barone. One of the things that I was shocked at when I first came to the trial division in 1987 was, as the professor mentioned, the reality that if you were convicted of murder you did seven years. I saw that time and again. I not sure, now that we have life without parole, if that has changed things. In the course of working in capital cases for the past 20 years, one of the realities is that all of the cases I have worked on are still in the system. We have a couple of people who have volunteered and gave up post-conviction and habeas and were executed, but all of those who did not do that are still in the system. I have a couple of cases that I worked on where the defendant died while in custody and that just happened a couple of days ago -- one of the people I worked on for probably 10 or 15 years. And we probably have a couple of others who are likely to die in custody before they can possibly be executed. Just to give you an overview of what we have right now, we have about 10 capital cases on direct appeal. We have about 20 in post-conviction and there are three that are in federal habeas at this point. Historically, the way it was organized in the Department of Justice, the way we organized these cases was, as you probably all know, the prosecutions are the DAs'. Once the judgment of conviction is entered, the Department of Justice takes over the case and we have the case for the rest of its life. There are certain circumstances in which the Department of Justice does the original prosecution on a DA assist sort of basis. The lawyers in the Criminal Justice Division will actually prosecute capital cases in some of the outlying counties. The Department of Justice will have Criminal Justice doing the original prosecution in some cases. All the capital cases at that point, once the judgment is entered, go to the Appellate Division. After the judgment is affirmed on direct appeal then the case goes into post-conviction; and historically that was in the Trial Division. Then the judgment was entered in post-conviction it was appealed and the Appellate Division would take it over again and when it went to federal habeas that would be the Trial Division and then back into the Appellate Division. So internally we have these cases bouncing around back and forth. We eventually realized that there is a lot of inefficiency in that process and as a practical matter we were ending up with the post conviction part of this process being the black hole. We have post conviction cases that have been sitting in Marion County Circuit Court, some of them for as long as 10 years without even a trial date yet.

474 Chair Ellis

Why is that?

474 T. Sylwester

Well, two reasons. One, there is no money which is the obvious one, and two ...

476 Chair Ellis

On the defense side?

476 T. Sylwester

Well, on both sides. We are not adequately funded. Our post-conviction section of the Trial Division has a humongous caseload. Every one of the lawyers there I think has 100 to 200 cases assigned to them. The capital cases are humongous cases. When you get them up on direct appeal there will be three or four boxes. When you get them into post-conviction trial there will be 10 or 12 boxes. When they come up on appeal on post-conviction, by the time you get to federal habeas, they will fill a wall. I think, for example, the Barone case right now will almost literally fill up a wall. The reality is the lawyers who are handling it in our trial section have a humongous caseload apart from this, so it is difficult for them to keep on top of it. The other reality is, and to be honest about it, the petitioner has absolutely no incentive to get moving. If you go through your post-conviction case what do you have to look forward to? Being executed. The reality is capital cases are different from any other case in the system because once the judgment of death is imposed the defendant has absolutely no incentive to proceed with his case. If it takes them 20 or 30 years to get to the collateral proceedings, that is fine with them. I mean the reality is, at least from our perspective, that

these people have no colorable post-conviction or habeas corpus and so they are not looking for a retrial and they are not expecting a retrial. What we have done internally over the past six months is that we have changed the way we were handling these cases. We have eliminated the back and forth and we have restructured ourselves internally so that now all of the capital cases are in the Appellate Division and will remain in the Appellate Division.

520 Chair Ellis

So even the PCR cases?

521 T. Sylwester

Yes, and at this point I am overseeing that. Over the course of time we have had many people, who were formerly in the Trial Division, come to work in the Appellate Division. At this point, we have a fairly good number of people in the Appellate Division who have actually tried cases and post conviction cases. At this point, we have eliminated the bouncing back and forth which we are hoping will eliminate the inefficiency in our own internal process. That also means that we are going to be trying, in the near future, to get these cases which are languishing in the post-conviction phase of the proceeding moving in Marion County Circuit Court. I think we have like six trials in various post conviction cases and I suspect some of those aren't going to go to trial. I am not sure if there is a way to improve the efficiency on the defense side of this. I think it is probably imperative, the way the system works, that you change horses at the defense side at every stage of the proceeding. Obviously, the person that handles the trial can't do the post conviction. I think we need to figure out some way to adequately fund the post-conviction petitioner's work and get these cases moving. I do want you to be aware, from the Department of Justice's standpoint, we are going to try and get these cases that are currently languishing in the circuit court moving, so there may be a need to get adequate funding on your end.

557 Chair Ellis

Are you seeking legislative funding support specifically for this?

560 T. Sylwester

Mary Williams, our Solicitor General, was testifying before the legislature yesterday on the Appellate Division's budget and one of the topics of discussion was adequate funding (inaudible). The reality is that the legislators don't really want to fund the capital work. I think the idea is we have the capital system because that is what the people want, but let's not put a whole lot of money into it because we don't want these cases to actually happen. We don't want people actually being executed so it is a way of throwing out the whole process by not adding any funding. From our perspective this is something that people want and this is something we are obliged to proceed with, and so we are trying our best with what we have. As the Chief Justice knows, the Oregon Supreme Court is making a real effort to get the direct appeal cases through quickly and we are cooperating with that. I think at this point, the capital cases are moving relatively expeditiously through the direct appeal process. Again, the sticking point is the trial process in post-conviction. It is very difficult for us to be doing post-conviction cases five, six, seven, eight, ten years after the trial. I did depositions of the defense counsel the other day asking about the case and she said "I don't remember." We eventually had to abort the deposition because she said "I don't remember" enough that we were getting no effective information out of her. The trial was seven or eight years ago and she said "I need to review the transcript and I need to review my file" so I said you go back and read this stuff. We were going to do depositions in this other capital case and the investigator said that he didn't remember anything about the case and he had lost his file. We had another capital case in which the defense counsel was storing his file on his back porch and his roof leaked and the file was completely destroyed by water damage. As you have heard there are cases that languish in the post-conviction area for five, six, seven, eight years. That is the reality. It is very difficult to review these cases after the fact. Some defense counsel are very, very professional about how they do this, because the reality is when you do a capital case you know this case is going to be in the system for 20 or 30 years. That is the way it works. You have to know that and when you are trying the case and when you are preparing it, and after you have done a case, you have to be aware that I am part of this process. I will be calling you for depositions. I will be examining the post-conviction files. It will be examined by the Federal Public Defender 20 years from now as part of habeas

corpus, so we have seen defense counsel who have done a very good job when they are trying their cases. They keep good notes; they keep their case all organized; and as one defense counsel said, at the end of a capital case he just sits down and dictates a long summary of his memory of the case and everything that is in the file just so that in a couple of years when he is called for deposition he will remember. That sort of thing is very helpful to the process. I am not sure there is any organized way that the defense bar handles these cases, or that even under their contracts are expected to handle these cases. I might suggest that, and I don't know if this something that you can do with contracting, is to have a standard that in capital cases defense counsel needs to keep certain records, keep certain notes and that sort of thing, make themselves available and make sure their investigators do the same thing, so that when these cases eventually end up in post conviction, as all capital cases do, that the case will be efficiently tried several years later. I am not sure that I have much else to add at this point. I was put down here as the prosecution perspective but I don't really speak for the DAs and you may have questions about the way DAs handle cases. Our perspective with prosecuting cases is very limited because the department does only a couple a year. One thing I do want to follow up on, I think it was a comment that was made earlier about funding some sort of position as a general assistant in these cases. As I mentioned, the way capital cases are tried in the state, each DA prosecutes his or her own cases, but the Department of Justice, the Appellate Division, Criminal Justice Division, always has been there in a very strong DA assistance position for prosecutors. I spend a good part of my day answering calls from DAs and providing advice on a regular basis in cases. We have lawyers over in Criminal Justice who do that. I do that in the Appellate Division and John Presley who you probably already know, does that too. As a particular matter, the DAs have that kind of assistance on a regular basis. Somebody files a demurrer or motion to dismiss and we review it and it would seem to me if we are doing that on the prosecution side, it would seem imperative that you have some sort of position like that on the defense side. Somebody has the overall view and provides that sort of service on a daily basis across the entire state. It is beneficial to us, of course, that the case gets tried properly at the outset. The last thing we want to do after spending a million dollars prosecuting somebody and getting the death penalty, is to have it get reversed in post conviction on the ground that defense counsel did something wrong. I think from our standpoint, from the DA's standpoint, we want the case perfectly tried, at the outset; we don't ever want to have to try it again. We have Mr. Guzek going back for maybe his third or fourth trial; Mr. McDonnell, his third or fourth. Simonsen and Williams going back over and over. One of the things that I have heard, particularly from our post-conviction section, is when you have a capital case and it is really a capital case and it is likely to end up in a death sentence, it makes sense from the efficiency standpoint at the outset, that the lawyer who is handling the defense be given adequate resources at the outset, a backup lawyer and a mitigation lawyer. And I think there are now people around who are essentially mitigation experts who work on nothing but capital cases. You know a couple of investigators and mitigation experts so that when and if the case actually does go to the trial, it is ready to go to trial and we never have to retry that case. A lot of the problems that we are having with the post-conviction trials at this point -- some of these cases were tried seven or eight years ago.... [end of tape].

TAPE 2; SIDE A

002 T. Sylwester

You can look at the decisions that we have been getting out of the Ninth Circuit Court of Appeals and the United States Supreme Court and you can see that what the federal courts at this point are most concerned about is the adequacy of counsel at the penalty phase on those mitigation issues. I don't know if that is something that is typically funded for capital cases on the defense side. I think that is something that is imperative to fund adequately. If you cut corners and you count your nickels at the front end, you are going to end up paying all that money ...

011 Chair Ellis

When you refer to mitigation specialists, are you talking about the lawyers as the mitigation specialists or an expert witness or both?

- 013 T. Sylwester Chair Ellis, I think that they are typically not lawyers they are just kind of specialized investigators. You may ask some of the defense counsel in the room about that but I think all around the country there are people who specialize in that -- looking up school records, talking to family and friends, getting the person psychologically evaluated, all this kind of evidence that could be used in the penalty phase at trial.
- 017 Chair Ellis Did you have a reaction or position on Judge McShane's suggestion that these trials be not just bifurcated, but have a whole different jury on the penalty phase so that you have significant time between the guilt and sentencing phase?
- 022 T. Sylwester Chair Ellis that is the first time that I have heard of that proposal and it is an intriguing one to me. There is a certain inefficiency in that process because in any capital case, one of the most important parts of the aggravating evidence, at least as far as the state is concerned, is the nature of the crime that defendant committed. If you separate it out, you are actually going to have to pick a different jury for the penalty phase and then the prosecutor may feel obliged to essentially retry the case at the penalty phase in order to educate the jury about the nature of the evidence of the crime that was committed. On the other, that is something that happens on a regular basis when the Supreme Court reverses a death penalty but affirms the aggravated murder conviction, so the case has to go back down and we redo the penalty phase. They have done that in Guzek and McDonnell and a variety of cases over and over again. Maybe at this point the prosecutors are reasonably adept at doing a quick summary of the underlying evidence so that it could be done that way. That may be something that works. One of the comments that has come up in the course of discussions this morning is that the DAs may be overcharging cases. Mr. Brown's comment, I think, is correct, that having the death penalty hanging over your head is a powerful incentive to consider plea-bargaining. The other thing I want to point to is that even if you are not given a death sentence, or even if you don't reasonably expect that you could get a death sentence, you'll want to have a person charged with aggravated murder if the evidence supports it because aggravated murder is the basis for getting the true life sentence or life without possibility of parole, which is the other alternative we have at the penalty phase. Sometimes I think that DAs go into these trials realizing that they are not likely to get a death sentence, but on the other hand what they really want is a true life sentence. That I don't think is basic overcharging. I don't know if that answers your question.
- 052 Chair Ellis I was interested, you are playing this role of capital litigation coordinator, so do you maintain within DOJ cost data on how much DOJ has had to spend on death penalty, both in direct appeal cases, but especially the PCR cases?
- 056 T. Sylwester Yes we do. I don't have that immediately available to me.
- 058 Chair Ellis Is that disaggregated, broken out, so it can be looked at separate from the rest of DOJ?
- 060 T. Sylwester As I mentioned, typically, capital cases were scattered across three divisions and I'm not sure that we ever combined the information. Now that all the cases are being done from start to finish in the Appellate Division, we can get a better handle on it. I think Mary Williams estimated that a capital case from beginning to end would be 4,000 lawyer hours.
- 065 Chair Ellis What I am interested in is one of the reasons we had to go back to the E-Board for additional funding this biennium was the cost to us of capital punishment cases that originated in biennia long past. We have the peristalsis problem and we are experiencing those costs now. It would be quite relevant to us to know what counterpart cost accumulation is occurring on the DOJ side. If you would be willing and able to share that with Ingrid and Kathryn, I know we would be very interested in that.
- 075 T. Sylwester Sure.

- 075 Chair Ellis My assumption is that it is probably almost a mirror, that as your costs increase with this accumulated group of cases and the impact you are experiencing, you tell me, but wouldn't you think it would almost be tit for tat?
- 079 T. Sylwester Well I would think so, yes. I will find out those costs.
- 082 Chair Ellis Obviously as DOJ seeks funding to handle this I believe you would tell the legislature that there is a counterpart funding that has to take place.
- 086 T. Sylwester Yes, and I think there are also ways that we can somehow streamline the process. One of the problems I mentioned we had is retention of records on both sides. On the prosecution side you can have a DAs file on a capital case and it is just boxes of junk. When you have these files going through the system for 20 or 30 years there is an efficiency in the process if all of these records, on both sides -- because when we get into federal habeas they will need to be all neat and tidy for the federal courts -- it would be beneficial to our process if we had adequate funding in order to get all the necessary documents at one point copied into some sort of form that can be retained for 20 or 30 years and that people can work with easily. Maybe putting them all on CDs rather than boxes and all that, but that requires an upfront cost of actually scanning all these documents in and having them all organized and that sort of thing. If we could figure out a way in these capital cases to improve the efficiency of the document production or the document organization and all of that at the front end, it would make all these cases more efficient and a cheaper cost to all. I don't know if that is something that you have considered.
- 107 J. Brown This is slightly collateral, for which I apologize, but nevertheless I will ask. As you may be aware, the Office of Public Defense Services, with very strong support of this Commission, is working very aggressively to reduce the time for filing opening briefs on behalf of indigent accused outside the capital murder area. Basically these are the people who do want to get their appeals through as quickly as they can. My impression has been that the Department of Justice has required pretty extensive extensions on its own opening briefs in response to the backlog. Are you able to tell whether or not, along with the other applicable requests for funding, is the Department of Justice also seeking additional funds in order to accelerate its ability to respond to opening briefs?
- 118 T. Sylwester That is my understanding. We are trying to get many new positions to try and clean up the backlog. There are only about 30 capital cases, but they drain an incredible amount of resources. It is not unusual, as the Chief Justice knows, to file briefs in capital cases that are several hundred pages long. I remember doing one that was 500 pages long and so these cases are just in a class all by themselves -- a long way to answer your question. Internally we have never had in the Appellate Division a group of lawyers that do nothing but capital cases. It is a real problem to burn out in that sort of situation so we have resisted all these years. When a case is assigned to somebody to work on as a capital case that means that we have to clear off that person's docket and spread those cases to other people in the Appellate Division. Those capital cases do end up causing problems as far as our being able to respond in a timely manner to other cases. The result of which is I think we have an extraordinary backlog right now in the Appellate Division that I have never seen in my 20 years I have been there. Mary Williams was -- I think she is reasonably optimistic at this point in getting adequate funding to get a whole bunch of new positions to work on the backlog, both to handle capital cases and to clean up the backlog.
- 144 Chair Ellis I want to ask you a question that may be venturing out on a dangerous subject, but you are here so I'll ask you. Defense lawyers are ethically charged with the obligation to zealously represent the client. In the context of the death penalty, particularly after a death penalty sentence has occurred, the client's interest may be in having the system go just as slowly as possible. There are two questions. One is, from your point of view, do you think included in

a defense lawyer's zealous representation is a legitimate ethical requirement of causing delay; and secondly, how much of that is happening?

- 158 T. Sylwester Well I would say, because I am an appellate lawyer I don't need to know. I think a defense counsel is always going to have a duty to the system and intentional delay, solely for the purpose of delay, I don't know if it is actually unethical to the point of being a basis for a disbarment or discipline. On the other hand, for the defense counsel who are doing petitioner work in post-conviction, if the state is able to take this trial, I'm not sure that they have any obligation to push it to trial themselves. It is one thing to be dragging your feet. It is another thing to say "Well, I have other things to work on, and if the state's not pushing this I'm not going to push it either", which is kind of where we are at this point. I don't know if I have actually seen anybody that I can affirmatively say is deliberately delaying the process. I think the reality is that a lot of them are not pushing the case because they have no incentive to. In your usual, typical civil case, the petitioner-plaintiff has the incentive to go forward. In a typical criminal case, the defendant has the incentive to go forward. Post-conviction in a capital case is completely topsy turvy. The petitioner has no incentive to go forward. I think where petitioner's counsel in that situation says "I don't see any reason to move forward." I don't think that is unethical, but if the state is trying to push it forward, trying to get trial dates, trying to get depositions and petitioner's attorney is firmly dragging his feet, maybe that is an ethical problem.
- 187 Chair Ellis From your vantage point and you have seen a lot of these capital cases, do you have any observation as to the quality of counsel that is being provided to capital defenders?
- 191 T. Sylwester I think that at this point in the process everybody is working very hard to ensure that trials are handled fairly. I think at this point, and after 20 years of doing this, I think that my impression is that the DAs treat capital case entirely differently. We will get calls and they will say "Can I make this argument?" We'll say "Yeah you can but please don't." You might win and I don't want to spend the next 20 years trying to defend that. I think that what happens is the DAs step back from the line, most of them. There are some who are still – it is in your blood and you have been doing this for 20 or 30 years -- it is very difficult to give anything. But I think a lot of the prosecutors now have learned, in capital cases, that you step way back from the line and you actually help the defense counsel in some situations and you try to make sure that the record is complete and that all the errors are preserved because it is at this point in the DA's interest to do so. I think my understanding, particularly in reviewing direct appeals is that defense counsel are doing a very, very good job. There are circumstances in which I think they could have done better. But, on the other hand, when it comes around to defending a PCR case, of course we are going to be saying that they have had excellent representation. I have not seen anything shocking in the cases. I think the representation has been very good. If there is a problem it may be that the people who are defending these cases aren't getting sufficient resources. Again, particularly in the penalty phase with mitigation of the evidence, everybody needs to be treating that a little more seriously and we need to get experts involved. Does that answer your question?
- 222 Chair Ellis Anything in particular on that with our Legal Services Division on the quality of our appellate attorneys?
- 223 T. Sylwester I am happy with the work that we are seeing. I don't have any complaints at this point. It has progressed quite a bit from 10 or 20 years ago. It is annoying for us to have to brief 20 or 30 assignments of error and I'm sure it is the same for the Chief Justice to have to read that, but the reality is we need to get any colorable issue hashed out on direct appeal. If we get it done now, we don't have to deal with it 20 years from now in the federal courts. From our standpoint, the more thorough they are the better. As a good example, and the Chief Justice knows, we recently argued a case in which the Supreme Court *sua sponte* raised an issue that hadn't been presented by the parties in the briefs. We re-briefed that issue and from my standpoint that was great. If the Supreme Court thinks that there are additional issues out

there, please tell us now. We want to get this issue resolved as soon as possible. Part of it from our standpoint, and the DA's standpoint, is that if we are going to have to retry the case, for heaven sakes lets retry it now. I don't want to have a case in federal habeas 30 years from now and the federal courts saying "No, you have to go back and retry this, the Simonsen and Williams murder case in Coos County that happened 20 years ago. It would be very difficult to try a case 20 years later. Again, from our perspective, from everybody's perspective in the process, we want to get the case handled thoroughly and properly at the outset and all the resources should be available to try these cases correctly at the outset. I think if it would cost more at the front end that would be far less expensive in the long haul.

256 J. Potter

Thank you, Tim, for actually coming here and walking into the lion's den. You are the closest thing we have to the prosecution perspective. Certainly when you walked in you had to think to yourself that most of these folks could hum a few bars from a Beattle's tune, but would have a tougher time with J.J. Cool. We have discussed that a lot here -- the graying of the defense bar -- and my question.... I have two questions, but the first question is, is a similar experience happening with the prosecution? You mentioned that you had been doing this for 20 years. You mentioned that a few prosecutors had been doing it for 20 or 30 years. Are you seeing a graying of the prosecution?

266 T. Sylwester

On a personal note, I was kind of feeling old the other day when I saw (inaudible) in Benton County and I remember when he was a punk prosecutor and I thought "Am I really that old," but I guess I am. We have people coming in, new lawyers, new prosecutors and they are doing an excellent job. From our end and I don't know if you know this, but the Department of Justice is involved with ODAA on a regular basis in training new prosecutors. We have a couple of conferences every year in which we go over stuff and try to be a resource. The Criminal Justice Division puts on an advanced prosecutor school every year and actually I was talking to Steve Briggs, who is chief counsel at the Criminal Justice Division, and he wants to do a special seminar in April on capital cases. We, on our side, have an ongoing process whereby we try to keep all prosecutors well educated and up-to-date on everything that relates to prosecution and in particular capital cases. I think, again, it is imperative that the defense bar figure out some way to do that on your side too. It is to the benefit of everybody concerned if the two people going in to try a case are absolutely well prepared and well experienced so the case gets tried correctly.

294 J. Potter

My second question is a little bit different but it takes off on a comment that Judge Barron made when he was suggesting to us that we might want to take into consideration the emotional impact that this work has on defense counsel. Clearly the defense lawyers have talked about that in the past. The question is, do prosecutors face a similar situation? An emotional impact of prosecuting death penalty cases in which their job is to try to kill a person through the state and the job of the defense lawyer is to try save the person's life. Is that ever discussed in the prosecution?

303 T. Sylwester

Well I think that in my experience nobody is happy with that verdict, not even the prosecutor. There is a huge toll on victims in this process too. On your side you may never see that but on our side we can. The victims who year after year have to come back to hearings and trials and new trials and have to know for 20 or 30 years that the person who murdered their mother still hasn't been executed. That is a serious toll too that has to be considered. One of things that I mentioned earlier is that we do not, and I actively resisted creating a capital unit in the Appellate Division because I have heard that in other states where you have people work on nothing but capital cases, it is extremely emotionally draining. I have a murder case that I am working on that I have to go look at the autopsy reports on. I am putting that off but I am going to have to go do it. Every one of those that you work on is depressing. I remember all of the capital cases that I worked on and how the victims died and after a while it gets hard to bear on a day to day basis. So, yeah, there is that problem on the prosecution side too.

- 325 J. Potter Is there a solution to this? Have the prosecutors in other states and other places figured out ways to help people just deal with this, both the job they have to do, the job of dealing with the victims, the job of dealing with the victims' families?
- 330 T. Sylwester I don't think there is anything in Oregon that ODA or DOJ does to assist prosecutors and people with the emotional part of the job. I don't know if that is done in other states or not. It sounds like it might be a good thing to do. You know, anecdotally, I have heard from some defense counsel that they would never work on a capital case because it is just too emotionally draining. They will never work on a capital PCR case again because it is just too emotionally draining to deal with. You realize that if you don't prevail this guy sitting next to you is going to die. I understand that and I understand that is one of the reasons why it is difficult to recruit new lawyers. From my side of it, it has to be done. It is a job that needs to be done and nobody is doing it so we need to move forward with it. As long as the state and the people want to have it, it should be done in a timely and efficient manner and yet when people start getting executed lawyers say "Gosh, I never really thought that was going to happen".
- 350 Chair Ellis Thanks a lot. It is 11:10. Why don't we take a 10 minute break and I'll resume at 11:20.
- 353 Chair Ellis Ingrid, did you want to introduce the defense panel?
- 357 I. Swenson Yes, thank you Mr. Chair and the Commission. We have three attorneys who are actively involved in representation on the defense side. Rich Wolf is here today and Dennis Balske and Duane McCabe, so I would ask all three of them to come up together.
- 362 Chair Ellis You had Rebecca Duncan?
- 362 I. Swenson We are going to save Becky Duncan for later.
- 365 Chair Ellis There being only three chairs.
- 367 D. McCabe I have been doing the death penalty cases since 1978 and I have the distinction of working under two different statutes, and I would be the most happy person in the world if the death penalty were abolished and I no longer had a job.
- 375 Chair Ellis Is death penalty a hundred percent of your time?
- 375 D. McCabe Yes. I am a full-time contractor primarily doing trial work but I do do some post conviction. The way to summarize my job and our job, I believe, is that we are the trial lawyers who are trying to convince many different people, prosecutors, judges, and ultimately jurors, that our clients who are charged with horrible things are really better than the worst thing that they have done. In order to do that, you have to set aside many of your traditional trial lawyer skills and get into really trying to learn about an individual and present that individual's life and what they have done in as sympathetic a way as possible. I won't spend more time on that because I know Rich has a lot to say about that as well. One of the things that all of us who do this work, I believe, especially at the trial level, are fearful of is two words. These are the most horrible words in the English language as far as I am concerned, and it is "procedural default," which means as a trial lawyer you did not do something that you should have done. You did not raise an issue that should have been raised. You didn't raise it in the right way. Those are the things that keep you awake at night in anticipation of making the mistakes that we all make, because we are only human, and try to devise ways to avoid those mistakes. I practice around the state. My home base is in Bend. I go to many of the different outlying counties, the rural counties, that Judge Barron was talking about. There too, many of the prosecutors will charge aggravated murder whenever they can as a tool, as a device, to get plea bargains. Our job is to save our client's life. That is our job, our primary job. We all have been trained by lawyers who have far more experience. We have been trained by

lawyers who have come to Oregon to give us lessons and most of us who do this work on a regular basis, always go to national conferences to try to learn how to do this work. Although I have done it for many, many years, there is always more I can learn and there are many ways that I could improve as a lawyer. Creating a team is the most important thing and those are the people we have talked about in the past -- the mitigation specialist, the mental health specialist, the forensic investigator, any other special type individuals that you need and so much of the cost that you see is not necessarily lawyer work, but is a smart lawyer who gets a team together to do the work. It is absolutely important, imperative, that this team be put together. As a trial lawyer handling death penalty cases, you become something different than you have ever thought you would be. You travel, you go to families, you talk to people, you talk to friends and relatives, you learn about this individual. You go to where they grew up. You have to take on responsibilities that you never imagined in going to law school. You could be an excellent trial lawyer and not be a good death penalty lawyer, because death is different. The United States Supreme Court has said that, you have heard that said by other speakers today. Death is different. One of the things that I want to touch on and then I will answer any questions you might have is the emotional aspect of this work. I am only 40 but look at how old I am. I went to a seminar last year, the National Legal Aid and Defender's Association seminar called "Life in the Balance." I try to go every year. One of the breakout sessions was moderated by a psychologist who was very well versed in post-traumatic stress disorder. She went through a room of probably 30 people and started to talk to them about their own life stories and I think that we all began to realize that we may suffer from some of these symptoms of post-traumatic stress disorder just because of the kind of work we do. I don't say that to gain sympathy or for any other reason, but just to try and give you some measurement of the kind of practice that this is. I will end with an anecdote from a case that I handled several years ago. I handled it with my partner, Ralph Smith, a case of a Mexican citizen who was in this country illegally, who did not speak good English -- a little bit of English -- but we had to have interpreters. The trial and pretrial proceedings lasted seven months. One of the things that a death penalty lawyer must do and must convey to a jury is that this person -- no offense, Rich -- but this person sitting next to you has worth as a human being. You start out telling yourself that you must show the jury that this person has worth. You come to learn and believe that the person has worth. When I sat in the jail cell with my client, Francisco, on a Sunday morning before closing arguments on Monday in the penalty trial with an interpreter there, I started to talk about some things. As I went on I got to a point where I choked up and started to cry and I couldn't go on. Of course it was an accumulation of things -- seven months of trial, being away from home, battling day in and day out for someone's life -- but really deep down inside it was because I cared about this young man. He reached over to me and said "I'll be okay. I hope you will." That is the kind of bond that you finally reach with so many of the clients that you represent, and if you don't reach that bond, you will never convince a jury that this person should live. I would be happy to answer any questions you have.

504 Chair Ellis

Why don't we hear from all three.

504 R. Wolf

Thank you, Mr. Chair, and thank you for the opportunity to address the Commission. I would also first like to note, along with Bill Linden, the passing this past Tuesday of William Timothy Lyons, a long-time capital defender in this state. He had been trying cases probably as long as Duane. He handled some of the most difficult cases -- Cesar Barone, Scott Harberts, the Hernandez case involving a police officer murder, and he untimely passed just this Tuesday. We are going to miss him very deeply. I wear a couple of different hats and I guess I come here in that capacity. Along with Dennis Balske, I am a co-chair of the Oregon Criminal Defense Lawyer's Association Capital Defender Section. In that capacity, Dennis and I are responsible for organizing and presenting the annual death penalty seminars that we put on. I also have tried capital cases here in Oregon and represented capital defendants before the Oregon Supreme Court and just this last term in front of the U.S. Supreme Court in a case that has been bouncing around quite a bit this morning, Mr. Guzek's case. I guess, just for the record, I would note that although we did try to get our own petition before the

Supreme Court, it was actually the state's petition that brought us there. We were quite happy with the result in Oregon Supreme Court, and that is part of the message -- that the costs of these cases are driven largely by the prosecution and their reaction to them. Understandably, these are often very notorious cases; there is a lot of media publicity surrounding all of them, so there is a lot of pressure on both sides. There is a lot of pressure on the prosecution to pursue these cases. When the budget reduction act took effect it certainly was not going to have any impact on capital murder cases. These are not cases that they are going to put aside for obvious reasons. That is the nature of these cases. They are extremely difficult cases, usually, and they often involve extremely difficult clients. They have very compromised backgrounds and that makes our jobs as lawyers very difficult. I am also a full-time death penalty contractor with PDSC and have been doing that now for about four years. There are a couple of things I would note about that. First of all, all these clients are in custody, so we spend a large amount of time in the jail or in the penitentiary if the clients are on retrial. So you spend a lot of time locked up and of course you can push the button and hopefully, eventually, they will come and let you out, but there is often a long wait for that. I really can't over emphasize what Duane said about how important it is to spend that time with these clients. If you can just imagine, I know the Chief Justice has done these cases before, but imagine for a moment if you haven't had any health insurance and you haven't had any long-standing relationship with any physician, all of sudden you feel lousy one day so a doctor is assigned to you. That doctor tells you that you have a really bad situation here and, in fact, I think you are going to die from this situation. However, there is a procedure that is going to cause you to be incapacitated for the rest of your life. You are going to have severe limitations on your living ability, but you know you will live if we undergo this procedure. I think you ought to pursue this procedure and sign right here and that will authorize me to perform this procedure that will save your life. Now how many of you are going just go ahead and sign off on that, without feeling confident in the doctor's opinion and experience, until you have made certain that that is really your only course of action. That is really the situation we find ourselves in when we are asking these clients at the end of the day, to sign a plea petition that is going to put them in the penitentiary for the rest of their natural life, or at best, with the possibility of parole after 30 years. If you have not done just a yeoman's job of trying to build that relationship with the client, which takes a long time, and sometimes it never really can happen no matter how much time you spend.... That means spending time talking about things that are often unrelated to the case. You just go there and spend all your time talking to the client about the case, which is often mostly bad news that usually doesn't foster a whole lot of confidence in your client. That is a really large portion of what we need to do in order to resolve these cases successfully. In the end really, the courtroom is the last place we usually want to be on these cases. They do look really bad from the perspective of the average juror. Often the most you can hope for is that your client is going get a true life sentence. It is important that we not underestimate how much time and energy it takes to defend some of these cases. There are a lot of people who are just not willing to do that. As a contractor I make more than the \$55 an hour these people make, but I just took my car into the shop the other week, and I got the bill and I looked at it and the labor rate for the work on my car was essentially what I am making to defend these capital cases. Now granted, if they don't properly repair my brakes hopefully my air bag is going to save me. I like to think that what I am doing takes a little bit more talent and is of greater import than working on a car, yet that is the rate of compensation. We look around and we ask "Gee, why can't we get more of these lawyers to handle these cases?" Mind you, I am an independent contractor and so I have my own practice which means I have to pay my own PLF, I have to pay my own bar dues, I have to pay for my own Lexus and all these things are expenses -- my own health insurance.... I don't get PERS. I don't get a retirement plan. I am not an employee of the state. There are all of these costs that I have to lay out on top of my other expenses in order to do this kind of work. The thing is, the first case I was appointed to was in '94. I was appointed by the Supreme Court to do an automatic direct appeal from a sentence of death, and at the time I was member of the Indigent Defense Consortium in Clackamas County and had a full caseload of other types of cases from misdemeanors to felonies. There was simply no way that I could do both those types of cases at the same time. I ended up taking myself

off the list of the consortium cases because you just can't work on a capital brief, or on a capital case, without large, uninterrupted, blocks of time. Along with the client relationship aspect, if you are sitting in jail and you have to get over to the Justice Center for an arraignment of something and you are sitting there, you are checking your watch and that just does not work well with somebody whose life hangs in the balance of your representation. In handling these cases when I had other types of cases, I came to realize it is really an all or nothing proposition. You cannot do them both and do them well in my view. I don't think the people that are doing these cases really began doing them with the idea that they were going to get rich. Still, beyond the problems we have heard about already I can tell you from having to seek co-counsel on these cases that there is a drastic shortage of people that are willing, and even marginally qualified, to handle these kinds of cases. The reason is why would you put yourself through that kind of aggravation? We are in the worst possible position. We have victim's family members who just despise us because they often don't understand what it is that we are doing. It is important for us to try and reach out to those people as well to help resolve these cases. We have clients who are often distrustful of us. We have judges who are pushing to get these cases moving and keep them moving and have them go forward. It really is a no win situation in many ways. The lawyers I would like to have as co-counsel in these cases, which is essential to have, why would they want to sit in court on a case of this nature next to me for \$55 an hour when they can go to federal court, on a non-death case, and make double that amount? That is a huge problem and the only way to resolve that, in my view, is to increase funding.

TAPE 2; SIDE B

006 R. Wolf

We had some meetings back in July and at the recent October death penalty seminar about creating a resource center. I was able to track down, I don't know if you recall, in the president's state of the union a few years ago he promised additional training and funding for capital defense as well as prosecution, and as part of the DNA backlog elimination act and the innocence protection act, funds were – well they haven't been appropriated yet, but they have been designated for the training of defense counsel in capital cases. And in November there was a solicitation for a grant through the Department of Justice, Bureau of Justice Administration. It is called Capital Case Litigation Initiative and as co-chair of the Capital Defenders I approached the OCDLA board and sought permission to apply for that \$50,000 grant from DOJ and that application was filed in January. I just communicated with the woman at the Department of Justice in DC who is administering that grant application process. She indicated that she expected a decision in the late summer as to whether or not our grant application was successful. Then there is still the issue of money being appropriated and we are waiting to see a) whether we get our application granted and, b) whether the program is funded. If we are successful on those two fronts, that \$50,000 is something that we hope to use to perhaps increase the frequency of the seminars that we put on. We used to have two death penalty seminars per year and they have never really been money makers. They have been sort of break-even or lose money propositions for OCDLA because the capital defense bar is quite small, so the cost associated with bringing speakers, especially national speakers, it is not cost-effective for OCDLA to do twice a year. Hopefully, with this money, we can at least either increase the frequency or maybe even expand the types of seminars that we present. We also want to help fund a position of a capital defense resource center attorney, someone who would be responsible for organizing the generic motions that are relevant to all these cases that help create an expert database, hopefully including transcripts, for a lot of the experts that often show up frequently in these cases. Also, it would be good to have someone just to be able to go around and work with other people that have these cases to bounce ideas off of. Many of the people handling these cases are sole practitioners such as myself. It is not the same as when you are in large office and you have lots of people to bounce ideas off of. It is important to be able to do that in these types of cases. We are keeping our fingers crossed that that money will come through from that grant. Professor Long talked about a decline in the death sentence cases and he attributes that partly to the passage of life without possibility of parole. I think that is one thing that contributes to the decline, but I also think that we have begun, some of us, most of us hopefully, have begun

to learn how to better defend these cases and that that is also resulting in the decline of the number of people who are sentenced to death. Those are the main points that I wanted to address with you and let you know about some of the challenges that we face in doing these cases. I guess the other thing, and I guess Rebecca Duncan is also going to be talking to you; I also want to say that I think that client contact component is also an essential part of the appellate representation as well. One of the concerns that I have had is that that relationship building through the appellate process has not always been present.

073 Chair Ellis

Why do you say the client relationship at the appellate level?

074 R. Wolf

At the appellate level?

074 Chair Ellis

Right.

074 R. Wolf

Well because often these cases, well hopefully if they are on appeal they are going to come back and they are going to be retried, and it is important for the client to feel that they are being heard by the lawyer that is representing them. Often these clients have ideas about how their cases should be presented and it is important to talk to them about that and tell them why that is a good idea or a bad idea. My perception has been that a lot of appellate lawyers get the sense of, look the client can't contribute to anything that I am doing on appeal, it is all based on the record, and for the most part that is true, but that doesn't mean that it doesn't help the lawyers on remand, that it doesn't help the process in general, for that client to feel as though the person who is representing him, at whatever stage in the proceedings, really has his best interests at heart and is concerned about the outcome of the case. I also feel that, and I don't think that you should mandate this or anything, but I have always personally had the view that if you are going to do one of these cases, you had better be prepared that someday you are going to have to go to the Oregon State Penitentiary and go to that death chamber. I was in it, fortunately not for – it was for the making of a video that we used in a recent capital case. I have never had one of my clients sitting there but I've always felt that if you are going to be doing this work, you had better be prepared and ought to be there, if at the end of it, that is where your client ends up. I really think that should be true for everybody that is participating in these cases. I just think that that is an important part of the approach that people should have when they are handling these cases, because as Duane said, and the U.S. Supreme Court has said, death really is different in nature and degree from any other punishment. The other problem is that oftentimes we have clients who are indifferent to whether they get death. Some clients feel as though death is a better alternative than life in prison without the possibility of parole, especially for older clients for whom even a 30-year minimum means they are going to be 80-years-old when they are eligible for parole. Oftentimes, we have clients who are indifferent if not actively trying to get the jury to give them the death sentence, and that is an incredible position for a lawyer to be in. There was a recent article in the Oregon State Bar bulletin about what, and it was an editorial, about whether or not a client can direct that he not have any mitigation and there was a debate about that. My view has always been that, first of all, you can't plead to a death sentence, a jury must impose it. If you are of that view, you are going to end up in a trial even if you plead guilty to the charge of aggravated murder. A jury still needs to be convened to determine punishment. My view on that is whether or not someone is sentenced to death is a reflection of the community's decision as comprised by that jury. That jury has the right to have all the evidence about that person's background and life before that. Certainly, the client has the right to get up and say "Hey, I want you to kill me" or "If you don't, I'll hunt down you and your family", which I have had clients threaten to do. The jury then decides that that is the appropriate punishment. That is how it should proceed. I think it is incumbent on all of us to investigate and present this kind of information to a jury. The other topic I wanted to discuss is what Judge McShane talked about -- this super bifurcated type of proceeding. The federal system and Washington State, for example.... In Washington State, the district attorneys have a certain amount of time before they have to declare whether they are going to seek death in an appropriate case. In the federal system, the AG ultimately has to determine

whether or not the Department of Justice is going to pursue a death sentence in a particular case, and that is after there is a panel and a recommendation of Assistant U.S. attorneys that make that recommendation to the Attorney General. Under your - the Commission can't really direct this but I think in some ways that might be something that could be explored in this state -- whether the DA's office would be amenable to that I don't know. But it wouldn't necessarily.... I am not sure how much it would decrease costs. It might in some sense. If there is a 90 day or 120 day window before the DA's office decides whether they are going to seek death, you are going to have to do an awful lot of work to present a mitigation case to that DA's office to tell them why it is they should not pursue death in that case. Then, of course if they agree not to, the cost would be less as the case proceeded from there. I think there are certain advantages and some other approaches that could affect how these costs are driven. The other thing that I think is important to mention is that as Duane said, the team approach is essential and the presence of a qualified mitigation specialist who usually is not a lawyer but is often a licensed clinical social worker, somebody with that type of background, is really key to these cases.

170 Chair Ellis

Are you able to find good ones here?

171 R. Wolf

No. There is even a worse shortage for qualified mitigation specialists than there is for counsel. As yet, the Public Defense Services Commission has not yet -- I think there is maybe one mitigator who has entered into, I think, part of a contract with a capital defense lawyer. As yet, there are no contracts for mitigation specialists and I think that would be something that would be beneficial. There is training and experience that is essential in that position, but I think you would attract more people, more qualified people, if we had that built into our system where people could rely on a regular paycheck to do these kinds of cases. That is another recommendation I would make with respect to that area. With that I will pass it over to Dennis.

186 D. Balske

I'll switch topics and go to the trial level, which is what I used to do, and to PCR which is what I do some of now. During my many years at the Federal Public Defender where I did federal habeas cases almost exclusively for a number of years, all of the cases that we got came from the post-conviction system, and I can say that the attitude if you were to go to a Federal Public Defender Office and ask them what they think of the post-conviction system in Oregon, they would say it is broken and it is broken because the quality of representation is extremely poor. We would get numerous cases with issues on the merits, and in 99.9% percent of those cases, the issues were procedurally defaulted mainly because the post conviction lawyers had failed to properly raise the issue in federal constitutional terms. One of those cases I was actually able to win in the Ninth Circuit, but the Supreme Court took cert and I argued it in the U. S. Supreme Court, and I lost and it was on a very narrow issue. This is just to point out how harsh habeas corpus is and how good you have to be in post-conviction to get a case into habeas corpus. And the inmate was forced, through the *Balfour* system, to represent himself on direct appeal and in post-conviction, because he said he got ineffective assistance of counsel. His post conviction lawyer said "Yes, you got ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution. When he appealed that, and had a *Balfour* brief submitted, the lawyer didn't say "ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments," but just said "ineffective assistance of counsel." The U.S. Supreme Court said "You know that is not enough. You didn't put the state courts on notice that that was a federal constitutional issue; just because you said ineffective assistance of counsel, you might have been talking about Article I, section 11 of the Oregon Constitution and under federal habeas corpus principles and exhaustion of state remedies that was not sufficient to preserve this issue. Therefore, even though you have a meritorious issue, go away, it is procedurally defaulted." That is in general what we say at the Federal Public Defender about our caseload -- meritorious issues defaulted, defaulted because of the poor quality of the representation in post conviction. It is a critical problem when you move up here into the capital area with all that you have heard today about how complicated, how complex the issues are, how hard it is

to preserve them, it becomes even more crucial that we improve the quality of representation. The problem that we have is that there is such a small pool of lawyers with a background in the death penalty and who know how to aggressively litigate post-conviction and do it in such a way that they actually exhaust all the remedies appropriately. When I was at the federal defender some of us who had death penalty backgrounds were permitted, on a volunteer basis, not during our paid time but during our own hours, to look over post-conviction petitions in capital cases and try to help the lawyers pursue the issues when we had enough free time that we could do it. We found in those cases that the quality of representation was better, generally speaking, than in the non-capital cases, but that there were some lawyers being appointed who simply didn't have what it takes in order to handle the cases appropriately. Politically speaking, how do you then weed them out of the system? I don't know, but it is a problem that I know continues to this day. The bigger problem though is when we talk about the pool of lawyers, we talk about the graying effect, all of us sitting here. My first capital case was in 1975 and I had two co-counsel. I was a year out of law school and after the trial was over we found out that the DA had been referring to us as Huey, Louey and Dewey, because of the way we handled the case, but I am not Huey, Louey or Dewey anymore. Unfortunately, people like Duane have been called on who we need to be trying the cases, and we have had to beg people like Duane and Ralph to come off of some of their trial cases and do the post-conviction, so that we can have a good lawyer preserving the record for federal review. Our pool is so depleted that we are taking an already depleted group and pulling people out of there. Whether more money will make a difference, I don't know. I would assume, obviously, as in anything, you will attract more qualified people if there are more funds to pay them for their work. I think the first thing we need to look at is funding. A second thing you need to look at realistically, again is somewhat political and I am only going to touch on it, is that they are all coming out of Marion County. The majority of the post-conviction cases historically came out of there. Now with prisons being built at other locales, they are being heard in some other locales. The Marion County judges have big caseloads and from what I saw at the Federal Public Defender Office, the kind of implicit rule was that we don't want you post conviction lawyers taking up our time by bringing in live testimony in these cases and presenting witnesses. Go ahead and argue your case and you have 10 minutes. We get a post-conviction transcript and it would be about 10 pages long with post-conviction counsel saying "I submit Exhibits 1 through 12. Any objections from the state?" Then the state puts in its exhibits and somebody says five words. The really bad post conviction lawyers instead of advocating call their client, saying "Tell the judge about your issues." That is it. That was the trial. In large part it is a pressure thing by the Marion County bench. I think, there is a second problem in the pool of available lawyers and that is that there is a contract through MCAD that is separate from the contracts they do (inaudible), and the MCAD pool is not as high quality a pool as the pool that you have with people like Duane and Rich. In that pool, there is no real control right now on which attorney gets the PCR capital case. A lot of these cases are coming with MCAD shooting one of their lawyers in and then somebody calls somebody like me or Steve Wax over at the federal defender and says "This lawyer is not really doing their job. Can you get us some help?" Ingrid maybe then gets a call and looks around and pulls somebody like Ralph or Duane off a case and says "Well this lawyer over here that MCAD got isn't really doing much, you need to come in and help that lawyer to save this case from going down the tubes." There are a number of little problems that affect PCR. I think historically the reason that PCR representation is as bad as it is, has been funding and the availability of lawyers in certain places to take the cases. Hopefully funds can make a big difference in attracting some of those lawyers, but it is a very serious problem right now. It is the smallest pool of lawyers out there and the last thing I should touch on is why it is so critical. In 1996 the AEDPA was passed by Congress, the Anti-Terrorism Effective Death Penalty Act, and it took what was already a very restrictive system thanks to Chief Justice Rehnquist's tenure on the court where it chipped away and chipped away at habeas corpus and then Congress stepped in and pretty much put the nails in the coffin. There is not a lot that you can do. There is nothing you can essentially do if the issues haven't been preserved and exhaustion means that you have raised the issue in appropriate federal constitutional terms. Under the AEDPA as well, you have to present all

available supporting evidence for those claims and you must do it in the state court. The federal court won't give you an evidentiary hearing where you call witnesses if you didn't do it in state court. What they will do is say "Was the lawyer diligent?" If the lawyer was not diligent and didn't present the evidence the federal court says "You don't get to present it now. Too bad, too late, you don't." What you had mentioned early, Barnes, concerning it being a big production when you get to PCR is ever so true because you have got to familiarize yourself with the entire appeal and evaluate the performance of appellate counsel. You have to reinvestigate the whole case because in order to win under the *Strickland* standard, you have got to prove a likelihood of a different result. The only way to do that is, put on the whole trial again, and prove that if it had been tried right the first time, there would have been a different result. The lawyers that you need to have do it have to do more work than the trial lawyer or the appeal lawyer. They have to do both jobs and they have to have that unique (inaudible) skill in order to do it, which is another reason why the pool is so thin. I feel like I have been highly negative, and I didn't mean to be negative, but I think it is a critical problem. It needs a lot of attention, it needs funding and I don't have all the answers but hopefully I have helped identify some of the problems. I would be happy to answer any questions.

349 R. Wolf

One thing I want to follow up on from what Denny said is that post conviction is quasi civil proceeding, so really it is helpful -- I think it was Professor Long who was saying or Judge Barron who was saying -- to bring in some civil lawyers. It would really be helpful to have some experienced civil practitioners in the post-conviction realm because a big part of it is a whole set of rules that experienced criminal lawyers hardly ever have to deal with and they are real pitfalls as well.

359 Chair Ellis

Rich, I wanted to ask you about your role on the Death Penalty Peer Panel that we have. Judge Barron had made the comment that where you have clients who want to discharge current lawyers, he was advocating, obviously, a peer group that would become involved to evaluate that. Is that being done with the peer review panel that we have? Should we be doing that?

367 R. Wolf

What I heard Judge Barron advocating, and what peer review panel does, are two different things. The peer review panel, rather infrequently, is called upon to assess extraordinary expense requests that PDSC is unsure about granting and two members of the peer review panel will review, without any kind of case identifying information, to say whether or not it is a reasonable request. The peer review panel also gives input on applicants seeking to handle death penalty cases and gives recommendations about applicants. That is different from what I heard Judge Barron talking about which would be coming in, I think, and helping fix what may be a broken or strained relationship between a current trial team and the client. Certainly, that is something that sometimes can be fixed. But my experience has been, once it is broken it is really difficult to repair and the real solution is preventative maintenance. Keeping it from getting broken is really, in my experience, the best approach. There is just an awful lot of distrust anyway for a whole host of reasons. The person didn't hire you; they don't understand the system; they don't understand you often; and so unless you are constantly working and trying to get that trust, you never really do get it, and if the relationship becomes strained on account of some event, it is really hard to repair. Also, as Tim Sylwester said, I think it is really hard if not impossible for us to do vertical representation where you keep a case. If you handled a case at the trial level, you shouldn't be doing the appeal, because if you missed an issue at the trial level you are going to miss it on appeal as well and you certainly can't post convict yourself.

414 Chair Ellis

I thought the point was that these cases that get remanded for retrial, I thought Judge Barron was urging that the same lawyer that did the first trial did the second trial.

- 418 R. Wolf I know some clients who have received a death sentence with a certain defense lawyers have been willing to have that lawyer represent them again. Others, I know, think “This guy didn’t work for me so this time I want to take another shot with somebody else.”
- 423 Chair Ellis I wanted to ask both you and Duane, I think I am right, you are both full-time and death penalty. You are both solo practitioners and you both are contractors at OPDS. Is that model, in your mind, the best model in this area? Should we be looking to do it somehow differently with lawyers in partnership working together, or some other model than this sole practitioner, full-time, contractor?
- 435 D. McCabe Well, in my experience, it is probably the best model that we have. Ralph Smith and I have been partners for several years, both on a contract to do death penalty cases. That creates a problem if there is a conflict. There are a lot of death penalty cases that come out of Umatilla County for instance. They don’t know how to charge just one person.
- 441 Chair Ellis PCR or direct?
- 441 D. McCabe Direct. If you are in a partnership situation, you have the conflict problem. I think as far as – the best benefit to the public defender would be to have us all separate, with separate contracts.
- 447 Chair Ellis I think both of you have indicated that to try one of these you really need a lead lawyer and a full-time second lawyer.
- 449 D. McCabe Absolutely.
- 450 Chair Ellis How does that work? Where do you get the full-time second lawyer if you guys are both solo defenders?
- 451 D. McCabe That is one of the things that Rich mentioned. It is becoming more and more difficult. For me, out in the hinterlands, it is almost impossible to find someone who 1) wants to do it; and 2) is qualified. We end up, oftentimes, at least east of the mountains, drawing on other contractors to be co-counsel. For instance, Ralph Smith and I have worked together on many cases just because there is no one else who is interested and wants to do the work. And it is very good for us to be familiar with the other lawyer; we do better. Ralph and I, for instance, are greater than the sum of our parts, because we have been working together for so long. I think Rich has had the same kind of experience.
- 468 Chair Ellis Tim Sylwester commented that on the prosecution side they have concentrated resources and the DOJ works as a support to the 36 DAs around the state. Could you comment on what level of support you are getting now from our LSD, the FTE lawyers in our group, and what you would like to see there if you are not seeing it?
- 477 R. Wolf I don’t usually contact the State Public Defender in these cases. I used to contact Eric Cumfer often, but my support now is I’ll call Denny or I’ll call Duane, somebody like that, and that is part of the whole basis for trying to create this capital resource center, to have someone that is centralized that can go around and amass all the information and share it with other people. That really was the impetus for creating that kind of a position. I wanted to answer also your first question about co-counsel and normally it is kind of an inherent tension because there is pressure on us to bring in and indoctrinate new, younger folks to do these cases to increase the pool of qualified people, but the qualification standards require that we have a certain level of expertise that you really don’t get until you try one of these cases. When I have got somebody’s life at stake, I don’t really always want to try out somebody new. As Duane said, I have tried several of these cases with David Falls and it is much easier if it is a known relationship and you know what the other’s strengths and weaknesses are and you are not reinventing the wheel, you are not training someone in addition to worrying about

preservation and client relationship and all these other things. But, yet, it is important to try and bring in people who are interested in these cases and think that they want to do them but it is an awful risky thing to bring an intern into the brain surgery. That is part of the problem. If there is no contractor and if David Falls or somebody I am used to trying cases with is not available, which is more and more the case because they already have three or four cases, then I am scrambling around calling people. I just recently took on as co-counsel someone who just left the Metropolitan Public Defender who been working there for about nine years. He is a real smart lawyer but he hasn't handled a capital case and they are very different so we are just going to have to see. You often don't know until you really get into it how the person is going to fare.

- 534 D. McCabe If I could just follow up. One of the things that those of us who have been doing this for a long time have really committed ourselves to recently is bringing on some new talent. In spite of what the public may think, you really are conscious of the expense of the cases and we try to be very responsible in our requests. I think one of the ways that we can do it is to do as Judge Barron suggested, maybe have a third lawyer. Of course that is going to be costly. I just wanted to let you know that that maybe one of the things that we can do to get some additional people within the death penalty defense community.
- 548 Chief Justice De Muniz I have a couple of comments and then I have a question for Dennis if I might. First, my hair is graying also as Duane's, and Rich's and Dennis' and I want to thank all of you personally for your dedication and commitment to the protection of individual rights. It is the most laudable goal of a lawyer, so I greatly appreciate it. I also wanted to just second something that I think all of you were trying to communicate and it resonates with me because I have stood in your shoes a number of times. There is a unique relationship that must exist between client and the lawyer to successfully defend these cases. All of us, particularly the defense bar, know we have our own definition of success and for defense lawyers we all know what that is. Success is you save that client's life, however that gets done, ethically and correctly. Not everybody is suited to establish that kind of relationship with someone, that non-judgmental kind of relationship which is a word nobody wants to use, but it is part of what lawyers do in dealing with that client. I think you would all agree that jurors observe the relationship between you and your client and that observation often can weigh in the calculus of what they decide to do -- your own body language and your reaction to your client and the client's reaction to you. I want to reemphasize your point about that because I think it is crucial. Dennis, I am confused about something. First of all, I share your concerns about post conviction relief because I think it has been too long neglected. In the capital area it is probably the most important -- it is hard to rank these things, but it is certainly equal to anything else that goes on, so here are my two questions. Is there a qualification standard for those lawyers who undertake a post conviction case, a capital post conviction case?
- 599 D. Balske Not that I am aware of.
- 603 Audience I don't know if it is exactly the same for trial level but ..
- 606 I. Swenson Yes, it is the same as the standard for death penalty appeals.
- 608 Chief Justice De Muniz Okay. My next question is, and maybe someone from PDSC knows this, but you indicated that sometimes these appointments of the post conviction cases go to MCAD lawyers, while other times they apparently are in some kind of direct appointment, and I'm asking why that is? Does anybody know?
- 618 K. Aylward We have a contract with MCAD that includes death penalty post conviction relief cases and the court contacts MCAD for the next available attorney. It is just the same process as with any contract where there is contractor who is the sole provider. We do get called by MCAD's

executive director if he can't find someone within his pool that is available and qualified. At that point he calls our office and we search around among the other providers.

627 Chief Justice
De Muniz

Is part of the qualification, I apologize, I haven't looked at it lately, you actually have tried a death case to a jury to be a post conviction lawyer?

631 K. Aylward

I don't think so. They are all calculated in terms of experience rather than specifics.

634 Chief Justice
De Muniz

So you have post conviction lawyers who have never been in the courtroom with a person's life at stake handling the post conviction.

637 K. Aylward

That is correct. It is possible that they meet the minimum standards of the qualifications and would be allowed to do those cases.

639 Chair Ellis

Isn't this a recipe for just nothing good. If we do it through MCAD and it is on a rotation basis, we are just not going to get anything like the level of focus -- I won't use the word "competent," I'll use "focus" -- on the issues in this area. As Dennis says, it is mind field designed by a series of U. S. Supreme Court decisions to weed out cases, but that is another way of saying designed to preclude defendants from having potentially valid claims heard.

656 K. Aylward

I agree with you and in fact this is a lot of the reason that we are hoping that we get our FTE positions to handle those cases ourselves in-house. But even given that, we wish it were better. I don't have anyone else. I've got no one, so your choice is someone who is not ideal, but minimally qualified, or no one, and that is the bottom line.

666 Chief Justice
De Muniz

I want to make one more comment about this for what it is worth. I agree 150 percent with Dennis' comment that, it should be this way in all cases, but we will just confine ourselves to the capital cases. A post conviction case in a capital case should be more difficult, it should be more complex, than the actual trial, because as Dennis points out in order to prove prejudice you have to establish that it would have made a difference in the case. You have to have lawyers not only who have criminal experience because this is a civil proceeding. You have the ability to obtain all kinds of discovery that you could not obtain in the criminal case, the ability to take depositions of people, and then present that at a civil trial, literally, in court. I am just surprised, I apologize that I am not familiar with those standards, but I am just surprised that this kind of situation would exist. As you say, maybe it is the reality of where we are, but I want to say I agree completely with that observation about those cases.

695 Chair Ellis

I wanted to ask one other question. You have all commented on the importance of a mitigation specialist and I believe the information we have had today is that there really isn't someone available, on a regular basis. Is it your view that we should seek to find someone and get a full-time contract and make that person available to each of you and others in similar situations as needed, or should it be a sub-contract to the lead lawyers? How do you think we ought to best structure making available a qualified mitigation specialist?

715 R. Wolf

I think there ought to be contracts for mitigation people like there are for capital defense lawyers so that they can work with different lawyers, not just work with the same lawyer all the time. That would be the model -- I think there are 20 some odd capital qualified lawyers that are handling these cases with a contract.

729 D. McCabe

I only know of half a dozen mitigation specialists that I would want working with me on these cases, and they are often just full up with doing other cases.

733 Chair Ellis

Are they in state or out-of-state?

- 734 D. McCabe Some are in and some are out-of-state. There are some up in Washington and some that have moved from Washington back here. Part of the problem is they are only making \$34 an hour.
- 744 Chair Ellis So moving to contractors is the way...
- 744 D. McCabe Right. Increasing their rate of compensation. [end of tape]

TAPE 3; SIDE A

- 001 D. McCabe We can't compete with the federal courts and we can't compete with Washington who will pay \$60 an hour for mitigation specialists, I believe. You use your friendship from time to time to get somebody to do the work but that only goes so far. If we have 20 lawyers doing contracts, we are going to need 20 mitigators.
- 007 C. Lazenby You say there are a limited number of people that do the mitigation investigation and I think we have a need for more of these on contract. You might also want to expand the pool to get training so we don't have to rely on the same six people or seven people over and over. How do they get their experience?
- 010 D. McCabe Either the same way the lawyers do, by working in tandem with somebody with the experience, somebody who wants to do it. I have talked for some time about perhaps starting a course at Portland State or somewhere that actually teaches the mechanics of mitigation. This is not just for death penalty; mitigation goes across the board for criminal cases in general. It could be a beginning course with some sort of special training in capital cases.
- 017 G. Hazarabedian Thank you Mr. Chair. There is also the National Association of Sentencing Advocates which is affiliated with the National Legal Aid and Defender Association. There are some national resources for training and that sort of stuff out there to access. It is not that it is nonexistent, just not in Oregon.
- 021 Chair Ellis Thank you all. Ingrid, Kathryn and I don't know if this is when Becky gets up here too.
- 024 I. Swenson Mr. Chair, may I suggest that we postpone further discussion until our March meeting. We will be dedicating most of that meeting to a further discussion of death penalty issues. We do have a couple of action items, one of which will address some of the issues you have heard about today that we probably need to proceed with. Becky is willing to come back and Kathryn, I am sure, will want to put together some additional information for next time.
- 031 Chair Ellis I appreciate your suggestion and I agree with it.

Agenda Item No. 3 Approval of Contract with Matthew M. Rubenstein – Death Penalty Resource Attorney

- 031 I. Swenson So let's proceed to Action Item No. 3. I have communicated with each of you a little bit about this issue because, for one thing, it does, in a sense, feel like we are jumping ahead. I think you heard from everybody today the potential value of having a resource center for our death penalty attorneys. It is not only a cost saving mechanism but in addition it performs all of these quality assistance functions that I listed in the communication I had with you. The timing is such that we are very fortunate to have available to us a highly skilled lawyer. We seek to add to our death penalty contractors attorneys that come from other places whenever we can so we can benefit from their different experiences, different knowledge, and different approaches to cases. We have actually been talking to Matt Rubenstein for several years. Greg Hazarabedian initially brought him to our attention. We contacted him, and he us, about potentially working as a contractor in Oregon. Well, he then came to Oregon with his family and went to work at the federal defender and we have continued our discussions with him. We are at a place where I think we can proceed financially with funds from our operating budget

to place him under contract at this point, and, because he would come under contract with no cases, he is a perfect position to take on the function of a resource attorney and begin putting together all of the pieces that need to be in place for a resource center. It takes some time to do that and ultimately it would be our expectation that he would handle, at least one case at a time, as part of that work. He is here today and I think I introduced him to the Chair, but as other Commission members haven't met him I asked him to step forward and certainly if you have questions for him, that would be fine too. For a lot of reasons I would ask you to go forward today and approve a contract with him. It would be one of our regular death penalty contracts and it would be our intention that he focus on a death penalty resource center.

- 064 K. Aylward Actually the initial contract that we are entering into is a personal services contract not a death penalty contract. So it is initially a personal services contract paid for out of our operating budget to do a lot of the initial setup and establishing of the resource center. Then the goal is that at some point if a death penalty case were available, and he were appointed, then we would switch over, I suppose, to a death penalty contract.
- 068 Chair Ellis Where would he be located?
- 070 K. Aylward Wherever he wants.
- 070 Chair Ellis It was just out of curiosity. Would you be with OPDS in Salem or would you have offices up here somewhere?
- 071 M. Rubenstein Mr. Chair, I expect initially to work here in Portland. I would be traveling quite a bit given the geographic distribution of cases. It is the first step in identifying how a center could facilitate collaboration among the defense bar, encourage talented attorneys to join the capital defense bar, provide training and assistance through attorneys who are representing clients currently.
- 080 Chair Ellis Both in the direct and the PCR?
- 080 M. Rubenstein Yes.
- 081 I. Swenson Mr. Chair, some piece of this center ultimately may be located at OCDLA particularly if this grant application is successful. We haven't talked about all of the details in terms of location.
- 084 Chair Ellis Any questions?
- 085 C. Lazenby I think this a great idea. My own question is you say it may end up at OCDLA. Are we doing any planning in our proposed budget and discussions with the legislature to cover some of the costs of this or are we just going to wait and see how it develops?
- 088 I. Swenson Mr. Lazenby, the grant application was submitted by OCDLA and it is somewhat independent of our establishment in this position. Part of the understanding with respect to the grant is that they will be able to leverage state support in order to get that grant.
- 094 Chair Ellis Any other questions? If not, I would entertain a motion.
MOTION: John Potter moved to adopt the personal services contract; Chip Lazenby seconded the motion; hearing no objection, the motion carried:
VOTE 6-0.

Agenda Item No. 4 Approval of Amendments to the Qualification Standards

- 098 I. Swenson Thank you very much. The other action item on today's agenda is the qualification standards. The Chief has just raised an interesting issue on a part of that, but for a number of reasons we

would like to go forward today with the qualification standards as they are. The publication date for the Oregon Rules of Court...

- 103 K. Aylward They actually wanted it February 1, but they are holding the presses for us.
- 104 I. Swenson We would like to get it included in there.
- 105 Chair Ellis This is like the timing of the federal budget, it is all driven by the printers.
- 106 P. Levy Thank you Mr. Chair. Just real briefly on these, at the last meeting there was concern about the questionnaire. I think that was the major concern. We were asking about matters that might have been expunged or sealed. I added to that question making clear that we don't want to know about criminal matters that have been expunged or sealed. There have been other changes, tinkering with the standards since you last saw them. They are mostly very minor, housekeeping or stylistic changes. After we meet with you we shopped these around, if you will, with the Death Penalty Peer Panel and with the Contractor Advisory Group and made some minor changes. I think in the death penalty area though, significantly we added in a requirement that attorneys be familiar with the ABA Standards. That was not in there previously. But otherwise there are no major or significant substantive changes in these since you last saw them. We may want to re-look at the post conviction standards in capital cases.
- 124 Chair Ellis That is paragraph 11, page 11?
- 124 P. Levy Yes, but what they require now is that an attorney meet the requirements. This reference to Standard IV, section 4 requires that they meet the requirements for counsel in murder cases and also meet the requirement for appellate counsel in capital cases. It is not everything we might want them to be but it is pretty close. It does not require that one have tried a capital case.
- 131 Chair Ellis Are you aware of any controversy from within the provider community on what you have presented?
- 133 P. Levy No, in fact this ultimate certification process has been streamlined ever further. I don't think there are any controversies.
- 135 Chair Ellis Any questions for Paul?
- 136 J. Brown If I may Paul, I am not closely familiar with how the mechanics work. I had a sense that the judges may write letters just to try and go along and that it might be more informative if some manor of the questionnaire were used. Is that something to look at downstream?
- 141 P. Levy Certainly. I am sure that we are interested in getting (inaudible). That was an interesting comment.
- 144 C. Lazenby It is tough to do that.
- 145 P. Levy I know in my short tenure already though -- I have talked to judges -- we are not necessarily taking just what they have send us.
- 149 K. Aylward Could I just add, I was going to comment, that sometimes it is very easy to read between the lines of letters of recommendation. You can look at them and it says "Attorney X has asked me to write this" so that is not as huge a concern as it might be.
- 153 D. Balske I had a case, a capital case, in which the attorney who originally represented my client read the qualification standards to say that they didn't actually need to request of a judge or prosecutor, a letter of recommendation. When I was doing the post conviction, I went back

and interviewed the number of people who were listed on this person's application and the first judge I contacted said "I never knew that I was listed by this person, and had I been listed, I would have said they weren't qualified." I got the same answer from several people, so I wasn't sure whether by streamlining – my concern is that you should actually have to submit something not just say that "Oh, yeah a judge will give me a recommendation and so will a prosecutor." I understand Judge McShane's concerns and others' being asked to submit these but people may think they are qualified and if they are not actually required to have the referral or recommendation, we are just taking them at their word.

- 170 P. Levy Mr. Chair, that is not the part of the process that I was referring to when I said it had been streamlined. Kathryn can speak to this more if necessary, but the supplemental questionnaire actually (inaudible). We are only using it for more information.
- 176 Chair Ellis Any more questions for Paul? If not I would entertain a motion.
MOTION: Chip Lazenby moved to adopt the standards; Jim Brown seconded the motion; hearing no objection, the motion carried:
VOTE 6-0.
- 182 Chair Ellis Multnomah Defenders, are we ready for that?
- 183 I. Swenson We are.
- 183 C. Lazenby Mr. Chair, I have an actual conflict of interest in this matter. My wife is employed by Mr. Petterson and works for Multnomah Defenders, so I am going to step out of the room. I would like the record to reflect that I was not present.
- 187 Chair Ellis I believe you can satisfy your conflict by disclosure but it is up to you if you want to go.
- 188 C. Lazenby I would have a potential conflict of interest around this if we, and I could declare that on the record under 244, if all we were doing were considering something generally that would affect Multnomah Defender. This is a specific request and would actually have a financial impact on an organization which my relative is actually associated with, so I have an actual conflict. As I understand the Government Standards and Practices' interpretation of the rules, I cannot participate in a discussion around these matters and I may not abstain either. That is participation. So I would like the record to reflect that I am not present and I will be not present.
- 201 Chair Ellis The record so reflects.
- 203 P. Petterson Mr. Chair, I am Paul Petterson the director of Multnomah Defenders. Our current contract provides that we will receive felonies, other than murder, if we already represent the client. Reading from the contract, PDSC will review this restriction in the fall of '06 after the contractor submits a report requesting an expansion of the felony caseload. I sent in a report last November and we didn't get to it until today because of other business. In the last few days the staff has proposed a compromise. Kathryn can certainly speak for herself and her staff. My understanding is they are not opposed to the increase that I am asking for but there aren't currently cases available. They would have to come from some other contractor. The proposal I am showing you with the chart there is from staff and would modify our current contract to show what we are actually doing. We have picked up a lot more felony cases than the wild guess that was in our contract. With the criteria of our current contract there is no way to know for sure what that will be, as opposed to picking up five cases of this type every week. We know what that is if it is five cases of this every week. If it is all just dependent on the felonious actions of current clients, then that is unpredictable and it has been varied. Some weeks there are a lot and some weeks there are virtually none. It is not the sort of contract that you can plan around.

- 229 Chair Ellis What is the definition of a current client plan?
- 230 P. Petterson An open file.
- 231 Chair Ellis My impression is you guys have done a lot of DUI and that a lot of those stay in the system as an open file for quite a long time.
- 233 P. Petterson Yes. Until the diversion is over and the case is dismissed or sentenced.
- 234 Chair Ellis So is the bulk of the cases you are getting under the current allocation felonies for current clients coming from that DUI base that is in the system?
- 236 P. Petterson No. I think the DUI clients are less felonious than say the domestic violence clients and the drug clients. We get a lot of drug cases and one reason there are fewer cases than were predicated is the DA in Multnomah County is sending a lot of felony drug cases, even heroin possession, an A felony, to community court. They go down from A felony to a misdemeanor and say "Well, stay out of trouble and go through treatment and it will be dismissed." We have got a lot of those drug clients with possession of meth, crack, heroin, whatever, and then they get into more serious trouble with either drugs or something else and then it is a felony charge against a current client. A lot of them come out of drug cases and some certainly from drunk driving cases. As a class they are less likely to be felons. What I am proposing to the Commission, and you will notice that this not an action item, I can determine whether something is an action item so I guess you are not being asked to do anything.
- 255 Chair Ellis But consider.
- 255 P. Petterson Consider anything.
- 255 Chair Ellis We are being asked to consider.
- 255 P. Petterson Yes, sorry. I understand that we can't make the substantive changes to our contract that I am proposing because of the lack of available cases, but next year, my chart shows my calculations, what staff is proposing is for us to get a little less than five percent of the felony caseload for Multnomah County. We have been in business for 25 years come this September. I think five percent is more than we are getting now and last year, but I would like to get it up incrementally as the caseload will allow over the biennia to about 25 percent of the caseload for Multnomah County. When we come back next year with contract negotiations I want you to keep that in mind.
- 267 Chair Ellis If you go from five percent to 25 percent, obviously the other two major providers that are at 95 percent bring it down to 75 percent. Do you envision what the reduction in the PDC and the reduction in MPD would be?
- 272 P. Petterson I am not sure how that would fall out but there is space in my building that I am looking at now if we do expand, as we are doing incrementally, one or two attorneys with the proposal that is before you now. A lot of those experienced felony attorneys would certainly be welcome to come apply.
- 279 Chair Ellis Here is the question I am proposing. I believe we are in a period of shrinking overall felony case volume. We have two other providers that you are obviously familiar with. I understand what you are proposing. You want to expand the number of attorneys you have working in the felony field. You want to hire new hire attorneys. How do we rationalize the caseload allocation if you have got two existing providers who are coming up short and you want to increase the numbers of attorneys that you have. Isn't there a disconnect there?

- 289 P. Petterson Yes. I think our business plan as a nonprofit is important for us and to give our new attorneys, we hire bright, qualified attorneys and they tend to leave after a year or two to do felony work. For the health of our organization, it is coming up on our 25 birthday, I think this is important for our organization.
- 296 Chair Ellis I understand that. I am just trying to think from our organization how we do what we are doing.
- 297 P. Petterson I think MDI plays an important role in Multnomah County.
- 299 Chair Ellis There is no question about it.
- 299 P. Petterson I think our health and our growth are important for those reasons too.
- 301 Chair Ellis Kathryn?
- 302 K. Aylward From the point-of-view of our organization, our goal is always to make sure that all contractors can reach quota once we have started contracts. The situation right now is MPD in Multnomah is pretty close to quota; they are a whisper shy. PDC is actually over quota for what they had contracted for, so theoretically it doesn't impact anyone if the extra cases that are going to PDC above and beyond their quota were handled by MDI. The downside is that if you are a PDC attorney and you have had an overage racking up and you are thinking "Man I'm going to get that money" well it is not a sure thing. You are not guaranteed anything beyond, you aren't even guaranteed the quota, but you are certainly not guaranteed anything beyond your quota and so maybe they have less work toward the end of the contract. I think that we can provide MDI what they are looking for certainly during 2007 without any impact on the other contractors. The other thing, aside from their business plan, it is very good for us to work with organizations that that have some sustainability and if you don't diversify then you are vulnerable. As we saw during BRAC, if you were a misdemeanor provider, you got hit harder. If you could balance it off with some juvenile or some felony, at least you had a little bit of cushion. I think that not only for professional development of MDI staff but for the stability of the business itself, this is a good move. If we can do it now without impacting other contractors, I would recommend it.
- 328 Chair Ellis Put this in terms to make sure I understand. In Paul's letter of November 9, on the third page there were three segments, and I think you are talking about saying "yes" to segment one but not to segments two or three?
- 333 K. Aylward It is "no" to number three because we absolutely don't have the caseloads.
- 334 Chair Ellis That is the delinquency component?
- 334 K. Aylward The delinquency component. We proposed a quota with felonies a little bit higher than what is in the first step. Whether MDI actually gets those cases or not, as far as we are concerned, is a little bit irrelevant because they have accumulated such a large overage from the first year of operations, that even if what we had in the quota for felonies is optimistic and we don't get them, they will simply be working down their overage. If the caseload happens to go up then, lucky for them, they would actually be getting those cases.
- 345 Chair Ellis Should we be worried that implicit in this proposal, and you say we can do it this year because the other two are pretty well in balance and one has an overage, but what I see is adding FTEs now then won't you be back a year or two years from now with "We have to have more cases because we are dependent on this, we have relied on this, we built up staff, we have added office space", and at some point if the caseload is in a continuing shrinking mode we are overloaded, aren't we?

- 358 K. Aylward I think the key to that is that we need to establish subsequent contracts. If there are lawyers with subsequent contracts with enough lead time that an organization can react. It is no good the first of December finding out what is going to happen in January. If you have three months lead time that you are not going to get the work that you had hoped to get, that gives people time to – you know attrition happens; you just don't fill a vacancy and you can absorb it. Our contracts run two years and I think we are pretty flexible with the terms if there is a shortage. If you didn't make quota but you still needed the money because you still had people who just wouldn't quit for some reason and you had no vacancies, then we are very flexible about saying "Well you can use the next contract period to work off that shortage."
- 372 Chair Ellis One of the things going back four years ago at our retreat down at the coast -- I associate these things with venues -- we wanted to get all contractors in the same jurisdiction coming up simultaneously, so that when we are doing contracts it is with the whole provider group in that area at the same time. How are we doing on that since today we are hearing from MDI only?
- 381 K. Aylward All of the contracts are on the same cycle now. So now all of the contracts that we have except for the sort of odds and ends of non-legal contracts, contracts that are not for legal representation, they all expire December 31, 2007. So basically what we are saying is in the fall of this year that is when the sort of jockeying for the piece of the pie is going to take place.
- 389 Chair Ellis And we'll have all three together?
- 390 K. Aylward All together at the same time. That is correct.
- 391 Chair Ellis Other questions for Paul or Kathryn?
- 392 J. Potter Paul, you are stating your intention to want to have 25 percent.
- 392 P. Petterson Eventually.
- 393 J. Potter Eventually. But I think what, at least from my perspective at the moment, we would be approving this particular increase to five percent or slightly under, but without a commitment to honoring your request for 25 percent.
- 398 P. Petterson Correct. This just goes through the end of this year.
- 399 K. Aylward Principally, what we are trying to remove is the limitation that only allows them to take felonies where they have an existing client. If we remove that, they can take it. I don't know if they are there or not but at least in concept they are available to take felonies.
- 403 P. Petterson I think that would get us into the system a little more efficiently than now. Put us on whatever the formula would be for the total caseload and some kind of rotation. If we haven't picked up a current client then at the end of whatever time period we are talking about we would be next in line to pick up a case, rather than just sitting around wondering whether any of our clients are getting in trouble that night and not knowing what our caseload is going to be from day to day.
- 410 K. Aylward The majority of their caseload still would be existing clients. I don't imagine that they would be put on the rotation necessarily because, as we have said before, they got that \$100,000 overage. If we did nothing but the amendment that we proposed, then they would get to end of their two-year contract at a zero balance -- no overage -- they would be just right on target. If it works out and we got, let's say, that overage that PDC has, then I have no problem with that. It is conceivable that if it drops and PDC is now not making quota and MPD is just barely making quota then no additional felonies would go to MDI other than existing clients as they are getting now.

428 P. Petterson It is nothing that either of us is asking you to intercede in.

430 Chair Ellis Paul correctly pointed out that this is not designated as an action item. What do you wish from us?

433 K. Aylward I would hope that you would say that you have no reservations about MDI having a felony caseload that is not limited to existing clients.

437 Chair Ellis Is that a motion?

438 K. Aylward No. I am just soliciting.

440 Chair Ellis I take it the question is for the balance of the current contract term?

442 K. Aylward That is correct. I think the reality is that we like to provide continuity to our contractors. And even though we said "All bets are off; when it is new contract period; you can't even be sure you are going to have a contract," we are cognizant and mindful of the fact that, yes, we know he rented extra space, and we know he got additional attorneys, so I think maybe if the Commission is thinking no how, no way, never, then, as a courtesy we ought to let MDI know that. But if you think that it could happen, and it is reasonable, and maybe it should happen, then I don't see any reason why they shouldn't start moving toward that. We'll have nine months or 11 months or experience with that process to make a decision for a subsequent contract.

455 J. Potter It strikes me, Mr. Chair, that Kathryn's verbiage should be a motion and especially if she believes right now it doesn't allow her to enter into this agreement with MDI. If that were the case I would so move.

Janet Stevens seconded the motion.

464 J. Brown What is the motion?

464 J. Potter Kathryn, could you repeat the motion?

464 K. Aylward To me, frankly, this is sort of business as usual. This is what we do with contractors. They call us up and say "I am way over quota can you increase my quota" and I think the only reason that it is coming to the Commission is that MDI was asked to report to the Commission in terms of their mentoring and their training. So really the Commission's involvement is that if you are comfortable enough that there is mentoring and training then that should not prohibit me from proceeding with business as usual in renegotiating the contract.

475 J. Potter It allows you the ability to enter a contract that says there can be new felony cases going into that office that are not existing client cases. Is that right?

480 P. Petterson The current contract that we all signed is limited to felony cases where a contractor represents the defendant. PDSC, you folks, will review this restriction in the fall of 06 after getting my report. So I want you to review that restriction and lift it.

485 J. Stevens So you move that we lift the restriction?

485 J. Potter Exactly.

486 Chair Ellis I did go back and read our service delivery plan for Multnomah County faithfully and accurately because we said to ourselves we would do that. The other comment that I want to

make is I don't have perfect information so I am sort of a prisoner of anecdotal information but I do hear positive things about how MDI is developing and the quality of what you are doing.

- 497 P. Petterson Thank you.
- 499 Chair Ellis All right there is a motion and second.
- 500 J. Hennings Mr. Chair, I have some information because of the work that I do, I handle the actual appointments. We call it the appropriate assignment process. The first item you have reflects the last three years of appointments. A very interesting thing happened after the BRAC in 2004. There was a seven percent increase from the BRAC year, not surprising. The following year was an 18 percent increase. Very interesting. Last year, there were actually fewer cases assigned, felony cases assigned, than the prior year. It comes out at zero because it is just a handful. That continued a trend that is in the second document that I am passing around which shows the weekly appointments back to when we started in 2002. The orange line is the overall appointments. The black lines through blue line are the C felony appointments, which are where most appointments are. The other one is the B felony appointments which is the black line running through the green.
- 531 Chair Ellis Is that the one down there near the bottom?
- 530 J. Hennings That is the one down near the bottom. Most cases, the bulk of the cases, are C felony cases. C felony cases have dropped through the floor and continue a long-standing loss. As you will see just the overall total number of cases, those lines by the way are 13 week moving averages, so they are basically a quarter, taking into effect what has happened in the prior 13 weeks.
- 541 Chair Ellis You say it has dropped through the floor but to my eye it looks pretty flat.
- 543 J. Hennings Well it is not pretty flat because what has happened in the last few months -- that is since the fall -- what has happened in the last few months and through the first five weeks of this year, if I factor out from five weeks' experience, which is only a month so it is only a twelfth of the period -- we are right now on track for a 11 percent decrease in felonies in Multnomah County.
- 554 Chair Ellis So this is on the very right-hand side of the draft.
- 555 J. Hennings Yes.
- 555 Chair Ellis Sort of the number of mid-06 through mid-January 07.
- 556 J. Stevens But isn't it true that they always decline in January or often decline in January?
- 557 J. Hennings They sometimes decline in January but not always, in fact that is the last item that I would pass out. The first two years going back, these are all of the assignments since 2003 to all of the contractors and what it will show is on a monthly basis how many cases and of what type were assigned. The issue is, where are the cases disappearing? This is something I have been in consultation with the county about. I notice there was a report out this morning that part one crimes are down in Multnomah County, except for robbery cases. Assault cases, the A Measure 11 cases are down. The C felonies are down. Some of the B felonies are up. It was mixed but the trend is downward in terms of number of cases. I expect that that 11 percent is probably not going to be 11 percent. At this point I see no indications that we are going to have more felony cases over the next year than we did this year. In fact, when you get down into the details, MPD is one percent behind in Multnomah County but the majority of those cases are in the felony area. The only reason we are only one percent behind is that we are making up for felony deficiencies and juvenile deficiencies by large number of misdemeanors

and community court cases. The other detail is that it isn't just Multnomah County but we are in two counties. Overall, the Metropolitan Public Defender would include Washington County because there is a similar case drop in Washington County, actually a bigger one. The question is, if you are going to make more cases available in part of our contract and we are not making our contract in this county, and we are also, in a major way, not making our contract in Washington County because there are just not enough cases to go around, then I have questions about increasing the numbers. One thing I do think would be important. I think Paul and his office ought to have a set of number of cases that ought to be on the rotation. Just as we handle all of the appointments if somebody is presently represented, we simply go to the next slot on the rotation and fill that in. There is no reason Paul should not be in exactly the same situation except for the definition of what is current representation. Paul's is the only office that has a different standard that we have to go through. The first thing we look at in every case is not whether there is a conflict but whether there is an attorney who is currently representing the client. I would suggest you establish the number of cases that Paul ought to be getting, put him on the rotation but also use the same standard for current appointment that we do with all the others. Something you have to take into account is that, for some reason in the Metropolitan area, the caseload is declining. We don't know why. I have been looking at that since last March, because in March of last year, there had been a steady increase for the first three months of the year and then it just steadily declined after that. We consulted with the district attorney, consulted with the sheriff, the police department and nobody can explain why we are having this major decrease of cases coming through. In Washington County it matches it only it is even worse, the decline out there is even greater.

- 650 J. Potter So Jim, are you speaking against the motion or are you raising a cautionary flag that Paul's office may not get the cases that Kathryn....
- 654 J. Hennings I guess I am raising a cautionary flag. I have conflict here because since I do handle the appropriate assignment, I felt you needed to have the factual information. I am also concerned, though, that we are presently running a deficit that doesn't look just at Multnomah County. It is aggravated because we are one percent behind in Multnomah County from where we ought to be. It is really exacerbated by not enough cases in Washington County. I have questions if additional cases are going to go out. Even if we were zero in Multnomah County then that wouldn't be problem if we were not behind in Washington County, but as long as we are behind we are deficient. There are cases that are being assigned somewhere else rather than under the contract.
- 676 Chair Ellis Any comment by either Kathryn or Paul?
- 677 P. Petterson I was going to talk to Jim about the decrease because I have gotten this information from him, it is interesting and I appreciate it. I'll remember to do that today. I am pretty sure that we have seen more and more and more drug felonies than any other community.
- 684 J. Hennings I think that is the problem.
- 685 P. Petterson I think that is a big problem. Possession of heroin is a A felony, twenty year maximum community court. I have seen a lot of that lately and I don't remember seeing it ever before.
- 690 J. Hennings These numbers that I have, since I do this for the system. I shared them I believe two or three weeks ago. I provided all of the contractors with basically the same numbers to show exactly where the appointments were. There are three items here; one is to show the declining trend which I think is of concern; one is to show exact appointments to all of the contractors so you can see the history; and one is just the last three years and it is very, very remarkable that we actually appointed on fewer felonies last year than this year and are now on track to appoint considerably fewer.

713 Chair Ellis I think the note of caution I would inject, Paul, is I understand completely from MDI's point-of-view as an organization, that the expansion you are talking about is very beneficial. I am concerned that as we experience declining cases, if one provider expands that puts a lot of tension into the system. When we do look at the renewal of contracts at the end of this cycle, which I guess is at the end of the year, we are going to have that in mind. I am not saying which way I would go or the group would go because there may be kind of a critical mass issue to make the organization have the momentum that you want it to have. I don't want to end up just saying yes and then at the end of the year we end of with two very good provider organizations feeling that crunch.

750 P. Petterson I understand. My immediate concern is we have taken a whole lot more cases than we have been paid for. [end of tape].

TAPE 3; SIDE B

002 P. Petterson Every time I hire somebody I tell them this is not going to be for all eternity. You are on probation for six months and if budgets go down then budgets go down and the last hired is the first to go.

005 Chair Ellis Anything else, Kathryn?

007 J. Brown I have a little problem with getting a bunch of numbers and stuff and I would like to assume this is the sort of thing that we would get to Kathryn and she would blend into her thinking and presentation ahead of time, just as a matter of process.

011 K. Aylward Absolutely.

012 J. Brown As one Commission member whose eyes can tend to click back into their sockets very quickly.

014 K. Aylward Let me just say that this is what we do all the time -- gauge how much risk can we take on that we are over-contracting or under-contracting. I am confident that if nothing changes and we make this change to MDI's contract, that they will finish up their contract as a wash. We don't owe them and they don't owe us. No one else would be impacted. If the felony caseload does go down then MDI ends up at the end of their contract owing us \$20,000, \$50,000 worth of work which they then can work off in the next two-year period. I am comfortable that we can do this without there any impact on the other Multnomah contractors.

024 J. Brown Mr. Chair, if I may the only other thought that I might throw into the mix is it strikes me as a valid consideration for the organization, the Office of Public Defense Services that the organizational institutional health should be taken into account. That strikes me as a legitimate consideration.

029 Chair Ellis Alright, there is a motion and there is a second.
MOTION: John Potter moved; Janet Stevens seconded the motion; hearing no objection, the motion carried.
VOTE: 4-0.

030 P. Petterson Thank you Mr. Chair and Commissioners.

032 Chair Ellis Quickly, before you leave, we need to adopt the minutes from two execution sessions. Is there a motion to approve the minutes of September 15 and September 21 of 2006.
MOTION: Janet Stevens moved to approve the minutes of the executive sessions from September 21 and 15, 2006; John Potter seconded the motion; hearing no objection, the motion carried.
VOTE 4-0.

- 050 I. Swenson Mr. Chair, yes, Mr. Robert Larry and I have communicated for some time about the representation that he has received in his current case, and I have told him that the Commission does not have the authority to review that by statute. He also has some concerns about the way his complaint about his attorney has been handled, if I am understanding him correctly. I advised him that today would be a very difficult time to get his feelings expressed and suggested that he write to me or to you but I think he has come today hoping that you could address his concern. I am not sure this is the appropriate time to do that.
- 061 Chair Ellis Yes sir go ahead.
- 062 R. Larry Thank you. That is not necessarily true totally. My reason for being here today is to basically say that these are supposedly public meetings but throughout all of my research I haven't seen any public input time allowed on the agendas.
- 067 Chair Ellis Have you had a chance to attend our meetings before today?
- 068 R. Larry No. Do you publish them?
- 068 Chair Ellis I think at every meeting we have had a point at the end of the meeting where there is new business and I don't recall not recognizing anyone who requested it.
- 070 L. White I don't want to interrupt that flow. My reason for being here today is to ask for some time on your March agenda to not talk specifically about my case but issues with defendants as a whole.
- 075 Chair Ellis I am willing to say yes but I would also ask that you do what Ms. Swenson has suggested and if you could send a letter to her, I would be happy to also get a copy, so that we have a little sense of what we are talking about.
- 079 L. White I don't have a problem with that. Ms. Swenson and I have talked at great length. I have never met her in person and that was another issue I wanted to take care of. I don't have a problem with that but I would like to make a request for your March meeting.
- 083 Chair Ellis Thank you. Any other business? If not I would entertain a motion to adjourn.
MOTION: A motion to adjourn was made and seconded. The meeting was adjourned
VOTE: 4-0.

Attachment 2

D R A F T
(March 8, 2007)

**OFFICE OF PUBLIC DEFENSE SERVICES REPORT
TO THE PUBLIC DEFENSE SERVICES COMMISSION**

*Critical Issues in the Delivery of Public Defense Services
In Death Penalty Cases*

Since Oregon is a death penalty state, among the clients served by public defense providers are those who are potentially facing a sentence of execution. In addition to its obligation to provide representation in a cost-effective manner, it is clearly of critical importance that the Public Defense Services Commission take appropriate steps to ensure high quality legal representation for clients in these cases.

In 2003 the American Bar Association adopted a revised edition of its “Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.” The stated objective of the guidelines is to “set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation....”¹

The Public Defense Services Commission is required by statute to

Establish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice. ORS 151.216(1)(a) (Emphasis added.)

A growing number of cases, including United States Supreme Court cases, look to the ABA standards as a statement of the standard of adequate representation in death penalty cases. In Strickland v. Washington, 466 US 668 (1984), a death penalty case, the Court held that in order to obtain federal habeas relief based on a claim of ineffective assistance of counsel, a petitioner must show that counsel’s performance was deficient and that the deficiency prejudiced the defense. Performance is deficient if it falls below an objective standard of reasonableness. The Court said that “[p]revailing norms of practice as reflected in the American Bar Association standards and the like...are guides to determining what is reasonable.” Id. at 688-689. In both Williams v. Taylor, 529 US 362 (2000) and Wiggins v. Smith, 539 US 510 (2003), the Court again highlighted the need for counsel in capital cases to make adequate investigations and pointed to the ABA Standards as guides and “well defined norms” for determining what is reasonably

¹ Guideline 1.1A.

required for adequate representation. In 2004, the Court again looked to the ABA Standards as a measure of reasonable attorney performance when it invalidated a death sentence where counsel failed to obtain and review available mitigating evidence. Rompilla v. Beard, 545 US 374 (2004).

It is appropriate, then, to take the measure of our existing delivery system for representation in death penalty cases by holding it up to the specific requirements of the ABA Guidelines for death penalty cases².

I. What the Guidelines Require

The February, 2003 revised edition of the ABA Guidelines for death penalty cases is generally divided into two sections – a set of principles and policies that are intended to guide jurisdictions in creating a system for the delivery of defense services (Guidelines 1.1 to 10.1), and a set of performance standards defining the duties of counsel handling individual cases (Guidelines 10.2 to 10.15.2).

A. System Requirements

The guidelines require each jurisdiction to create a system that includes the following components.

(Italicized paragraphs set forth OPDS’s preliminary assessment of Oregon’s compliance with each provision.)

Legal Representation Plan (2.1)

Each jurisdiction needs a legal representation plan setting forth how the jurisdiction will conform to the guidelines. The plan must ensure freedom from political influence and be judicially enforceable against the jurisdiction.

It is expected that the Commission’s review of the delivery of public defense services in death penalty cases will result in the creation of a legal representation plan.

Responsible Agency (3.1)

The plan should designate one or more agencies to be responsible for ensuring high quality legal representation and performing all the duties of such agency. The agency should be independent of the judiciary and it, not the judiciary, should select lawyers for specific cases.

² It is also worth noting that ABA Standards for Criminal Justice, Standard 4-1.2 generally recognizes that “[s]ince the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused.”

The responsible agency should be one of the following:

- a. A defender organization that is either a jurisdiction wide capital trial office (with either staff attorneys or members of the private bar or both), or a state-wide capital appellate office, or
- b. An independent authority run by capital qualified defense attorneys

If a jurisdiction uses a defender organization it would also need an independent authority to handle conflicts.

If an independent authority is the responsible agency, lawyers who hold “formal roles” should not be eligible to represent defendants in capital cases during their term.

The responsible agency should: Recruit and certify, publish rosters, publish certification standards, assign attorneys to cases, monitor performance, periodically review the attorney roster and withdraw certification if necessary, conduct or approve specialized training, and handle complaints.

The agency should not use a strict rotation system to assign counsel but should attempt to match a client with an appropriate attorney.

OPDS’s Contract and Business Services Division (CBS) is currently serving as the responsible agency in that it is responsible for overseeing the quality of representation; for selecting, or providing lists to the court from which the court may select, the attorneys for each case; for recruiting attorneys; for approving and publishing lists of certified attorneys; for drafting certification standards; for monitoring the performance of attorneys; for reviewing the roster of attorneys and withdrawing certification if appropriate; and for investigating and maintaining records concerning complaints and taking corrective action without delay.

OPDS is independent of the judiciary but it is not a jurisdiction-wide capital trial office, a jurisdiction-wide capital appellate or post-conviction office, nor an entity run by defense attorneys with expertise in capital representation, since it is the Contract and Business Services Division of OPDS and not the Legal Services Division that manages this function. The only duties of a responsible agency which OPDS does not perform are: the direct assignment of the particular attorney in every case and the regular sponsoring or approving of specialized training programs. With respect to the monitoring of attorney performance, OPDS does not actively monitor attorneys’ performance but receives and responds to complaints it receives from others and, solicits input from judges, defense attorneys and others in order to compile the list of attorneys approved for appointment in death penalty cases.

Policy Issue: *Should the CBS division of OPDS continue to serve as the responsible agency?*

Policy Issue: *If OPDS(CBS) continues to serve as the responsible agency, should OPDS create a system for actively monitoring the performance of attorneys in death penalty cases³? Should OPDS assume responsibility for the assignment of counsel in every case?*

Defense Team and Support Services (1.4)

The plan should provide for no fewer than two attorneys, an investigator, and a mitigator. One member of the team should be qualified to screen for mental health issues.

Specialized training and qualification standards should be developed for investigators and mitigators.

Most death penalty teams at the trial level include all of the requisite personnel. Outside experts are ordinarily retained to conduct an initial mental health assessment.

OPDS recognizes the need for at least two counsel at the trial level in every death penalty case. While OPDS requires lead counsel to seek authorization for co-counsel hours in increments, this requirement is intended to ensure that lead counsel is directing the preparation of the defense and using all resources, including co-counsel, effectively and efficiently. In some instances it is appropriate for additional attorneys to be engaged for specific tasks, such as serving as local counsel who may already have developed a working relationship with the client, as suggested by Judge Richard Barron; or performing research in an area in which the attorney has developed special expertise.

With regard to other members of the defense team, the Commission heard testimony from a number of witnesses, including a representative of the state, that it is important to provide adequate resources at the early stages of the case in order to avoid having the case remanded, sometimes many years later, because of inadequate assistance of counsel at the trial level⁴. Appropriate use of investigators, mitigators and experts is critical.

³ Dennis Balske and Judge McShane both testified about gaps in the current screening process for those certifying their qualification to handle death penalty cases. OPDS could probably obtain more accurate information by periodically asking judges to complete a confidential survey about the performance of death penalty lawyers.

⁴ Timothy Sylwester testified that "The last thing we want to do after spending a million dollars prosecuting somebody and getting the death penalty, is to have it get reversed in post conviction on the ground that defense counsel did something wrong. I think from our standpoint, from the DA's standpoint, we want the case perfectly tried at the outset; we don't ever want to have to try it again. It makes sense from the efficiency standpoint, at the outset, that the lawyer who is handling the defense be given adequate resources -- a backup lawyer and a mitigation

Currently there is a shortage of qualified mitigators. To address this problem PDSC has submitted a policy package to the legislature which would increase the hourly rate for all investigators in death penalty cases from \$34 per hour to \$45 per hour. Whether or not rates are increased, OPDS intends to issue an RFP for mitigation investigation in the fall of 2007. It is hoped that the benefits of a contract relationship with PDSC will attract additional well-qualified investigators to perform mitigation investigation on a full time basis.

Other than the requirement that independent investigators to be licensed by the state⁵, OPDS has no qualification standards for investigators. There are trainings available to investigators, including specialized trainings for investigation of death penalty cases, but OPDS has not participated in their development.

Policy Issue: *Should OPDS require that all teams, at a minimum, include two lawyers, a mitigator and an investigator? On the appellate and post-conviction levels, should more than one attorney be appointed in every case or should a decision be made on a case-by-case basis about the number of attorneys needed?*

Policy Issue: *In order to develop additional qualified mitigators, should OPDS work with the Department of Public Safety Standards and Training, the Oregon Association of Licensed Investigators, Inc., the OPDS Death Penalty Peer Panel, our new Death Penalty Resource Attorney, OCDLA, Portland Community College and others to explore the creation of a mitigation curriculum?*

Qualifications of Defense Counsel (1.5)

The responsible agency should develop and publish qualification standards for counsel. The types of skills required should focus on the ability to provide high quality representation rather than just quantitative measures of experience.

PDSC's Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense were recently amended to conform to the standards recommended by the ABA Guidelines in death penalty cases.

[expert]...“ Later Mr. Sylwester characterized the need for adequate funding of the mitigation investigation as “imperative.” In addition, Judge Barron recommended that “[W]e should all work to make these cases as right as they can be the first time so we are not going through [two or three] retrials.”

⁵ ORS 703.430 ff. In order to qualify for a license an investigator must, among other things, have “at least 1,500 hours of experience in investigatory work, have completed a related course of study approved by the department [Department of Public Safety Standards and Training] or have a combination of work experience and education approved by the department.” ORS 703.415(1)(g). In addition, “an investigator must complete at least 32 hours of continuing education every two years.” ORS 703.447(1)(a).

Policy Issue: *In view of the information provided to the Commission about the poor quality of representation provided to post-conviction relief clients in some death penalty cases⁶, what steps can OPDS take to improve representation in this area? PDSC has included in its 2007-2009 budget proposal a policy package that would create a four-FTE post-conviction unit. If the legislature were to approve this policy package the Commission would need to consider how best to use the new positions. OPDS recommends that further discussion of the quality of representation in death penalty PCR cases be postponed until its August meeting and retreat. In the meantime, OPDS will work with the courts to see that the best qualified public defense attorneys available are assigned to any new death penalty PCR cases,⁷ and will ask the Oregon State Bar to convene a workgroup to compile performance standards for counsel in post-conviction relief cases.*

Workload (6.1)

The responsible agency should implement effective mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with the guidelines.

Capital murder contractors generally carry no more than three pending cases, each of which is usually at a different stage in the process so that they are not doing intensive trial preparation in multiple cases at the same time. Generally, OPDS is able to stagger the appointments so that at least one of the attorney's pending cases is near completion before the contractor is asked to accept a third case. OPDS relies upon the contractor to gauge when a new case can be accepted and to refuse appointment to a new case if the current workload will not permit the contractor to devote sufficient time to the case. Occasionally, a contractor who is the most logical choice for a particular appointment will agree to take the new case if the court is willing to make certain accommodations, such as flexibility in the scheduling of the trial.

Cases assigned to private bar attorneys, especially when the court does not first consult with OPDS, may go to an attorney who is already overburdened, although most private bar attorneys will decline to take an additional case if they are not able to give it the attention it requires.

It is sometimes difficult to find a contractor or private bar attorney who is immediately available to accept a new appointment, especially in the case of

⁶ Dennis Balske testified that attorneys at the Federal Public Defender Office would say that the post-conviction system in Oregon is "broken and it is broken because the quality of representation is extremely poor."

⁷ It should be noted that Timothy Sylwester warned the Commission that the Department of Justice is going to try to accelerate death penalty PCR cases. "I think that we need to figure out some way to adequately fund the post conviction petitioner's work and get these cases moving, so there may be a need to get adequate funding on your end."

multiple co-defendants. Contract attorneys may be at maximum workload and private bar attorneys may have other, non-death penalty cases that affect their availability. Private bar attorneys also report difficulties, both financial and otherwise, sustaining a private practice while handling even one complex death penalty case. In addition, lead attorneys report significant difficulty in identifying qualified co-counsel in some cases.

The Commission heard testimony from an experienced trial judge who identified a shortage of qualified attorneys in Coos and Curry Counties. He urged the Commission to increase compensation substantially in an effort to attract more attorneys to the area.

A Multnomah County judge said that there are too many cases for the best qualified attorneys to handle and the cases then go to less qualified attorneys. He identified contract attorneys in the room as among the best, as “phenomenal” attorneys, committed to their work. He also noted that cases that should settle may not if the clients don’t have sufficient confidence in their attorney. Attorneys need the time and resources to develop a relationship of trust and confidence with the client.

PDSC’s budget proposal includes a policy package that would increase the hourly rate for private bar death penalty representation from the current \$55 per hour to \$95 per hour. If approved, this increased rate of compensation would help OPDS attract more highly-qualified attorneys to death penalty representation.

Currently, it is mainly through the contract process that OPDS has been able to attract and retain the services of the most highly qualified lawyers.

Policy Issue: *OPDS believes it would be beneficial to have more death penalty attorneys under contract. Currently, death penalty contracts are on the same cycle as other OPDS contracts. OPDS would like approval from the Commission to contract with qualified attorneys on an as-needed basis rather than issuing an RFP each time it seeks to add another death penalty contractor. This would allow OPDS to recruit attorneys on an ongoing basis and be able to offer a contract immediately to an attorney who may be available at the time but who might not be available by the time of the next contracting cycle. This would also avoid the need for OPDS to go through an off-cycle and largely pro-forma RFP process each time it identified an especially well qualified prospective death penalty contractor. Since death penalty contracts expire every two years, OPDS would continue to issue an RFP for all its death penalty contracts every two years so that any interested attorney could submit a proposal.*

Witnesses also suggested that efforts should be made to avoid substitution of counsel by providing additional support for the attorney-client relationship and better training of attorneys regarding what constitutes a conflict of interest. OPDS

will confer with its Death Penalty Peer Panel on the need for additional support and will suggest that OCDLA consider including a segment on the law relating to substitutions in one of its upcoming CLE programs.

Monitoring and Removal (7.1)

The responsible agency should protect the interests of the attorney's current and potential clients, have a complaint procedure, review rosters, suspend or remove attorneys or offices, provide for notice and opportunity to respond in writing for lawyers suspended or removed. Protect zealous advocates from improper suspension or removal.

Discussed above.

Training (8.1)

The state's plan should provide funds for training. Attorneys seeking to qualify should be required to complete a comprehensive training program approved by the responsible agency (outline of curriculum set forth). Additional training should be required at least once every two years. Training is also required for non-attorneys.

OPDS requires attorneys to complete training in the required areas but does not provide funds for training. With lawyers under contract it is assumed that some portion of contract funds will be used to access appropriate trainings. Training for non-attorneys is also available from other organizations, including the Oregon Association of Licensed Investigators and the Oregon Criminal Defense Lawyers Association. No funds are provided to non-attorneys for training.

OPDS believes that the new death penalty resource attorney will be able to identify additional training resources, may be able to access OCDLA grant funds to offer additional training events and will be available to provide expert assistance and advice on particular legal issues.

Policy Issue: *With respect to trainings for death penalty lawyers, should OPDS "conduct, sponsor, or approve specialized trainings" or should it continue to require completion of a specified number of hours of CLE programs approved by the bar?*

Funding and Compensation (9.1)

The plan must assure full funding. Rates should be commensurate with high quality representation. There should be no flat fees, caps on compensation or lump-sum contracts. The salary scale should be commensurate with the prosecutor's office. Counsel should be fully compensated for actual time and service performed (commensurate with prevailing rates for retained counsel).

Non-attorneys should be compensated like their prosecution counterparts. Experts should be compensated on an hourly basis commensurate with rates paid by retained counsel.

Oregon does not have flat fees in death penalty cases, does not cap compensation, and does not use “lump-sum contracts.” Private bar attorneys and contract attorneys are fully compensated for actual time. Since the great majority of death penalty cases are public defense cases it is difficult to determine what the prevailing rate for retained counsel would be. Some experts are willing to work for public defense attorneys at discounted rates. Others charge OPDS the same amount for their services as they charge clients with retained counsel but, in large part, public defense clients have available to them the same experts that would be used by retained counsel.

Policy packages included in PDSC’s budget proposal would increase the hourly rate for death penalty lawyers and investigators. In addition, an adjustment to PDSC’s essential budget level is being considered which would result in the application of the personal services inflation rate rather than the Department of Administrative Services adjustment for services and supplies for contractor costs. Such an adjustment would allow PDSC to increase contractor rates accordingly.

Establishment of Performance Standards (10.1)

The agency should establish standards including those set out in the guidelines for the performance of counsel.

B. Performance Standards for Counsel

Applicability of Performance Standards (10.2)

Counsel should provide high quality legal representation in accordance with the guidelines.

Obligations of Counsel Respecting Workload (10.3)

Lawyers should limit caseloads to provide high quality legal representation in accordance with the guidelines

The Defense Team (10.4)

The Responsible Agency should designate lead counsel who bears overall responsibility for the case but may delegate in accordance with the guidelines. Lead counsel should consult with the agency to identify associate counsel, then select associate counsel and the balance of the defense team. Lead counsel should “demand” appropriate resources.

Relationship with the Client (10.5)

Clients should be seen within 24 hours. Attorneys should discuss with the client all matters that might reasonably be expected to have a material impact on the case. All counsel, including appellate and post conviction counsel, need to monitor the client's personal condition for potential legal consequences.

The Commission heard testimony from an experienced trial judge about the need for attorneys to see clients in death penalty cases as soon as possible, before arraignment. Currently it may be several days, and on occasion it has been significantly longer, before the designated death penalty lawyer is appointed and can see the client. OPDS has attempted to work with the court and the attorneys to accelerate this process. Judge Barron's suggestion that local counsel be used for this purpose is a good one and has been considered in earlier discussions with the Death Penalty Peer Panel. OPDS will convene a meeting of the peer panel, the Contractor Advisory Group, and one or more representatives of OCDLA to discuss possible solutions.

One of the death penalty contractors who testified before the commission urged that appellate lawyers also need to maintain a close relationship with clients in death penalty cases and said that in some cases attorneys were not building these kinds of relationships. Rebecca Duncan will be testifying on March 8th regarding LSD's efforts to comply with the ABA standards.

Obligations regarding Foreign Nationals (10.6)

Counsel for foreign nationals should, with the client's consent, contact the relevant consular office to inform it of the client's detention and arrest.

Investigation (10.7)

Counsel is to fully investigate guilt and penalty issues even if the client objects. Counsel at all stages (including appellate) must interview prior counsel and members of the defense team and examine files of prior counsel to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

(The commentary to the guidelines includes useful checklists of documents to be obtained and examined, potential witnesses to be interviewed, physical evidence to be examined, personal and medical histories to be reviewed, collateral convictions and adjudications to be investigated.)

Duty to Assert Legal Claims (10.8)

This guideline requires counsel at every stage of the case to consider, investigate, evaluate and properly assert and preserve appropriate claims.

Duty to Seek an Agreed-Upon Disposition (10.9.1)

Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition and should pursue such a settlement with the state even if the state initially declined the proposed disposition.

Entry of Plea of Guilty (10.9.2)

Counsel should make certain that the client understands the rights being waived, the conditions and limits of the agreement, the maximum punishment and other consequences of the plea and should prepare the client for participation in the plea hearing.

Trial Preparation Overall (10.10.1)

Based on information received from investigation of the case, counsel should formulate a defense theory that will be effective for both the guilt and penalty phases.

Voir Dire and Jury Selection (10.10.2)

Counsel should consider possible challenges to procedures used for selecting the jury, should be familiar with the procedures and techniques for selecting a death-qualified jury, and should consider seeking expert assistance in jury selection.

The Defense Case Concerning Penalty (10.11)

This guideline sets forth a list of witnesses and evidence which should be considered in the penalty phase, an admonition to counsel to confer closely with the client regarding this phase, to review and, if appropriate, challenge the state's aggravating evidence, and to request jury instructions and verdict forms that would give effect to the defense case.

The Official Presentence Report (10.12)

Counsel should challenge the inclusion of improper, incorrect or misleading information in the report and take steps to include information favorable to the client.

The Duty to Facilitate Work of Successor Counsel (10.13)

Counsel at all stages should safeguard the interests of the client and cooperate with successor counsel. The duty includes maintaining records in the case, providing files and information to successor counsel, sharing potential further areas of legal and factual research and cooperating with successor counsel's professionally appropriate legal strategies.

In view of the testimony provided to the Commission regarding the state of trial counsel's case files in some death penalty cases, especially years after the events to which the records relate, OPDS will explore with its Death Penalty Peer Panel ways in which files can be better organized, preserved and accessed by successor counsel.

Duties of Trial Counsel After Conviction (10.14)

Trial counsel should take such actions as may be required to maximize the client's ability to obtain post-conviction relief and shall continue acting on the client's behalf until representation has been terminated or successor counsel has entered the case.

Duties of Post-Conviction Counsel (10.15)

This provision requires post conviction counsel (including counsel on appeal) to seek a stay of execution, to seek certiorari in the Supreme Court, etc. Such counsel are also required to maintain close contact with the client regarding case developments, to continually monitor the client's mental, physical and emotional condition for effects on the client's legal position, to keep under review the desirability of modifying prior counsel's theory of the case and to continue an "aggressive investigation of all aspects of the case."

Commentary to the guideline (but not the blackletter portion) recognizes that practice varies between jurisdictions regarding the limits of the appellate process and the relationship between direct appeal and post-conviction. The commentary requires appellate attorneys to explore issues that are only partially or minimally reflected by the record, or that are outside the record, as a predicate for informed decision-making about legal strategy. It is described as critically important for counsel on direct appeal to proceed, like all post-conviction counsel, in a manner that maximizes the client's ultimate chances of success. "Winnowing" issues in a capital appeal can have fatal consequences. Appellate counsel must be familiar with the deadlines for filing petitions for state and federal post-conviction relief and how they are affected by the direct appeal. If the conviction and sentence are affirmed, appellate counsel should ordinarily file on the client's behalf a petition for cert. The appellate attorney must immediately inform successor counsel if the petition for cert was not filed or was denied. If no

successor counsel is appointed, appellate counsel should advise the responsible agency of need for appointment.

Rebecca Duncan will be testifying on March 8th regarding LSD's efforts to comply with the ABA standards.

Duties of Clemency Counsel (10.15.2)

Clemency counsel should be familiar with the clemency procedure, should conduct an investigation, should seek clemency in a timely and persuasive manner, should ensure that the process is just, and, if it is not, seek appropriate redress.

II. Overall Assessment -- Compliance with Standards

Oregon's current delivery system for representation in death penalty cases complies in most important respects with the standards established by the American Bar Association. In addition, OPDS believes that the quality of representation provided at the trial and appellate levels is high in most cases. Representation in post-conviction relief cases, for all case types, needs to be improved. OPDS recommends that the Commission review the policy options identified above, and any others that Commission members may propose, to ensure that Oregon is in compliance with national standards of representation in death penalty cases.

Attachment 3

Presenter: Kathryn Aylward

Public Defense Services Commission
Meeting Action Item
March 8, 2007

Issue

PDSC approval of a change in the OPDS Compensation Plan.

Discussion

The attached Compensation Plan includes the addition of two new classifications: a Human Resource Analyst 1 and a Human Resource Analyst 2. By adding the human resource series to PDSC's classifications we will have available for use classifications that more closely match the job descriptions of existing employees and allow for possible future changes that may be needed if OPDS receives additional FTEs in a future biennium. The salary scales are identical to the standard Executive Branch classifications.

Recommendation

Approve the attached Compensation Plan.

Required Commission Action

Vote to approve the new Compensation Plan effective April 1, 2007.

**OFFICE OF PUBLIC DEFENSE SERVICES
COMPENSATION PLAN**

Effective: April 1, 2007

CLASSIFICATION TITLE	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8	Step 9	Step 10
Accountant 1	2531	2647	2771	2904	3044	3184	3337	3505	3673	
Accountant 2	2771	2904	3044	3184	3337	3505	3673	3848	4034	
Accountant 3	3337	3505	3673	3848	4034	4229	4437	4657	4889	
Accounting Tech 1	1808	1880	1957	2048	2117	2216	2307	2420	2531	
Accounting Tech 2	2117	2216	2307	2420	2531	2647	2771	2904	3044	
Accounting Tech 3	2307	2420	2531	2647	2771	2904	3044	3184	3337	
Business Services Manager	3870	4061	4265	4482	4705	4937	5180	5441	5708	5996
Chief Defender	5708	5996	6292	6598	6928	7279	7641	8014	8406	
Chief Deputy Defender	5708	5996	6292	6598	6928	7279	7641	8014		
Compliance Specialist	2531	2647	2771	2904	3044	3184	3337	3505	3673	
Contract & Business Services Director	5604	5879	6176	6481	6796	7136	7497	7869	8260	
Deputy Defender 1	3649	3831	4023	4224	4438	4669				
Deputy Defender 2	4438	4669	4901	5145	5399	5673	5954	6249		
Executive Assistant	3039	3185	3353	3520	3689	3870	4061	4265	4482	
Executive Director	5996	6292	6598	6928	7279	7641	8014	8415	8830	9266
General Counsel	5335	5604	5879	6176	6481	6796	7136	7497	7869	
Human Resource Analyst 1	2844	2990	3130	3281	3454	3625	3800	3987	4184	
Human Resource Analyst 2	3185	3353	3520	3689	3870	4061	4265	4482	4705	
Internal Auditor	4219	4430	4652	4884	5130	5388	5654	5933		
Legal Secretary	2117	2216	2307	2420	2531	2647	2771	2904	3044	
Legal Secretary Supervisor	2584	2712	2844	2990	3130	3281	3454	3625	3805	
Office Assistant 2	1542	1603	1672	1741	1808	1880	1957	2048	2117	
Office Specialist 1	1741	1808	1880	1957	2048	2117	2216	2307	2420	
Paralegal	2531	2647	2771	2904	3044	3184	3337	3505	3673	
Public Defense Analyst	3645	3827	4019	4219	4430	4652	4884	5129	5386	
Senior Deputy Defender	5182	5441	5708	5996	6292	6598	6928	7279		

Attachment 4

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

Introduction

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

Non-Discrimination and Affirmative Action Policy

It is the policy of the Public Defense Services Commission that no person shall be discriminated against by reason of race, religion, color, national origin, sex, age, marital status, or physical or mental disability not shown to prevent adequate performance of available work. It is also the policy of PDSC to establish a program of affirmative action to address the effects of discrimination intended and unintended, which is indicated by analysis of present employment patterns, practices and policies.

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

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

Harassment in the Workplace Policy and Procedures

Harassment is a form of discrimination that is prohibited by state and federal law and by PDSC's Affirmative Action Policy. Any person who believes that he or she has been harassed at PDSC based on race, sex, religion, national origin, age, or disability, or based on opposition to discrimination or participation in investigation or complaint proceedings under this

policy may file a formal or informal complaint with PDSC's Executive Director. Confidentiality will be maintained to the fullest extent permitted.

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

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

Harassment based on race, color, sex (without sexual conduct), religion, national origin, age, disability, or because the employee opposed job discrimination or participated in an investigation or complaint proceeding under this policy is any objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment, intimidation or threat engaged in by an individual that is directed at and offensive to another person or persons in the workplace, that the individual knew or ought reasonably to have known would cause offense or harm when:

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

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

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

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

- The complainant submits her or his complaint in writing to the Executive Director or his designee, which must be filed within 365 days of the alleged harmful act.
- The Executive Director acknowledges in a Letter of Acknowledgement receipt of the formal complaint, which includes information on the complainant's right to file a complaint with other state or federal agencies. Copies of the Letter of Acknowledgement are sent to the individual or individuals accused of harassment and the director of the relevant division of PDSC.

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

- Upon determining that the complaint is facially valid, the Executive Director conducts a thorough investigation of the complaint.
- Within thirty (30) calendar days of receipt of the formal complaint, the Executive Director informs the complainant and all persons who received copies of the Letter of Acknowledgement of the formal complaint by a Letter of Determination of the final status of the complaint, its disposition and the complainant's rights to file a complaint with other state or federal agencies.

Persons with Disabilities Policy and Procedures

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

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

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

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

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

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

Employee Training and Education

The Oregon State Bar requires every attorney licensed to practice law in the state to attend Continuing Legal Education (CLE) programs that train and educate lawyers concerning issues of ethnic diversity and cultural competency. PDSC presents in-house training programs that satisfy these requirements. PDSC is currently developing an in-house training program that will still satisfy the Bar's CLE requirements, but will also involve all its non-attorney employees.

Responsibilities for Implementation

The person responsible for discharging this policy is PDSC's Executive Director: Ingrid Swenson, 1320 Capitol Street N.E., Salem, OR 97301; (503) 378-2515.

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

- Brief all new employees on PDSC's affirmative action plan and their role in supporting it.
- Periodically review training programs and hiring and promotion patterns in order to remove impediments to attaining affirmative action goals and objectives.
- Regularly discuss PDSC's affirmative action policy with employees to ensure the policy is being followed.
- Periodically review office policies, practices and conditions to ensure that:
 - Equal Employment Opportunity information and PDSC's affirmative action policy are properly displayed;
 - all facilities for the use and benefit of employees are in fact desegregated, both in policy and use, exclusive of those areas excepted by federal laws and regulations;
 - minorities, females, and disabled employees are afforded a full opportunity to participate in PDSC's educational, training, recreation and social activities; and
 - all facilities are accessible to disabled employees or clients.

Analysis of PDSC's Workforce and Job Groups (NAAPGRS Report As of 9/30/06)

With a total workforce of 51, PDSC employs 35 females and four people of color (one Hispanic and three Asians).

PDSC has four job groups: management, professional, paraprofessional, and support staff. The management group has four positions, three of which are filled by females. The professional group has 30 positions, 17 of which are filled by females and 3 of which are filled by people of color. The paraprofessional groups has one position filled by a female.

There are 16 positions within the support staff group, 14 of which are filled by females and one of which by a person of color.

Goals and Objectives

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

- Expand employment opportunities for members of protected classes not represented in PDSC's current workforce.
- Increase the distribution of PDSC's protected class employees at all salary range levels in an effort to approximate the proportion of protected class members in the workforce from which PDSC employs.
- Assess minority group and female staffing on an ongoing basis to ensure that PDSC is making progress toward meeting these objectives.
- Refine recruitment strategies and hiring practices to facilitate the placement and promotion of minority group and female personnel.
- Actively participate on affirmative action committees, organizations and activities to promote PDSC's Affirmative Action Plan.

PDSC'S AFFIRMATIVE ACTION STRATEGIES AND ACCOMPLISHMENTS

As noted on page 5, PDSC is comprised of two divisions: The Legal Services Division (LSD), which provides appellate legal services to financially eligible criminal defendants in the state; and the Contract and Business Services Division (CBS), which administers the state's public defense contracting and payment systems.

PDSC's Non-Discrimination and Affirmative Action Plan includes both policies and procedures governing PDSC's own activities as an employer and strategies for working with the private contractors who provide the great majority of public

defense representation in the state to help them attract and retain attorneys and staff that more closely reflect the diversity in their communities.

PDSC's Accomplishments in 2005-07

- Convened a Diversity Task Force to advise PDSC on innovative and culturally relevant methods and programs to improve the recruitment of minority attorneys and staff and to increase the cultural competence of the state's public defense workforce. Received initial report and recommendations from the Task Force.
- Continued to develop working relationships with criminal law faculty, career counselors, and placement offices at Oregon's three law schools to identify and recruit law students of color who might be interested in internships and attorney positions in the state's public defense system.
- Continued to participate in job fairs and recruitment programs throughout the Pacific Northwest for law students and attorneys of color who are interested in careers in public service and public defense.

PDSC's Strategies for 2007-09

- Perform a survey of public defense providers, as recommended by the Diversity Task Force, to determine the current composition of the work force in terms of race, religion, color, national origin, sex, age, marital status and physical or mental disability.
- Work with public defense contractors to create a brochure for distribution to law students in Oregon and other states promoting public defense employment opportunities in Oregon.
- Continue to participate in job fairs and recruitment programs throughout the Pacific Northwest for law students and attorneys of color who are interested in careers in public service and public defense.
- Work collaboratively with the Oregon Criminal Defense Lawyers Association to establish a statewide directory of job openings in public defense offices across the state and to enhance the PDSC or OCDLA website to offer additional information on employment in public defense in Oregon.

- Continue the work of the Diversity Task Force in identifying goals and strategies to promote diversity.
- Prepare and present elimination of bias trainings to PDSC attorneys and staff.

PDSC's Strategies for 2007-13

- The demand for minority attorneys and other legal professionals such as trial assistants and investigators is high in Oregon as it is elsewhere in the country. In order to attract these professionals to public defense work, PDSC needs to be able to offer compensation that is at least comparable to the compensation offered to district attorneys and other government lawyers in the state. In support of this effort PDSC has included in its 2007-2009 budget request policy packages which would help it achieve parity in compensation with prosecution lawyers for its own employees and for at least some of its private contractors. The achievement of parity may well take more than a single biennium.
- Over the next six years PDSC will develop and present an integrated series of trainings for its own employees designed to address some of the underlying biases and misconceptions that can impair one's judgment about members of other cultural groups. The agency's general counsel is well qualified to assist in the development of this series, having served as the trainer for the largest public defense office in the state and having planned and presented many such trainings in the past. The training series will be opened to interested contract providers and may be recorded for possible future use by others.
- Once the survey which is now being designed to determine the current composition of the public defense work force has been completed and the results obtained, PDSC intends to work with its contractors to establish appropriate goals for each year of the next six-year period to expand the number of minority attorneys and staff members employed in public defense in Oregon.
- In anticipation of the difficulty of recruiting successfully from the small group of minority attorneys graduating from Oregon law schools each year, PDSC will work with its contractors to develop strategies for promoting legal careers and, specifically, careers in public defense, among Oregon high school and college students.